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THE
Distinguished Jurist's Primer

VOLUME I

Bidāyat al-Mujtahid wa Nihāyat al-Muqtaṣid

Ibn Rushd

Translated by Professor Imran Ahsan Khan Nyazee

Reviewed by Professor Mohammad Abdul Rauf

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I

THE BOOK OF (RITUAL) PURIFICATION (*ṬAHĀRA*)

The Muslim jurists agreed that *sharʿī* (legal) purity (*ṭahāra*) is of two types: purity from *ḥadath* (ritual impurity) and purity from *khabath* (physical impurity).[23] They also agreed that purity from *ḥadath* is of three kinds: ablution (*wuḍūʾ*), bathing (*ghusl*), and their substitute, ablution with clean earth (*tayammum*).[24] This is because of their inclusion in the verse of ablution,[25] which dealt with these issues. We shall begin, out of these, with a discussion of ablution. We say:

1.1. THE BOOK OF ABLUTION (*WUḌŪʾ*)

A comprehensive discussion of the principles of this (type of) worship (*ʿibāda*) is covered in five chapters. Chapter 1 relates to the evidence of its obligation—on whom it is obligatory and when; Chapter 2 is about the identification of its acts; Chapter 3 is about the identification of that with which it is performed, that is, water; Chapter 4 is about the identification of factors nullifying it; and Chapter 5 is about the identification of things with which it can be performed.

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[23] Impurity (*najāsa*) is divided by the jurists into two kinds: actual (*ḥaqīqiya*) and technical or legal (*ḥukmiya*). The term *ḥadath* is applied to legal or technical impurity, while *khabath* to actual impurity. *Ḥadath* may be minor, which is removed through ablution, or it may be major (sexual defilement and menstruation) and is removed through bathing (*ghusl*). Similarly, actual *najāsa* may be heavy (*mughallaza*) or light (*mukhaffafa*).

[24] The term *wuḍūʾ* is also referred to as the minor (*sughrā*) ablution, while the term *ghusl* is referred to as the major (*kubrā*) ablution.

[25] Qurʾān 5 : 6.

1.1.1. Chapter 1 The Evidence (*Dalīl*) of its Obligation

The evidence of its obligation is in the Qurʾān, *sunna*,[26] and *ijmāʿ*.[27] In the Qurʾān it is in the words of the Exalted: "O ye who believe, when ye rise up for prayer, wash your faces and your hands up to the elbows, and lightly rub your heads and (wash) your feet up to the ankles".[28] The Muslim jurists agreed that obedience to this communication is obligatory for each person on whom prayer is obligatory, when it is time for it(s) (performance). In the *sunna*, it is in the words of the Prophet (God's peace and blessings be upon him) "Allāh neither accepts prayers without purity nor charity out of purloined wealth [of spoils]", and in his saying, "Allāh does not accept prayers from one who has acquired *ḥadath* till he performs ablution". These two traditions are authentic according to the leading traditionists. Its evidence in *ijmāʿ* is based on the absence of a transmission from any of the Muslims disputing its obligation. Had there been a dispute, it would necessarily have been transmitted because of the demands of practice.

Those on whom it is obligatory are the sane and pubescent.[29] This too is established through *sunna* and *ijmāʿ*. In the *sunna*, it is found in the words of the Prophet (God's peace and blessings be upon him), "The pen [liability] has been lifted from [in the case of] three persons". He then mentioned the minor, till he attains puberty, and the insane person, till he recovers. There is no transmitted controversy about its proof in *ijmāʿ*. The jurists (*fuqahāʾ*) disagreed whether Islam is a requisite condition for its obligation. It is an issue that is of little benefit in *fiqh*, as it relates to the *ḥukm* of the hereafter.

Ablution becomes obligatory when it is time for prayer (*ṣalāh*) or when a person has intended an act for which ablution is a requisite condition, even if the act is not associated with a fixed time. About its obligation upon a person in a state of *ḥadath*, when it is time for prayer, there is no controversy because of the words of the Exalted, "O ye who believe, when ye rise up for prayer, wash your faces and your hands up to the elbows, and lightly rub your heads and (wash) your feet up to the ankles".[30] Thus, ablution is made obligatory at the time of prayer, and one of the conditions (for the validity) of prayer is the commencement of the time of prayer. With respect to the evidence of its obligation at the time of intending an act, for which it is a condition, the discussion will be taken up under the description of the acts for which ablution is required, along with the (narration of the) differences among the jurists over this.

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[26] The term *sunna* applies to the practice of the Prophet (God's peace and blessings be upon him) as established through his words, acts, and tacit approval. The *sunna* is the source of Islamic law along with the Qurʾān. It is to be distinguished from the term *ḥadīth*, which is the bearer of the *sunna*. A *ḥadīth* may contain more than one *sunna*.

[27] The term "*ijmāʿ*" refers to the consensus of Muslim jurists, in a determined period of time, on the scope and meaning of a principle or rule of Islamic law.

[28] Qurʾān 5 : 6.

[29] The term "pubescent" is being used here, for want of a better term, to mean a person who has attained puberty.

[30] Qurʾān 5 : 6.

1.1.2. **Chapter 2 The Acts of Ablution**

The source for the identification of the acts of ablution is the description laid down in the words of the Exalted, "O ye who believe, when ye rise up for prayer, wash your faces and your hands up to the elbows, and lightly rub your heads and (wash) your feet up to the ankles",[31] and the method of performing ablution traced to the Prophet (God's peace and blessings be upon him) in the established narrations (*āthār*). To this are related twelve well-known issues that resemble fundamental principles. They are related to the identification of the requisite conditions, the elements, the description of the acts, their number, their specification, and the identification of the objects of the *aḥkām* of all these.

1.1.2.1. Issue 1: Whether intention (*niyya*) is a requisite condition

The jurists disagreed whether intention is a condition for the validity of ablution, although they had agreed on the stipulation of intention as a condition for worship (*ʿibādāt*), because of the words of the Exalted, "And they are ordered naught else than to serve Allāh, keeping religion pure for Him",[32] and because of the saying of the Prophet (God's peace and blessings be upon him), "The value of acts depends upon accompanying intentions", which is a well-known tradition. A group of jurists, including al-Shāfiʿī, Mālik, Ḥammād, Abū Thawr, and Dāwūd, was of the opinion that it (intention) is a condition. Another group said it is not a condition, and this was the opinion of Abū Ḥanīfa and al-Thāwrī. The reason for their disagreement is the vacillation of the term *wuḍūʾ* between being a pure ritual *ʿibāda*—I mean, not subject to rationalization and intended only for the pleasure of Allāh, like *ṣalāh* and similar forms of mere ritual worship—and between an *ʿibāda* that can also be rational, like washing of dirt. They did not differ about pure *ʿibāda* being in need of intention, and rational *ʿibāda* not being in need of it.

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[31] Qurʾān 5 : 6.
[32] Qurʾān 98 : 5.

Ablution has a resemblance to both kinds of worship and a disagreement has, therefore, resulted. The reason is that it combines ritual worship and purification, and the aim of *fiqh* is to examine which one it resembles more strongly so that it may be linked to it.

1.1.2.2. Issue 2: *Aḥkām* of washing hands before touching utensils

The jurists differed about washing of hands before immersing a hand inside the water-utensil of ablution. Some have held that it is one of the practices (*sunan*) of ablution that is always recommended,[33] even when the hands are clean without a doubt. This is the better known opinion of Mālik and al-Shāfiʿī. It is also said that it is recommended in the case of a person doubting the purity of his hands. This too was an opinion narrated from Mālik. It is also said that washing of hands (before immersing them in the water inside a utensil) is obligatory on one waking up from sleep. This was Dāwūd's view and that of his disciples. Some have distinguished between nocturnal sleep and that of the day, and made it obligatory for nocturnal sleep, but not for that during the day. This is Aḥmad's opinion. Thus, four opinions are arrived at through this (discussion). First, that it is *sunna* in absolute terms (i.e. always undertaken). Second, that it is recommended for the person in doubt. Third, that it is obligatory on one awaking from sleep. Fourth, that it is obligatory on one waking up from nocturnal sleep and not that of the day.

The reason for their disagreement in this is their dispute over the meaning of Abū Hurayra's authentic tradition that the Prophet (God's peace and blessings be upon him) said, "When one of you wakes up from his sleep, let him wash his hand(s) before putting it into the water-can, for he does not know where his hand has spent the night". In some versions it is said, "let him wash it thrice". Those who did not see a contradiction between the additional requirement in this tradition and what is contained in the verse of ablution, interpreted the imperative word here in its apparent meaning of obligation (*wujūb*) and (thus) rendered the washing of hands from among the obligations of ablution. Those, among them, who considered the word "during the night" (*bayāt*) to imply nocturnal sleep, rendered it an obligation in the case of nocturnal sleep alone. Those who did not have a similar understanding of this, but understood from it sleep only, made it obligatory for all kinds of awakening from sleep, whether that of the day or night. Those who saw a conflict between the addition in this tradition and the verse of ablution—the apparent meaning in the verse of ablution being the enumeration of the obligations (*furūḍ*) of ablution—reconcile the two by shifting the apparent meaning, that is, obligation to mean recommendation (*nadb*). Those for whom this recommendation is emphatic (*muʾakkada*) due to the Prophet's persistent performance of this act, considered it a category of the *sunan*. Those for whom this recommendation was not emphatic, said it is from the category of *mandūb* (recommended) only. For them the washing of hands in this manner is required even when they are undoubtedly clean, I mean, those who considered it emphatic *sunna* and also those who said it is recommended. Those, among them, who did not comprehend from this tradition an obligatory underlying cause, so as to deem it a category of the particular word implying generality, recommended it only for one waking up from sleep. Those who deduced from it the cause of doubt deemed it to be of the category of the particular word implying generality and considered it to apply to every person in doubt, for it is close to the state of arising from sleep.

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[33] The author is apparently using this term to mean *sunna muʾakkada* which depicts an act persistently performed by the Prophet (God's peace and blessings be upon him) as compared to *sunna ghayr muʾakkada* that applies to an act performed, by him, occasionally and for which the term recommendation (*mandūb*) has been used here.

This tradition apparently is not intended for the *ḥukm* of (washing of) hands in ablution, but is intended for the *ḥukm* of the water with which ablution is to be performed, as purity is a stipulated condition for such water. The report about the Prophet (God's peace and blessings be upon him) washing his hands most of the time before handling the utensil is probably applicable to the *ḥukm* that washing hands in the beginning is one of the acts of ablution. It is also likely that it is related to the *ḥukm* for water, as it should not be polluted or become doubtful (as to purity), that is, if we say that doubt is an effective factor.

1.1.2.3. Issue 3: Elements: rinsing of mouth (*maḍmaḍa*) and snuffing water (*istinshāq*).

The jurists differed about rinsing of the mouth (*maḍmaḍa*) and snuffing (*istinshāq*). There are three opinions. First, that these practices are a *sunna* (emphatic recommendation) in ablution. This was the opinion of Mālik, al-Shāfiʿī, and Abū Ḥanīfa. Second, that they are obligatory (*farḍ*) in ablution. This was the view of Ibn Abī Laylā and some disciples of Abū Dāwūd. Third, that *istinshāq* is obligatory, while *maḍmaḍa* is recommended (*sunna*). This was the opinion of Abū Thawr, Abū ʿUbayda, and of a group of Ẓāhirites.

The reason for their disagreement, whether it is an obligation or a recommendation, is their dispute about the traditions reported on this issue, whether they amount to an addition over the verse of ablution, entailing a conflict. Those who considered that this addition, if deemed an obligation, conflicts with the verse—as the aim of the verse is to provide a foundation for this rule along with its explanation—shifted the implication of the traditions from the category of obligation to that of recommendation. Those who did not consider it as conflicting, assigned it its apparent meaning of obligation. Those for whom the authority of the Prophet's sayings and acts is equal (in strength), for purposes of assigning obligation, did not make a distinction between *maḍmaḍa* and *istinshāq*. Those for whom a saying is interpreted as an obligation and an act as recommendation distinguished between *maḍmaḍa* and *istinshāq*, as *maḍmaḍa* has been reported through the acts of the Prophet (God's peace and blessings be upon him) and not his command, while *istinshāq* is reported both from his commands and acts. The Prophet (God's peace and blessings be upon him) said, "When one of you performs *wuḍūʾ*, let him snuff up water into his nose and then let it out, while he who performs *istinjāʾ* (with stones) let him do it an odd number of times". It is narrated by Mālik in his *al-Muwaṭṭā* and by al-Bukhārī in his *Ṣaḥīḥ* from the tradition of Abū Hurayra.

1.1.2.4. Issue 4: Defining the area to be washed

The jurists agreed that washing of the whole face is one of the obligations of ablution, because of the words of the Exalted: "O ye who believe, when ye rise up for prayer, wash your faces". They differed about this on three points; namely, washing of the hairless part of the face between the beard and the ears, washing of the whole length of the beard, and the *takhlīl* of the beard (combing it with wet fingers).

The well-known opinion in Mālik's school is that the portion between the beard and the ears is not part of the face, though some Mālikites maintain that it is. Some jurists make a distinction between a person who is still beardless and a person with a beard. Thus, in the school (Mālik's) there are three opinions. Abū Ḥanīfa and al-Shāfiʿī said that it is a part of the face. With respect to the length of the beard, Mālik was of the opinion that it is obligatory that water flow on it, but it is not obligatory according to Abū Ḥanīfa and also al-Shāfiʿī in one of his two opinions. The reason for their disagreement over these two issues is the ambiguity of the term "face". With respect to the *takhlīl* of the beard, the opinion of Mālik was that it is not obligatory. Abū Ḥanīfa and al-Shāfiʿī had a similar view. Ibn ʿAbd al-Ḥakam, one of Mālik's disciples, made it obligatory.

The reason for their disagreement is the controversy about the authenticity of narrated traditions containing the command for *takhlīl* of the beard. The majority are of the view that they are not authentic and the narration in which the acts of the Prophet's ablution are reported do not contain anything about *takhlīl* of the beard.

1.1.2.5. Issue 5: Washing of hands and arms up to the elbows

The jurists agreed that the washing of the hands and the forearms are from among the obligations of ablution because of the words of the Exalted, "O ye who believe, when ye rise up for prayer, wash your faces". They disagreed about the inclusion of the elbows (in the forearms). The majority, Mālik, al-Shāfiʿī, and Abū Ḥanīfa, considered their inclusion as obligatory. Some of the Ẓāhirites, later Mālikites, and al-Ṭabarī were of the opinion that their inclusion in washing is not obligatory. The reason for their disagreement in this is the equivocality (*ishtirāk*) in the preposition *ilā* (to, up to) and the term *yadd* (hand), in the language of the Arabs. The preposition *ilā* sometimes denotes, in the usage of the Arabs, the limit (up to) and at other times gives the meaning of "with". The word *yadd* (hand), in the usage of the Arabs, is applied to three meanings: the hand; hand and forearms; hand, forearm, and upper arm. Those who rendered *ilā* as "with" or considered *yadd* as all three parts of the limb, deemed the inclusion of elbows for washing as obligatory. Those who understood from *ilā* the limit and from the term *yadd* whatever is lower than the elbows, and did not consider the limit as included in the defined category, did not include the elbows in washing. Muslim has reported in his *Ṣaḥīḥ* that Abū Hurayra used to first wash his right hand till the beginning of the upper arm, then the left in the same manner, followed by the washing of the right foot till the beginning of the calf and then the washing of the left in the same manner. He (Abū Hurayra) then said: "That is how I saw the Prophet of Allāh (God's peace and blessings be upon him) performing ablution". This is the proof given by those who made obligatory the inclusion of the elbows in washing.

When a word vacillates between two meanings it is necessary that it should not be assigned either meaning except through another evidence, even though in the case of *ilā* the meaning in the usage of the Arabs as being "limit" is more readily apparent than the meaning "with", and even though the term *yadd* is used more often to include whatever is below the forearm rather than what is above it. Thus, the opinion of those who did not include it is preferable from the aspect of the literal indication, and the opinion of those who did include it is clearer from the aspect of the narrated tradition, unless the tradition is interpreted only as a recommendation (*nadb*). The issue is probable either way, as is obvious. Some say that if "limit" is from the same genus as the term, it is included in it, but if it is not from the same genus it is not included.

1.1.2.6. Issue 6: Wiping (*masḥ*) of the head

The jurists agreed that wiping (*masḥ*) of the head is one of the obligations of ablution. They differed about the extent (of wiping) required. Mālik said that it is obligatory to wipe the whole of it (the head). Al-Shāfiʿī, some followers of Mālik, and Abū Ḥanīfa said that it is obligatory to wipe a part of it. Some followers of Mālik defined the minimum part to be a third, while others defined it as two-thirds. Abū Ḥanīfa, on the other hand, limited it to a fourth, and he also defined the part of the hand with which it is to be wiped as a fourth. He said, "Its wiping with less than three fingers is insufficient". Al-Shāfiʿī did not fix a limit for either.

The basis of this disagreement is due to the equivocality (*ishtirāk*) that is in (the particle) *bā*, in the usage of the Arabs. It is sometimes used as a mere addition for emphasis – as in the words of the Exalted, "*tanbut biʾdduhni*",[34] according to one who read "*tunbitu*" with a *ḍamma* for "*t*" and *kasra* for *bā* from the root *anbata*. At other times, the particle *bā* indicates the idea of a portion, as in the sentence "*akhadhtu bi thawbihi wa bi ʿaḍuḍih* (I held him [grabbed him] *bi* [by] his garment and his forearm)". There is no purpose in denying this, that is, the fact that *bā* may convey the idea of "a portion of". This is the opinion of the Kūfī school of grammar (*naḥw*). Those who considered it superfluous have deemed obligatory the wiping of the entire head. Superfluous here means that it is added only for emphasis. Those who considered *bā* as indicating apportionment have deemed obligatory the wiping of only a part of the head. Those who preferred this meaning have argued on the basis of the tradition of al-Mughīra that "the Prophet (God's peace and blessings be upon him) performed ablution wiping his forehead and turban". It is reported by Muslim. If we accept that *bā* is superfluous, there still remains another probability, whether the obligation relates to the front part of names (like head) or to the back part.

1.1.2.7. Issue 7: Determination of the number

The jurists agreed that the obligation in ablution is to wash each washable limb once, one after the other, soaking these parts with water. Washing each (limb) twice or thrice is recommended (*mandūb*) for it is authentically reported that the Prophet (God's peace and blessings be upon him) performed ablution washing each (limb) once. On another occasion he washed twice, and on yet another occasion he was seen washing them thrice. The command, however, does not require washing each limb more than once, that is, the command laid down in the verse of *wuḍūʾ*.

They differed about the merit in repeating the wiping of the head. Al-Shāfiʿī was of the opinion that the person who washes his other limbs three times should preferably wipe his head thrice. The majority of the jurists saw no merit in repeating the *masḥ*. The reason for their disagreement (here) lies in their dispute over the acceptance of the addition contained in one tradition coming down through a single chain. The majority of the jurists do not use such a tradition. Most of the other traditions relating that he (the Prophet) washed thrice, including that related through Uthmān and others, state that he wiped only once. In some narrations from Uthmān, however, that describe the *wuḍūʾ* of the Prophet (God's peace and blessings be upon him) it is stated that he (the Prophet) wiped his head thrice. Al-Shāfiʿī emphatically supported accepting this excess on the basis of the apparent generality of the narrations that the Prophet (God's peace and blessings be upon him) performed *wuḍūʾ* repeating his acts twice and thrice. The generality, here, even though it arises from the word of a Companion is assigned to all the limbs in ablution. This addition, though, is not in the two *Ṣaḥīḥs*. If proved authentic it (the narration) must be followed, as that which fails to mention a thing cannot be a proof against that which does mention it. The majority of the jurists made obligatory the renewal of water for wiping on the analogy of the other limbs. It is narrated from Ibn Mājishūn that he said, "If the water is exhausted he may wipe with the moisture on his beard". This is the preference of Ibn Habīb, Mālik and al-Shāfiʿī.

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[34] Qurʾān 23 : 20.

It is recommended in the performance of *masḥ* that one begin with the forehead, passing the hands over the top up to the nape of the neck, and then bringing them (to the point) where he started. This is stated in the reliable tradition of ʿAbd Allāh Ibn Zayd al-Thābit. Some of the jurists preferred that one begin with the back of the head. This too is narrated from the description of the ablution of the Prophet from the tradition of al-Rubayyiʿ bint Muʿawwidh, except that it is not found in the *Ṣaḥīḥayn*.

1.1.2.8. Issue 8: Determination of the objects of wiping

The jurists disagreed about (the sufficiency of) *masḥ* over the turban (alone). This was permitted by Aḥmad Ibn Ḥanbal, Abū Thawr, al-Qāsim, Ibn Sallām and some others. It was prohibited by another group and by Mālik, al-Shāfiʿī, and Abū Ḥanīfa. Their disagreement arises from their dispute about the validity of acting upon the tradition related by al-Mughīra and others "that he [the Prophet] (God's peace and blessings be upon him) performed *masḥ* on his forehead and on his turban, and also upon the analogy of [the *masḥ* of] boots. It is for this reason that most of them stipulated that it be worn in a clean condition.[35] This tradition was rejected by some, either because it was deemed unauthentic by them or because the apparent meaning in the Qurʾān contradicted it, in their opinion, that is, the command in it about the *masḥ* of the head, or because it was not widely accepted in practice. This is according to those who require widespread practice for matters reported through individual traditions, particularly in Medina, as is known about the school of Mālik, who stipulated widespread practice as a condition. The *ḥadīth* is reported by Muslim. Abū ʿUmar Ibn ʿAbd al-Barr said that it is a defective (*maʿlūl*) tradition. In some of its versions the wiping of the turban alone is mentioned, while that of the forehead is not. It is for this reason that some jurists did not stipulate with the wiping of the turban the wiping of the forehead as well, as the original requirement and its substitute cannot be combined together.

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[35] That is, when the worshipper is in the ritual state of purity.

1.1.2.9. Issue 9: Wiping (*Masḥ*) of the ears

They (the jurists) disagreed about the wiping of the ears whether it is recommended (*sunna*) or an obligation (*farīḍa*), and whether the water is to be renewed. Some said it is obligatory and that water is to be renewed for (wiping) them. Those who expressed this opinion are a group from among Mālik's followers, as he considered the ears a part of the head. Abū Ḥanīfa and his followers considered their wiping as obligatory, and said that they are to be wiped along with the head with the same water. Al-Shāfiʿī considered their wiping as a *sunna* and stipulated the renewal of water for them. This opinion was held by another group of Mālik's followers and they maintained that it is Mālik's opinion, because it is narrated that he said "their *ḥukm* is the same as the *ḥukm* of *maḍmaḍa*". The disagreement—whether wiping of the ears is recommended or an obligation—stems from the controversy about the traditions transmitted on this issue, that is, the wiping of the ears by the Prophet (God's peace and blessings be upon him) whether it is an addition over what exists in the Qurʾān about the wiping of the head. Its *ḥukm* then is that it is a recommendation due to the conflict between it and the verse, if it is interpreted as an obligation. If, however, it is considered an explanation of an unelaborated word in the Qurʾān, its *ḥukm* becomes the *ḥukm* already existing for the head, that is, obligatory. Thus those who considered it obligatory deem it an explanation of the difficult (*mujmal*) word in the Qurʾān, while those who did not consider it obligatory deem it an addition, as in the case of *maḍmaḍa*. There are many traditions transmitted on this issue. Though they are not included in the two *Ṣaḥīḥs*, practice has become common according to these traditions.

With respect to the disagreement about the renewal of water for the ears, the cause is the vacillation of the term "ears", whether they are considered independent limbs for purposes of ablution or whether they form part of the head. One group gave a distinct opinion that they are to be washed with the face while another considered that the inside of the ears is to be wiped with the head and the outer parts to be washed with the face. The reason is their being equipoised between being part of the face or head. All this has no real significance in view of the common traditions about their *masḥ* and its widespread practice. Al-Shāfiʿī considers the repeated wiping of the ears as being recommended,[36] as he does in the case of wiping of the head.

1.1.2.10. Issue 10: Washing of the feet

The jurists agreed that the feet are limbs that are the object of ablution, but they differed about the method of purification required for them. A group of jurists, and these are the majority, said that their purity is attained by washing. Another group said that the obligation in their case is wiping. And yet another group said that their purity is achieved through either way; it depends upon the choice of the worshipper.

The reason for disagreement is based upon two well-known readings of the verse of *wuḍūʾ*, that is, the reading of those who read the word "feet" as the object of washing with a *naṣb* (accusative; final vowel *a*) in conjunction with limbs washed, and those who read it with a *khafḍ* (final vowel *i*) in conjunction with parts wiped. The reading with a *naṣb* clearly indicates washing, while reading it with a *khafḍ* evidently indicates wiping. Those who held that the obligation is specifically for one of these two types of purity, determined as washing or wiping, preferred one reading over the other, disposing of, by interpretation, the meaning of the other reading in favour of the reading that was preferable for them. Those who believed that the obvious implications of both readings were equal, and that one of these did not have a stronger indication than the other, rendered it as a *wājib mukhayyar* (obligation with a choice), like expiation for breaking an oath. This was the opinion of al-Ṭabarī and Dāwūd. The majority, however, have numerous ways of interpreting away the reading with a *khafḍ*, and the best of these is that the conjunction here relates to the pronounced form of the word, which is found in Arab usage.

The other party, and they are those who made wiping obligatory, interpreted the *naṣb* reading as being a conjunction related to the position of the immediately preceding word introduced by the genitive particle, which is like the direct object of the verb. The majority preferred this reading of theirs (in the accusative case) on the basis of reports established from the Prophet (God's peace and blessings be upon him) when he said about people who did not wash their feet, "Woe to the heels in the fire".[37] They said that this indicates that washing of the feet is an obligation, as an obligation is that to which punishment is linked for non-observance. There is, however, no legal force in this; the warning was issued here about the people who chose to wash their feet but not their heels.[38] There is no doubt that those who made washing obligatory, made it so for the feet in their entirety, while those who made wiping obligatory, did so for the feet in their entirety, as did those who granted a choice in the two obligations. This may also be supported by what is related in a tradition, also recorded by Muslim, where it is said that "We began wiping our feet, when he [the Prophet] proclaimed, 'Woe to the heels in the fire'". This tradition, though it has been the practice to argue through it for the denial of wiping, is stronger in the indication of its permissibility rather than its prohibition, as the warning was issued for the neglect of completion and not for the type of *ṭahāra*; in fact, it is silent as to the type, which indicates their permissibility. The permissibility of wiping is also related from some of the Companions and the Tābiʿūn, but by way of implication.

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[36] That is, he considers it to fall under the category known as *mandūb* (recommended). The phrase "al-Shāfiʿī recommended" is being used here as recommended by the Lawgiver not by al-Shāfiʿī. This may apply to the other categories of the *aḥkām*, and will be encountered frequently in what follows. The reader should note the distinction.

[37] The reference here is to ankles not properly washed in ablution.

Washing is more suitable for the feet than is wiping, just as wiping is more suitable for the head than is washing, as the dirt on the feet is usually not eliminated except by washing, while the dirt on the head is usually removed by wiping. Rational interests (*maṣāliḥ*) are probably not applicable as causes for obligatory acts of worship, and the law has, therefore, recognized both meanings in them: a meaning securing an interest and an *ʿibādī* (ritual) meaning requiring obedience. I mean by *maṣlaḥī* that which relates to the senses, and I mean by *ʿibādī* that which pertains to the purification of the self (*nafs*).

Likewise, those jurists, who permitted wiping, differed about whether ankles are to be included in wiping or washing. The disagreement stems from the equivocality of the preposition *ʿilā* (up to), that is, in the words of the Exalted, "up to the ankles". The discussion of the equivocality found in this word has preceded in the discussion of the words of the Exalted, "up to the elbows". The equivocality there was from two aspects, because of the word *yadd* and the word *ʿilā* while here it is due to the equivocality of the word *ʿilā* alone.

They disagreed about the connotation of the term *kaʿb*, because of the equivocality of the word *kaʿb* and the disagreement of language experts about its connotation. It is said that they are the two bones at the knot of the straps of the sandals, while it is also said that they are the two protruding bones on the sides of the (lower) calf. There is no dispute, as far as I know, about their inclusion in washing, according to those who maintain that they are the bones at the knot of the straps, for they are indeed parts of the foot. It is for this reason that one group has said that if the defining limit is of the same category as the defined part, it is included in its ambit, that is, the thing introduced by the words "up to". If, however, it does not fall under the same category as the defined term, it is not covered by it, as in the words of the Exalted, "Then strictly observe the fast till [up to] nightfall".[39]

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[38] Since they started washing the fore-parts of the feet the heels had also to be washed.

1.1.2.11. Issue 11: The sequence of the acts of ablution

They disagreed about the observance of a sequence in the acts of ablution as arranged in the verse. One group of jurists said that it (following the sequence) is a *sunna* (recommended). This is what is related by the later disciples of Mālik from the opinions in the school. It was also upheld by Abū Ḥanīfa, al-Thawrī, and Dāwūd. Another group of jurists said that it is an obligation, which was the opinion of Al-Shāfiʿī, Aḥmad, and Abū ʿUbayd. All this is about the sequence of the obligatory acts (of ablution) in relation to each other. As to the sequential ordering of the obligatory acts with recommended acts, it is regarded by Mālik as commendable (*mustaḥabb*), while Abū Ḥanīfa considered it to be a *sunna* (i.e. it should be acted upon as a *sunna*).

There are two reasons for their disagreement. First is the equivocality that arises from the conjunction *wāw* (and), as the conjunction is sometimes achieved through it in a sequential order, while at other times it is without such order. This is indicated through induction in the usage of the Arabs. On this point the grammarians are divided into two groups. The grammarians of Baṣra said that the *wāw* does not indicate an order or a sequence, it merely implies a connection of the words joined by it. The Kūfīs said that it does indicate an order as well as a sequence. Those who maintained that the *wāw* in the verse implies order, upheld the obligation of a sequence, while those who maintained that it does not imply a sequence, did not uphold its obligation. The second reason is based upon their difference related to the acts of the Prophet (God's peace and blessings be upon him), whether they are to be construed as an obligation or a recommendation. Those who interpreted them as obligatory, upheld the obligation of a sequence, as it is not related from him that he ever performed ablution without a definite sequence. Those who interpreted them to imply a recommendation said that sequential performance is a *sunna*. Those who made a distinction between acts prescribed as a *sunna* and as an obligation said that obligatory sequential ordering has to be in acts that are obligatory, but those who did not make such a distinction said that obligatory conditions may apply even to acts that are not obligatory.

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[39] Qurʾān 2 : 187

1.1.2.12. Issue 12: The continuous performance of the acts

They disagreed about the (obligation of) continuous performance of the acts of ablution (without uncalled-for intervals between them). Mālik held that continuous performance is an obligation, when the acts are remembered along with the ability to perform them, relaxed only because of forgetfulness, or when they are remembered but there is a valid excuse, and the interval is not excessive. Al-Shāfiʿī and Abū Ḥanīfa said that continuous performance is not an obligation of ablution. The reason for disagreement is again the equivocality of the *wāw*, as the conjunction sometimes applies to adjacent things following each other, while at other times it applies to acts delayed with respect to others.

A group of jurists argued for the suspension of continuous performance on the basis of what is established from the Prophet (God's peace and blessings be upon him) that he occasionally performed ablution, and used to delay the washing of his feet till sometime later. The disagreement over this issue also arises from the interpretation of (following) these acts (of the Prophet) as an obligation or a recommendation.

Mālik made a distinction on the basis of intention and forgetfulness; the principle applying to the person who forgets is that he is excused, unless evidence to the contrary is established, because of the words of the Prophet (God's peace and blessings be upon him), "Liability for mistake and forgetfulness is removed from my *umma*". Similarly, a valid excuse, as is obvious from the dictates of the law, is effective in obtaining a concession.

A group of jurists said that invoking the name of Allāh at the beginning is an obligatory part of ablution. They argued for this on the basis of the words of the Prophet (God's peace and blessings be upon him), through a *marfūʿ* tradition: "There is no *wuḍūʾ* for the person who has not proclaimed the name of Allāh". This tradition has not been proved authentic according to the traditionists. Others have interpreted it as implying *niyya*, while some, as far as I know, have construed it as a recommendation.

These are the widely known principal issues in this topic (of ablution). They relate, as we have seen, either to the description of the acts of this ritual purification, or to the determination of their positions in relation to each other, or to the identification of the conditions and elements, and to all the rest that has been said.

1.1.2.13. Issue 13: Wiping over boots

One of the topics on this subject relates to *masḥ* over boots (*khuffayn*), as it is related to one of the acts of ablution (namely, washing of the feet). The discussion covering its principles relates to the study of seven issues: its permissibility; delineation of the object of *masḥ*; category of the object; its description, that is, the description of its object; its time; conditions; and factors nullifying it.

1.1.2.13.1. Sub-issue 1: Permissibility

There are three opinions about this. The widely known opinion, which was upheld by the majority of the jurists of the provinces, is that it is permitted absolutely. The second opinion permits it during a journey and not within settlements. The third opinion maintains its absolute prohibition, and is the most strict. All three opinions have been related from the first generation (of Islam) and also from Mālik.

The reason for their disagreement is the conflict thought to exist between the verse of ablution, commanding the washing of feet, with the traditions that permitted wiping, bearing in mind the fact that the verse itself was revealed later. This disagreement is to be found among the Companions in the first generation of Islam. Some of them maintained that the verse of ablution had abrogated these traditions, which is Ibn ʿAbbās's opinion. Those who upheld its permissibility argued on the basis of the report by Muslim that the tradition of Jarīr appealed to them, as it is related from him that he had seen the Prophet (God's peace and blessings be upon him) wiping his boots. It was said to him that this was prior to the revelation of *sūrat al-Māʾida*, but he said, "I converted to Islam after the revelation of *al-Māʾida*". The later jurists, who upheld its permissibility, said that there is no conflict between the verse and the traditions, as the command for washing feet is directed toward those who do not have boots, and the exemption has been granted to one wearing them. It is said that the interpretation of the verse based on the *khafḍ* version relates to wiping over boots. Those who made a distinction between travelling and being in a settlement, did so because most of the authentic traditions, conveying *masḥ* by the Prophet (God's peace and blessings be upon him) over his boots, relate to travel. Further, journey in itself depicts exemption and leniency. And, *masḥ* belongs to the category of leniency, as taking them off presents a hardship for the traveller.

1.1.2.13.2. Sub-issue 2: Defining the area to be wiped

The jurists of the regions disagreed about the delineation of the area (to be wiped). One group of jurists said that the obligation is for wiping the upper part of the boots, and that wiping the lower part, that is, the sole, is commendable. Mālik is one of those who upheld this, as is al-Shāfiʿī. Some of them deemed obligatory the wiping of the external and the internal parts of the boots, which is Ibn Nāfiʿ's opinion, from among the disciples of Mālik, while others deemed obligatory the wiping of the external part alone, and did not consider commendable the wiping of the inner part, which is the opinion of Abū Ḥanīfa, Dāwūd, Sufyān (al-Thawrī), and a group of jurists. Ashhab deviated from this and said that the obligation is for wiping the inner part or the external, whichever he (chooses) to wipe.[40]

The reason for their disagreement stems from the conflict of the traditions relevant to the subject, and the resemblance of wiping with washing. There exist two opposing traditions. The first is the tradition of al-Mughīra ibn Shuʿba, which says, "He (God's peace and blessings be upon him) wiped over his boots and inside them". The other is the tradition of ʿAlī, saying, "Had the *dīn* been structured upon opinions, the wiping of the lower part of the boots would have been better than wiping the upper part, but I have seen the Messenger of Allāh wiping the external part of his boots". Those who adopted an opinion based on the reconciliation of traditions interpreted the tradition of al-Mughīra to imply recommendation, and interpreted the tradition of ʿAlī to imply obligation. This is the preferable method. Those who adopted preference, either adopted ʿAlī's tradition or that of al-Mughīra. Those who gave predominance to al-Mughīra's tradition over ʿAlī's did so on the basis of analogy, that is, the analogy of *masḥ* upon washing, while those who gave predominance to ʿAlī's tradition did so because of its opposition to analogy or on the basis of a more reliable chain of transmission. Prominence in this issue goes to Mālik. I have no knowledge of the basis for those who permitted *masḥ* of the inner part alone, for they neither followed these traditions nor employed this analogy, that is, the analogy of wiping upon washing.

1.1.2.13.3. Sub-issue 3: Kinds of objects

About the kinds of objects that are to be wiped, the jurists upholding *masḥ* agreed upon wiping over boots, but they disagreed about socks (*jawrabayn*). One group of jurists permitted this, while another prohibited it. Among those who prohibited this are Mālik, Al-Shāfiʿī, and Abū Ḥanīfa. Those who permitted it include Abū Yūsuf and Muḥammad, the disciples of Abū Ḥanīfa, and Sufyān al-Thawrī.

The reason for their disagreement arises from their dispute over the authenticity of a tradition from the Prophet (God's peace and blessings be upon him) on this issue, which conveys that he wiped his socks as well as his sandals (*naʿlayn*). They also disputed as to whether analogy for other things can be constructed upon the wiping over boots, or whether it is a fixed ritual or non-rational interpretation upon which no analogy can be based nor can it be extended to other things. Those for whom the tradition did not prove authentic, or (information about) it did not reach them, and they did not employ analogy upon boots, restricted *masḥ* to the boots, while those who considered the tradition to be authentic, or upheld analogy upon boots, permitted *masḥ* over socks. This tradition has not been recorded by the two Shaykhs, that is, al-Bukhārī and Muslim, but has been deemed authentic by al-Tirmidhī. Because of the vacillation of leather socks between boots and non-leather socks, there are two narrations from Mālik about wiping them: one prohibits it, while the other permits it.

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[40] Note by the Editor of the original text: In the Fās manuscript it is stated: "While (wiping of) the external part is commendable".

1.1.2.13.4. Sub-issue 4: Description of boots

They agreed about wiping over boots that are in good condition, and disagreed about those that are torn. Mālik and his disciples said that one may wipe over them if the tear is minor. Abū Hanīfa limited the extent of the tear to the measure of three fingers. A group of jurists said that it is permitted to wipe over them as long as they can be described as boots, even when the tear is extensive. One such jurist from whom this is related is al-Thawrī. Al-Shāfiʿī, in one of his two opinions, held that the boot should not be torn from the front exposing the foot, even if the tear is small.

The reason for their disagreement derives from the question of whether the transference of the obligation, from washing (the feet) to wiping, is due to their being covered, that is, the feet being covered by the boots, or whether it is due to the hardship arising from taking off the boots and then wearing them after washing.[41] Those who said that it is due to covering did not allow wiping over torn boots, as the uncovering of the feet transfers the obligation from wiping to washing. Those who considered the underlying cause (*ʿilla*) to be hardship did not take into consideration the tear, when they could (still) be called boots. The distinction between a major and a minor tear[42] is based on *istiḥsān* and the removal of hardship. Al-Thawrī said that the boots of the Muhājirūn and the Anṣār were not devoid of tears, like the boots of other people, and had there been a prohibition in this regard it would have been laid down and related from them. I would say that this issue is one that is not expressed (in the texts), and had a *ḥukm* existed for it, along with the fact that tears in boots were common, the Prophet (God's peace and blessings be upon him) would have explained it. Allāh, the Exalted, has said, "We have revealed unto thee the Remembrance that thou mayst explain to mankind that which hath been revealed for them".[43]

1.1.2.13.5. Sub-issue 5: The time of wiping

The jurists also disagreed about (the extent of) its time. Mālik held that it is not limited by time, and one wearing boots may wipe over them, as long as he does not take them off or is not affected by a major impurity (*janāba*). Abū Ḥanīfa and al-Shāfiʿī held that it is limited by time.

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[41] The word in the original is *nawʿ*. It should have been *nazʿ*—apparently a printing error.

[42] The word in the original is "boot"; obviously, it should be "tear".

[43] Qurʾān 16 : 44.

The reason for their disagreement is based upon the conflict of traditions about this. Three (relevant) traditions have been related. The first is a tradition of ʿAlī from the Prophet (God's peace and blessings be upon him) that he said, "The Prophet (God's peace and blessings be upon him) determined three days and accompanying nights for a traveller and a night and a day for the resident." It is recorded by Muslim. The second is the tradition of Ubayy ibn ʿUmāra that he said, "O Messenger of Allāh, do I wipe over my boots?" He said, "Yes". He said, "For a day?" He said, "Yes". He asked (again): "Two days?" He said, "Yes". He said, "And a third?" He said, "Yes, till you reach the seventh". He [the Prophet] then added, "Wipe for as long as you wish". This is recorded by Abū Dāwūd and al-Ṭaḥāwī. The third is the tradition of Ṣafwān ibn ʿAssāl, who said, "We were on a journey and were ordered not to take off our boots for three days and accompanying nights, except in the case of a major impurity, but not for urinating, sleep, or when answering the call of nature".

I would say that the tradition of ʿAlī is authentic, as it is recorded by Muslim. About the tradition of Ubayy ibn ʿUmāra, Abū ʿUmar ibn ʿAbd al-Barr has said that it is not established, and does not have a verified chain of narration, therefore, it cannot be used to oppose the tradition from ʿAlī. Though the tradition of Ṣafwān ibn ʿAssāl has not been recorded by al-Bukhārī or by Muslim, yet it has been considered sound by experts in traditions, like al-Tirmidhī and Abū Muḥammad ibn Ḥazm. Like ʿAlī's tradition, it conflicts in its apparent meaning with Ubayy's tradition. It is possible to reconcile the two by saying that the traditions of ʿAlī and Ṣafwān place a time limit in response to the question, while the tradition of Ubayy ibn ʿUmāra is explicit about the negation of such a limit, but the tradition of Ubayy has not been authenticated. It is, therefore, necessary to act according to the traditions of ʿAlī and Ṣafwān and that is better, although their implication conflicts with analogy: a time limit is not effective in annulling purity as factors that nullify it are impurities.

1.1.2.13.6. Sub-issue 6: Conditions for wiping over boots

The condition for the wiping over boots is that the feet, at the time of wearing the boot, should be clean through the purification of ablution. This is something agreed upon, except for a slight disagreement, which is attributed by Ibn al-Qāsim to Mālik, as reported by Ibn Lubāba in *al-Muntakhab*. The basis for the majority view rests on the traditions related by al-Mughīra and others, which state that when the Prophet (God's peace and blessings be upon him) wanted to take off his boots he said, "Let them be, for they (the feet) were clean when I put them on". Those deviating from the majority view interpreted this remark according to the literal meaning of cleanliness.

The jurists differed in this topic about the person who (while performing ablution) washes his feet, puts on his boots, and then completes the ablution, whether he is entitled to wipe over his boots (next time he performs ablution). Those who did not consider an ordered sequence to be obligatory (in ablution) and held that purity of each limb is valid before the purity of all the other limbs is completed, maintained that it is permissible. Those who held that a sequence is obligatory, and that purification of a limb is not valid before purification of all the limbs (preceding it), did not permit it. The first opinion was held by Abū Ḥanīfa, while the second was held by Mālik and al-Shāfiʿī, except that Mālik did not disallow this because of the sequence; he did so as the purity of this limb cannot be achieved except by washing the remaining limbs. (This is on account of) the words of the Prophet (God's peace and blessings be upon him), "I put them on when they were clean", meaning legal ceremonial purity. In some narrations from al-Mughīra the words are: "When you slip your feet into your boots, and they were then pure, wipe over them". On the basis of these rules the answer to the question about a person, who puts on one boot after washing his foot prior to washing the other, is provided by Mālik, who said that he is not to wipe over his boots for he wore them before the completion of (ritual) purification. This is also the opinion of al-Shāfiʿī, Aḥmad, and Isḥāq. Abū Ḥanīfa, al-Thawrī, al-Muzanī, al-Ṭabarī, and Dāwūd said that wiping is permitted. It was also the opinion of a group of Mālik's disciples, among whom are Muṭarrif and others. All of them agreed that if a person takes off one boot after washing the other foot and then puts it on, wiping is permitted to him.

Is it a condition for wiping over one boot that it should not be on a second boot (worn on top of the first soft boot)? There are two opinions about this from Mālik. The reason for disagreement is whether the obligation of wiping the inner boot is transferred to the outer boot, just as the obligation of washing the foot is transferred to the boot when it covers the foot? Those who held the second transference similar to the first allowed wiping of the outer boot, while those who did not hold it to be similar and found a distinction did not permit it.

1.1.2.13.7. Sub-issue 7: Factors nullifying this form of purification

They agreed that the factors nullifying this form of purification are the same factors nullifying ablution itself. They disagreed on whether taking off the boots nullifies this kind of purification. A group of jurists said that if a person takes off his boots and washes his feet, purification is maintained, but if he does not wash them and prays, his prayer is not counted, and he has to pray again after washing his feet. Those who maintained this include Mālik and his disciples, al-Shāfiʿī, and Abū Ḥanīfa. Mālik, however, maintained that if he delays this he has to renew ablution, conforming with the condition of continuous performance of the acts of ablution, which has preceded. Another group of jurists held that purity is maintained and he is not obliged to wash his feet, unless the person acquires some form of *ḥadath* (legal impurity) that nullifies his ablution. Among those who maintained this are Dāwūd and Ibn Abī Laylā. Al-Ḥasan ibn Ḥayy said that if he takes off his shoes, purity is annulled. Each of these three opinions was held by a group of the *Tābiʿūn.* This issue has not been explicitly mentioned (in the texts).

The reason for disagreement is whether wiping over boots is an independent act in itself or is a substitute for washing the feet once they are inside the boots. If we maintain that it is an independent act, purity must remain, even if he removes his boots, as in the case of a person whose feet are cut off after ablution. If we maintain that it is a substitute, it is possible to say that if he takes off his boots purification is annulled even if we stipulate immediate washing; and it is also possible to say that washing of the feet is enough to achieve purification, if we do not stipulate immediate washing. As to the stipulation of immediate washing at the time of removal of boots, it is weak, for it is something conjectural.

This is what we intended to establish in this chapter.

1.1.3. Chapter 3 The Kinds of Water Used

The basis for the obligation of purification with water are the words of the Exalted, "And (He) sends down water from the sky upon you, that thereby He might purify you",[44] and His words, ". . . and then ye find not water, then go to high clean soil and rub your faces and your hands (therewith)".[45]

The jurists agreed that all kinds of water are pure in themselves, purifying other things, except for the water of the sea, about which there was some disagreement in the first period. They (the dissenters) are defeated by the fact that sea-water is included within the unqualified use of the term "water" and also by the tradition recorded by Mālik, which is the saying of the Prophet, "Its water is pure, and its dead creatures are lawful". Although, this is a tradition whose authenticity is disputed, the law apparently supports it.

The jurists, similarly, agreed about things that alter the water and that are normally found in it (or that are not normally separated from it, like green moss), do not usurp its purification and the quality of purifying, except for slight disagreement recounted about stagnant water by Ibn Sīrīn, whose opinion here is also rejected on the ground that the absolute use of the term

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[44] Qur'ān 8 : 11. Pickthall's translation altered.

[45] Qur'ān 4 : 43. Pickthall's translation altered.

"water" applies to stagnant water as well. They agreed about water that has been altered by impurity with respect to taste, colour, or smell, or with respect to more than one of these qualities, that it is not permitted for purposes of ablution or purification. They agreed that water in large quantities is not defiled by impurities that do not alter one of its (mentioned) qualities, and that it remains pure.

This is what they agreed upon in this topic, but they disagreed about six issues that are like rules and principles of the topic.

1.1.3.1. Issue 1: Water mixed with impurities without change in its attributes

They disagreed about water that contains impurities, but where none of its attributes is altered. One group of jurists said that it is pure irrespective of large or small quantities. This is one of the narrations from Mālik and is also upheld by the Ẓāhirites. Another group made a distinction between water in large and small quantities, saying that if there is little of it, it is impure and if there is much of it, it is not. They disagreed then about the demarcation separating small from large quantities (of water). Abū Ḥanīfa's opinion is that a large quantity of water is that in which a ripple caused by a person at one end does not reach the other side. According to al-Shāfiʿī the limit is the fill of two *qullas* (containers), which weigh about five hundred *raṭl* (pounds). Some jurists did not impose any limit, though they held that impurities defile water in small quantities, even if its attributes are not changed. This is related from Mālik. It is also related that such water is not defiled, but that its use is undesirable. Thus, there are three opinions from Mālik about the use of small quantities of water in which small impure objects have been dropped. First, that it has thus been defiled, or it has been rendered unusable. Second, that it has not been defiled, so long as its attributes have not changed. Third, that its use is reprehensible.

The reason for disagreement here is based upon the conflict of the apparent meanings of traditions recounted on this matter. In the preceding tradition of Abū Hurayra—"When one of you wakes up from sleep"—the apparent meaning is that a small amount of impurity defiles a small amount of water. Similarly, in the tradition of Abū Hurayra established form the Prophet (God's peace and blessings be upon him) where he said, "No one should urinate in standing water and then use it for washing", from the apparent meaning of which it is understood that a small amount of impurity soils a small quantity of water. So also the proscription of washing in still water by the person who has acquired a major impurity. This is opposed to the implications of the tradition of Anas, which reports: "A bedouin went to the side of the mosque to relieve himself, and the people shouted at him. The Messenger of Allāh (God's peace and blessings be upon him) said, 'Leave him alone'. After the man had relieved himself the Messenger of Allāh (God's peace and blessings be upon him) ordered a pitcher of water to be poured over his urine". This tradition indicates through its apparent meaning that a minor impurity does not defile a small quantity of water, as it is obvious that this spot became clean with a pitcher of water. There is also the tradition of Abū Saʿīd al-Khudrī, recorded by Abū Dāwūd. He said, "I heard the Messenger of Allāh (God's peace and blessings be upon him) being asked whether the water of the well of Buḍāʿa could be used, and it was a well in which dog flesh, menstrual clothes, and dirt were cast. The Prophet (God's peace and blessings be upon him) said, "Nothing defiles water'".

The jurists attempted to reconcile all these traditions, but they differed in their methods of reconciliation and, therefore, their opinions differed. Those who decided to uphold the apparent meaning of the traditions of Anas about the bedouin and of Abū Saʿīd maintained that the two traditions of Abū Hurayra should not be subjected to rationalization;[46] and compliance with what they maintain is a mode of worship, and the fact that the water had become unusable does not mean that it had become impure. The Ẓāhirites exaggerated and went so far as to say that if a person were to pour urine into the water from a bowl, washing and ablution with it would not be considered reprehensible. Thus, those who held this opinion reconciled the traditions in this way. Those who considered the use of a small amount of water, which had some impurities dropped in it, as undesirable, also reconciled the traditions by construing the traditions of Abū Hurayra to imply mere undesirability, and interpreted the tradition of the bedouin (incident) and the tradition of Abū Saʿīd in their literal meaning, that is, validity (in the use of the water).

Al-Shāfiʿī and Abū Ḥanīfa reconciled the traditions of Abū Hurayra and Abū Saʿīd, applying the two traditions of Abū Hurayra to small quantities of water and the tradition of Abū Saʿīd to huge amounts. Al-Shāfiʿī maintained that the solution for this that reconciles all the traditions is related in the tradition of ʿAbd Allāh ibn ʿUmar from his father, recorded by Abū Dāwūd and al-Tirmidhī and declared as authentic by Abū Muḥammad ibn Ḥazm. ʿUmar said: "The Messenger of Allāh (God's peace and blessings be upon him) was asked about water and about the leftovers of beasts of prey and other animals. He [the Prophet] said, "If the water is more than two *qullahs* it does not retain impurity'". Abū Ḥanīfa maintained that the solution can be arrived at through analogy (reasoning). He connected the spreading of impurities in the water with the movement of water. If the quantity of water is so much that impurity cannot be conceived to move throughout it by a stir caused in the water then the water is pure. Yet, the implication of the well-known tradition of the bedouin story appears to oppose those who hold these two opinions (i.e. the opinions of al-Shāfiʿī and Abū Ḥanīfa). For this reason the Shāfiʿites were constrained to distinguish between pouring water over impurities and dropping impurities in the water itself. They said that if it is poured over an impurity, as in the tradition about the bedouin, it does not remain impure, but if impurities are cast into the water, as in Abū Hurayra's tradition, it does. The majority of the jurists said that this is an arbitrary opinion. Yet, it does have a basis if pondered over carefully, because the jurists unanimously agree that a small amount of impurity does not affect a large amount of water, when the quantity of water is such that the impurity is not likely to spread through all its parts, and its essence would stand dissolved in such large amounts of water. In that case, it is not unlikely that if a small amount of impurity is dropped in a certain quantity of water it can get dissolved and spread throughout it, making it impure. If the same water were, instead, to be slowly poured over impurities, the essence of such impurity would gradually go and completely disappear before the disappearance of the water. In this way the last part of the water would have purified the defiled spot, as its ratio to what is left of the filth over which it is poured is the same as that of a large amount of water to a small amount of impurity. It is in this manner that certainty is attained about the disappearance of impurity, that is, by the falling of the last part of pure water on what remains of the essence of the impurity. For this reason they agreed that the amount of water with which ablution can be performed can purify a drop of urine falling on clothes or the body, but they disagreed when a drop falls into the same (little) amount of water.

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[46] Perhaps, they can easily be rationalized on the basis of hygienic principles, but the interpretation here is literal, that is, unquestioned compliance.

The best view, in my opinion, is that of reconciliation, which interprets the traditions of Abū Hurayra, and those having the same implication, to mean abomination, and the traditions of Abū Saʿīd and Anas to imply permissibility. Such an interpretation retains the obvious meaning of the traditions, I mean, the traditions of Abū Hurayra, with their aim of indicating the effect of impurity on water. The definition of abomination, in my view, is what a person would naturally shy away from, and would consider to be filthy. Thus, whatever a person refrains from drinking, he must avoid using in attaining nearness to Allāh Almighty, and he should refrain from spilling over his outer body what he refrains from pouring within.

The argument of those who maintain that if the principle that a small amount of impurity defiles a small amount of water is upheld, water would never be able to purify anyone (or anything); the claim that the object outside the water that is intended to be purified would always make the water filthy, is an opinion that has no validity, though many later jurists have found it (this opinion) to be appealing. This is because of the explanation we have given about the ratio of the last part of water poured over the last part of impurity remaining at a spot as being the same as a large amount of water to a small quantity of impurity. We know certainly that large amounts of water dissolve the impurity and convert its essence to purity. The jurists, therefore, agreed that a small amount of impurity does not defile a large amount of water. If the person washing continuously pours water on the impure spot or on an impure limb, the water will necessarily remove the impurity because of its excess, whether the large amount of water is poured over impurity all at once or slowly in parts. These jurists, thus, argued on the basis of a unanimously agreed point for a matter that is disputed without realizing it. The two points are wide apart.

This is what seems appropriate to us in this issue based on the differences of the jurists in this, and through the preference of their opinions. If we were to follow this method in each issue, our opinion, we feel, would become lengthy and would tax time. As a precaution, we should stay with our original purpose, which we determined for ourselves, and if Allāh Almighty were to make things easy and we have ample life, this aim will be met too.

1.1.3.2. Issue 2: Water mixed with saffron and clean things

Water in which saffron or other things of which water is often free, are mixed, altering one of its attributes, is pure according to all the jurists, but loses its power to purify according to Mālik and al-Shāfiʿī. It purifies according to Abū Ḥanīfa as long as the change (in attributes) is not achieved through heating. The reason for disagreement stems from the understanding of the absolute term "water" as applied to such mixed water. Those who held that water so mixed is not covered by the unqualified term water, but is described by the things added, such as "the water of such and such thing", did not allow ablution with it, as ablution is to be performed with unadulterated water. Those who said that the term water still applies to water so mixed, allowed ablution with it. For the obvious inapplicability of the term to water heated with a non-polluted thing, they did not permit ablution with it; similarly, they did not permit it in the case of water extracted from vegetation, except for what is recorded in the book of Ibn Shaʿbān about the permissibility of using rose-water in the *jumuʿa* washing. The truth is that the verdict depends upon the quantities of the additives. With excessive mixing, the water may reach a state where the absolute term for water will not apply to it and will acquire a qualifying term, like the term bath water; or it may not reach such a state, especially when it is only the smell that has been altered. It is for this reason that some jurists did not take smell into account when prohibiting mixed water. The Prophet (God's peace and blessings be upon him) is reported to have said to Umm ʿAṭiyya, when she was about to bathe his (dead) daughter, "Bathe her with water and *sidr* (lotus), and in the last course of washing add some camphor". This is mixed water, but the mixture did not reach a state where it would negate the absolute term for water. Mālik, basing his judgment on the intensity of the mixture, made a distinction between weak and strong mixtures. He permitted weak mixtures, even when the attributes of the water were altered, but did not permit it in strong ones.

1.1.3.3. Issue 3: Water already used for purification

The jurists disagreed about water (already) used for purification and held three opinions. A group of jurists did not permit its use in purification under any circumstances, which is the opinion of al-Shāfiʿī and Abū Ḥanīfa. Another group considered it undesirable, but did not permit *tayammum* when it existed, which is the view of Mālik and his disciples. A group of jurists did not find any difference between this water and water in its absolute meaning, which was the opinion of Abū Thawr, Dāwūd, and his disciples. Abū Yūsuf deviated from all this and said that it is impure.

The reason for disagreement here also arises from the question of whether it is included in the unqualified term for water; some went as far as saying that the term bath-water is more appropriate for it than the term water. The Companions of the Prophet (God's peace and blessings be upon him) used to compete for the excess left over from the ablution of the Prophet, and it is obvious that some drops of the water used would fall into the utensil that contained the surplus.

On the whole, it is absolute water and does not end up with changed attributes through the dirt of the limbs that are washed with it, but if it is sullied, then its *ḥukm* is the same as that of water one of whose attributes has changed with something pure, though it is something repelling by nature; this is what was taken into account by those who considered it abominable. As for one who considered it filthy, there is no evidence to support him.

1.1.3.4. Issue 4: Water left over by Muslims and animals

The jurists agreed about the purity of the leftovers of Muslims and cattle, but they disagreed extensively about other categories. Some believed that the leftover of every animal is pure, while others made an exception in the case of swine alone. These two views are related from Mālik. Some jurists made an exception in the case of swine and dogs, which is al-Shāfiʿī's opinion. Some excluded the beasts of prey generally, which is Ibn al-Qāsim's opinion. Others maintained that leftovers of animals are subservient to the *ḥukm* of (their) flesh; if the flesh is prohibited the leftover is impure, if the flesh is abominable the leftover is abominable too, but if the flesh is permissible the leftover is pure. As to the leftover of an idolater, it is said that it is impure, while it is said that it is abominable only if he drinks *khamr* (wine), which is Ibn al-Qāsim' opinion. The same is the case for him of all animals that do not normally avoi filth, like filth-consuming wild hens, camels, and dogs.

Their disagreement is based on three points. First is the conflict of analog with the obvious meaning of the Book. Second is its conflict with the litera meaning of the traditions. The third is the conflict of the traditions amon themselves.

The point that death resulting without slaughter is legally the cause o impurity of the animal's carcass provides the basis for the analogy that life must be the basis for the purity of the body of the animal. If this is the case, then each living thing is pure, and whatever is pure its leftover must also be pure. The apparent meaning of the Book opposes this analogy in the case of swine and polytheists, as Allāh, the Exalted, has said about swine, "swine-flesh—for that verily is foul",[47] and that which is filthy in its essence is also impure. Thus, one group of jurists have excluded only swine from all living animals, while those who do not exclude it interpret the verse to imply derogation for it. As to the polytheists, the words of the Exalted are, "O ye who believe! The idolaters are unclean. So let them not come near the Inviolable Place of Worship".[48] Those who interpreted this too in its literal sense excluded the idolaters from the implication of the analogy, while those who considered this to be merely derogatory for them reimposed the requirement of analogy.

The traditions conflicted with the analogy about dogs, cats, and beasts of prey. The tradition about the dog is Abū Hurayra's, which is agreed upon for its authenticity, and it is the saying of the Prophet (God's peace and blessings be upon him), "If a dog licks a utensil belonging to one of you, he should purify it by washing it seven times". In some of its versions it says, "The first time with dust", and in others, "Cover it the eighth time with dust". With respect to the cat it is the tradition related by Qurra from Ibn Sīrīn from Abū Hurayra, who said, "The Messenger of Allāh (God's peace and blessings be upon him) said, 'The purification of a utensil, when a cat has licked it, is to wash it once or twice'". Qurra is a trustworthy narrator according to the traditionists. About the beasts of prey is the preceding tradition of Ibn ʿUmar from his father, who said, "that the Messenger of Allāh (God's peace and blessings be upon him) was asked about water and about the leftover of beasts of prey and other animals. He said, 'If the water is more than two *qullahs* it does not retain impurity'".

A conflicting tradition in this topic is the report from the Prophet (God's peace and blessings be upon him) "that he was asked about the ponds between Mecca and Medina frequented by dogs and beasts of prey. He said, 'To them belongs what they carry in their bellies, and for you is what is left, a drink that is pure'". Similar to this is ʿUmar's tradition that was related by Mālik in his *al-Muwaṭṭaʾ*, which is the saying, "O owner of the pond, let's know not, for we follow up the beasts of prey and they follow us". Further, there is the tradition of Qatāda, also related by Mālik, "that Kabsha poured out water for his ablution and a cat came to drink from it. He tilted the utensil for it until it drank from it. He then said, 'The Messenger of Allāh (God's peace and blessings be upon him) said that it is not unclean. It is one of those (creatures) that move among you'". The jurists differed about the interpretation of these traditions and about their reconciliation with the stated analogy.

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[47] Qur'ān 6 : 146.

[48] Qur'ān 9 : 28.

Mālik held the view that the leftover of a dog is to be spilled and the utensil is to be washed, as it is a ritual act of non-rational worship, for the water it has lapped up is not unclean. He did not require, according to the widely known opinion from him, the spilling of things other than water, which a dog had licked. The reason, as we have said, is the conflict with analogy according to him. He also believed that if it is to be understood from the tradition that a dog is unclean, it opposes the apparent meaning of the Book, that is, the words of the Exalted, "So eat of what they catch for you",[49] meaning thereby that if it had been unclean the prey would have become unclean by its touch. He supported this interpretation by the required number of washings, as number is not a condition in the washing of unclean things. He held that this washing is merely an act of worship. He did not rely on the remaining traditions as they were weak in his view.

Al-Shāfiʿī excluded the dog alone from all living animals maintaining that the literal meaning of the tradition implies the impurity of its leftover. He held, I think, that the uncleanliness lies in its saliva and not in the dog itself. Abū Ḥanīfa believed that the meaning of all these traditions laid down about the uncleanliness of the leftover of beasts of prey, cats, and dogs relates to the prohibition of their flesh (for eating). This pertains to the rule of a particular meaning intended generally. He said that the leftovers are dependent upon the (*ḥukm* of the) flesh of the animal.

Some jurists excluded from this a dog, cat, and beast of prey in conformity with the literal meaning of the related traditions, while some deemed the leftover of the dog and cat as pure, excluding only the beast of prey. (They declared clean) the leftover of the dog (considered unclean) because of the number of washings, as that is opposed by the obvious meaning of the Book, and also because of its conflict with Qatādah's tradition; if the underlying reason for the cleanliness of the cat is its moving around among people, then the dog does so too. With respect to the cat, (they declared it clean) by deciding to prefer Abū Qatāda's tradition over the tradition of Qurra from Ibn Sīrīn, and by preferring Ibn ʿUmar's tradition over that of ʿUmar and of others that convey the same meaning, because of its conflict with Abū Qatāda's tradition through the (indirect) indication of the text, that is, when the underlying reason for the cleanliness of the cat is its moving among people; it is to be understood from that that the leftovers of those (beasts) that do not move among people, namely the beasts of prey, is prohibited. Among those who held this opinion is Ibn al-Qāsim.

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[49] Qurʾān 5 : 4.

Abū Ḥanīfa upheld, as we have said, the uncleanliness of the leftover of a dog, and did not deem the number to be a condition for the purification of the utensil licked by the dog, as this is opposed, in his view, by analogy arising from the washing of unclean things, that is the point considered here is the removal of the filth alone. This conforms with his practice of rejecting individual narrations when they are opposed to the principles.

The Qāḍī (Ibn Rushd) said, "He thus used a part of the traditions and did not employ others; I mean, he used those that did not conflict with the principles, and did not use those that clashed with the principles. He supported this with the assertion that this was the opinion of Abū Hurayra, who had narrated the tradition. These, then, are the factors that moved the *fuqahāʾ* to have such extensive disagreements on this issue and led them to dispute their implications. The issue is ratiocinative (*ijtihādiya*) and it is difficult to prefer some opinions over others. Perhaps, it is preferable to exclude from the purity of the leftovers those of the dog, swine, and the polytheist, because of the authenticity of the traditions about the dog, and also because it is better to adopt the obvious meaning of the Book, as against analogy, in maintaining the uncleanliness (of the leftovers) of swine and polytheists; similarly, the obvious meaning of the tradition. This is the opinion of the majority of the *fuqahāʾ*, that is, maintaining the uncleanliness of the leftover of the dog. The directive of spilling of what has been licked by the dog is based on *ikhāla* (reasoned conviction: *mukhīl*) and is compatible (*munāsib*) with the law, because of the uncleanliness of the water that has been touched, I mean, that the usual implication of the law in requiring the spilling of a thing and of washing the utensil is usually on account of the uncleanliness of the thing. About the objection raised by them that had this been due to the uncleanliness of the thing the number of washings would not have been stipulated, it cannot be denied that the law may single out some form of pollution from others assigning it a different *ḥukm*, because of the intensity of the contamination".

The Qāḍī (Ibn Rushd) said: "My grandfather, may Allāh have mercy on him, ruled in the book *al-Muqaddimāt* that this tradition has a rational underlying cause, which is not related to uncleanliness, but is based on the likelihood that the dog licking the utensil is rabid, and the [viral] infection is to be feared. He said that it is for this reason that this number of seven has been laid down for its washing. This number has been used on many occasions in the law in relation to the treatment and medication for illnesses. What he expressed, may Allāh have mercy on him, is an outstanding view conforming with the method of the Mālikites. If we say that this water is not unclean, it is better to provide a rational underlying reason rather than saying that it is non-rational when water in itself is clean. Some people raised an objection to this, according to what has reached me, saying that a rabid dog does not go near water when it has hydrophobia. What they said is true when this canine illness has reached serious proportions, but it is not so when it is in its early stages. Their objection, therefore, has no foundation. Further, the tradition does not talk about water, and only the utensil has been mentioned. Perhaps, there is in its leftover some characteristic of a harmful nature, I mean, before rabies has reached more serious proportions. Such prescriptions in the law cannot be denied. Of a similar nature is the tradition about a fly falling on food, that it is to be immersed completely (and then thrown out). The underlying reason is that there is a disease in one of its wings, while in the other there is its antidote.

The opinion in Mālik's school that the reference in the tradition concerning the dog's licking relates only to a dog whose taking as a pet is forbidden, or that it is a street dog, is weak and remote from this cause, unless the claimant were to say that by this is meant a proscription of its restraining [as a pet]".

1.1.3.5. Issue 5: Leftovers from ritual purification

The jurists disagreed about the leftovers from purification expressing five opinions. One group held that the leftovers of purification are clean absolutely (and purifying). This is the opinion of Mālik, al-Shāfiʿī, and Abū Ḥanīfa. Another group said that it is not permitted for a man to purify himself with the leftover of a woman, but it is permitted for a woman to purify herself with the leftover of a man. A third group said that it is permitted for a man to purify himself with the leftover of a woman as long as she is not sexually defiled or menstruating. The fourth group maintained that it is not permitted for either one of them to undertake purification with the surplus water of the other, unless they started using it at the same time. Another group said that it is not permitted even if they commenced at the same time, which is Aḥmad ibn Ḥanbal's opinion.

The reason for disagreement is based upon the differences in the relevant traditions. There are four related traditions about this. First, the tradition that the Prophet (God's peace and blessings be upon him) used to wash away major ritual impurities along with his wives using the same utensil. Second, the tradition of Maymūna that he washed with the surplus left by his wife. Third, the tradition of al-Ḥakam al-Ghifārī that the Prophet (God's peace and blessings be upon him) prohibited the ablution by a man with the surplus left by a woman; this is recorded by Abū Dāwūd and al-Tirmidhī. Fourth is the tradition of ʿAbd Allāh ibn Sarjas, who said, "The Messenger of Allāh (God's peace and blessings be upon him) prohibited that a man may wash with the surplus left by a woman, or that a woman may wash with the surplus left by a man, unless they commence at the same time". The jurists adopted two kinds of methods for the interpretation of these traditions: a method of preference, and a method of reconciling some and preferring others.

Some jurists preferred the tradition about the Prophet's bathing along with his wives, drawing from the same vessel, over the rest of the traditions, for it was a tradition agreed upon by the compilers of the *ṣaḥīḥ* traditions, and because there was no distinction in their view between bathing at the same time or bathing with the surplus left by others. This is because bathing at the same time means that each is bathing with the surplus left by the other person, and further, because the tradition of Maymūna proved authentic along with this tradition, and was preferred over the tradition of al-Ghifārī. They, therefore, maintained the absolute purity of the leftovers of purification. Those who preferred the tradition of al-Ghifārī over the tradition of Maymūna, which is the opinion of Abū Muḥammad ibn Ḥazm, reconciled the tradition of al-Ghifārī with the tradition about the Prophet's bathing along with his wives, drawing from the same vessel. They also made a distinction between bathing together while drawing from the same vessel and bathing with a surplus left by the other. Thus, acting upon these two traditions alone, they permitted a man to undertake purification along with a woman drawing from the same vessel, and permitted her to purify herself with a surplus left by him; however, they did not permit him to do so with a surplus left over from her purification.

Those who used the method of reconciliation of all the traditions, except for the tradition of Maymūna, adopted the tradition of ʿAbd Allāh ibn Sarjas, for it is possible to accommodate the tradition of al-Ghifārī within it. So also the tradition of the Prophet bathing along with his wives, drawing from the same vessel. There is, however, an addition to it, which is that a woman also should not undertake purification with the surplus left over by a man. Further, it is opposed by Maymūna's tradition, which is recorded by Muslim. Yet some jurists have found a defect in it as some of its narrators used (doubting) statements like "I think" or "to the best of my knowledge, Abū al-Shaʿthāʾ related to me (such and such)". Those who did not permit either one of them to undertake purification with the leftover of the other nor allowed them to commence at the same time did so, perhaps, because the only tradition reaching them was that of al-Ḥakam al-Ghifārī. They, therefore, drew an analogy for a man from the case of the woman. I have no knowledge of the argument of those who prohibited only the left over of a woman who is sexually defiled or is menstruating, except that it is related from someone in the early generation, I believe from Ibn ʿUmar.

1.1.3.6. Issue 6: Ablution with the *nabīdh* (a beverage) of dates

Abū Ḥanīfa, in an opinion opposed by his disciples and all the jurists of the regions, permitted ablution with the *nabīdh* of dates during a journey on the basis of the tradition of Ibn ʿAbbās, which says: "Ibn Masʿūd went out with the Messenger of Allāh on the night of the *jinn* and the Messenger of Allāh asked him, 'Do you have any water?' He said, 'I have *nabīdh* in my container'. The Messenger of Allāh (God's peace and blessings be upon him) said, 'Pour out some'. He (the Prophet) performed ablution with it saying, 'It is a beverage and a purifying element'". He also quoted the tradition of Abū Rāfiʿ, the client of Ibn ʿUmar, derived from Ibn Maʿūd—which is almost the same—as follows: The Messenger of Allāh (God's peace and blessings be upon him) said, "It is good fruit and purifying water". They also claimed that this opinion is attributed to Companions like ʿAlī and Ibn ʿAbbās, and as there was no other Companion opposing them it amounted to a consensus. The traditionists, however, rejected this tradition because of the weak line of narrators (in its *isnād*). Furthermore, more reliable channels have related that Ibn Masʿūd was not with the Messenger of Allāh (God's peace and blessings be upon him) on the night of the *jinn*. The majority rejected this tradition on the basis of the words of the Exalted, "And ye find not water, then go to high clean soil and rub your faces and your hands (therewith)".[50] They said that He did not permit the use of anything beside water and clean soil. They also argued on the basis of the words of the Prophet (God's peace and blessings be upon him), "Clean soil constitutes the ablution of a Muslim, even if water is not to be found for ten seasons, and as soon as he finds water let him touch his face with it". They (the Ḥanafites) could have said that the term water is used in the absolute sense in the tradition (thus, including *nabīdh*), and it is an addition that does not constitute abrogation so that the Book should conflict with it, but then it is against their principle that an addition constitutes abrogation.

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[50] Qurʾān 4 : 43.

1.1.4. Chapter 4 Factors Nullifying Ablution

The basis for this chapter are the words of the Exalted, "Or one of you cometh from the closet, or ye have touched women",[51] and the words of the Prophet (God's peace and blessings be upon him) that "Allāh does not accept prayers from one who is unclean, till he has performed ablution". In this chapter they agreed about the nullification of ablution due to urination, visit to the privy, passing wind, *madhy* (prostatic secretion prior to cohabitation), and *wady* (fluid preceding or following urination), on the basis of the authenticity of the traditions laid down in this, when such excreta and discharges occur in a state of health.

There are seven issues in this chapter, about which they disagreed, that are like the principles of this subject.

1.1.4.1. Issue 1: Unclean excretions from the body

The jurists of the regions disagreed about the invalidation of ablution resulting from unclean excretions from the body into three opinions. One group took into account excretions alone, whatever the outlet or the state in which it is excreted. This was the opinion of Abū Ḥanīfa, his disciples, al-Thawrī, Aḥmad, and a group among whom are Companions. They said that each unclean substance flowing from the body or excreted from it necessitates ablution, like blood, excessive nose-bleeding, drawing of blood, cupping, and vomiting, except for sputum in Abū Ḥanīfa's view. Abū Yūsuf, one of the disciples of Abū Ḥanīfa, said that ablution is necessary if it is a mouthful. None of them considered minor bleeding as significant, except for Mujāhid. Some other jurists took into account the passages through which the excretion occurs as factors affecting the nullification of ablution and limited these to the anus and the penis, saying that anything excreted from these two passages invalidates ablution, whatever its nature whether blood, or stone, or mucus, and whatever the condition of the body, whether in health or sickness. Those who held this opinion include al-Shāfiʿī, his disciples, and Muḥammad ibn ʿAbd al-Ḥakam from among the disciples of Mālik. Others took into account the passages and the type of excretions and also the manner of excretion. They said that normal excretions from these passages, like urine, faeces, *madhy*, *wady*, and wind, if passed in a state of health invalidate ablution. They did not take into account blood, bile, worms, nor the incontinence of urine. Those who upheld this opinion were Mālik and most of his disciples.

The reason for disagreement is that the unanimous conclusions of Muslim jurists over the invalidation of ablution due to whatever is excreted from the two passages, like faeces, urine, wind, and *madhy*, on the basis of the apparent meaning of the Book and also of the traditions, led to three possible interpretations. First, that the *ḥukm* be related only to the substance of these things, which are agreed upon, as in Mālik's opinion, may Allāh have mercy on him. The second likelihood is that the *ḥukm* be associated with these things insofar as they are pollutants excreted from the body, because ablution is purification and purification is (adversely) affected by pollution. The third possibility is that the *ḥukm* be related to them insofar as they are excrements from these two passages. According to the last two views the requirement of ablution, because of these forms of uncleanliness that are agreed upon, belongs to the category of a particular injunction intended to be general. Mālik and his disciples held that it is a particular category that is applied to its particular category. Al-Shāfiʿī and Abū Ḥanīfa agreed that the command belongs to the particular category intended to be general. Yet, they differed as to what is the generality intended here. Mālik preferred his opinion requiring that the principle is to maintain the particular within its sphere till an evidence indicates otherwise. Al-Shāfiʿī argued that what is intended is the passage and not what is excreted, because of their agreement over the obligation of ablution due to the passing of wind from (the passage) below, and that ablution is not an obligation when it is exhaled from above, although both are of the same category. The only difference between them is that of outlet. This indicates, it appears, that the *ḥukm* depends on the outlet, but this is weak, as the two kinds of winds are different with respect to characteristics and odour.

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[51] Qurʾān 4 : 43.

Abū Ḥanīfa argued that the factor of annulment is the unclean excrement (coming out through any outlet), because of the adverse effect of uncleanliness on ritual purity, and though this kind of purification is legal it resembles the actual physical purification, that is, freedom from filth. Further, (he argued) on the basis of the tradition of Thawbān "that the Messenger of Allāh (God's peace and blessings be upon him) vomited and then performed ablution"; and also on the basis of what is related from ʿUmar and Ibn ʿUmar (God be pleased with them) about the obligation of ablution due to a nosebleed. (Moreover, Abū Ḥanīfa argued) on the basis of what is related about the command of the Prophet (God's peace and blessings be upon him) for the continuously menstruating woman to perform ablution at the time of each prayer. The meaning of all these, according to Abū Ḥanīfa, is (that any) unclean excretion (from any passage annuls ablution). Al-Shāfiʿī and Abū Ḥanīfa agreed that factors nullifying ablution are effective even if they occur during sickness, because of the command of the Prophet (God's peace and blessings be upon him) requiring ablution before each prayer in the case of the continuously menstruating woman, which is an illness. As for Mālik, he was of the view that illness is effective in obtaining a concession on the analogy of the continuously menstruating woman, who was simply ordered to wash herself. The reason is that this tradition of Fāṭima bint Ḥubaysh is agreed upon for its authenticity, and there is a dispute only about the addition, that is, the order to perform ablution before each prayer. It has, however, been declared *ṣaḥīḥ* by Abū ʿUmar ibn ʿAbd al-Barr, on the analogy of one who bleeds incessantly as in the case of ʿUmar (God be pleased with him), who continued to perform his prayer while blood was flowing out of his wound.

1.1.4.2. Issue 2: Sleep

The jurists disagreed about sleep, expressing three opinions. One group of jurists held the view that it is a factor of annulment, and made ablution obligatory after it whether it was for a short or for a long duration. Another group held that it is not so, and they did not make ablution obligatory after it, unless the person was convinced, in accordance with the opinion of those who do not acknowledge doubt, that he had acquired *ḥadath*,[52] or when he was in a doubt that he had, in accordance with the opinion of those who consider doubt (as an effective factor). Some in the early generation used to depute a person to keep track of their state during sleep, that is, whether they had acquired *ḥadath*. Another group made a distinction between a light short sleep and a long deep sleep. They made ablution obligatory after a deep sleep, but not after light sleep. This is upheld by the *fuqahāʾ* of the regions, and by the majority.

As some (bodily) positions facilitate deep sleep as well as discharge of annulling elements more than other positions, the jurists differed about them. Mālik said that the person who sleeps reclining on his side or prostrate must perform ablution, whether the sleep was long or short, but one who sleeps in a sitting posture is under no obligation for ablution, unless such sleep becomes very long. His opinion about one (who sleeps while) bowing differed. He said once that his *ḥukm* is the same as that of the person standing, while he said another time that his *ḥukm* is that of the person prostrating. Al-Shāfiʿī said that whenever a person sleeps, whatever his posture, he is obliged to perform ablution, except for the person dozing off while sitting. Abū Ḥanīfa and his disciples said that there is no ablution for a person who sleeps, except for one sleeping on his side.

The basis for disagreement among them on this issue is the conflict of the relevant traditions. There are traditions whose apparent meaning implies that there is no ablution at all for a person who goes to sleep, like the tradition of Ibn ʿAbbās, "that the Messenger of Allāh (God's peace and blessings be upon him) visited Maymūna and went to sleep at her place till they could hear him breathing. He then arose and prayed without performing ablution". There is the saying of the Prophet (God's peace and blessings be upon him) which is as follows: "If one of you dozes off during prayer, he should lie down till he is no longer sleepy (and then resume prayer). For it is possible that he intends to seek forgiveness of his Lord, but may err and slander himself". It is also related that the Companions of the Prophet (God's peace and blessings be upon him) used to doze off in the mosque till their heads would sink low. They prayed after this without performing ablution. All these are established traditions. There are also others whose obvious meaning indicates that sleep is a form of *ḥadath*. The clearest of these is the tradition of Ṣafwān ibn ʿAssāl in which he said, "We were on a journey with the Prophet (God's peace and blessings be upon him) when he ordered us not to take off our boots because of a visit to the privy, urination, or sleep, and that we should take them off only in case of sexual defilement". He thus held urination, visit to the privy, and sleep to be similar. It has been declared *ṣaḥīḥ* by al-Tirmidhī. Among these is also the preceding tradition of Abū Hurayra, which is the saying of the Prophet (God's peace and blessings be upon him), "When one of you wakes up from sleep, he should wash his hand before putting it into the water (utensil)". Its apparent meaning is that sleep necessitates ablution, whether it is short or long. Similarly, the apparent meaning of the verse of *wuḍūʾ*, according to those who derive such a meaning from the words of the Exalted, "O ye who believe! When ye rise up for prayer, wash your faces, and your hands up to the elbows, and lightly rub your heads and (wash) your feet up to the ankles",[53] that is, when you arise from sleep, in accordance with what is related from Zayd ibn Aslam and other early authorities.

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[52] The term *ḥadath* does not always involve pollution or filth or uncleanliness. For example, in the opinion of some jurists touching a woman or a human genital may be *ḥadath* in the sense of annulling ablution, though these acts do not constitute uncleanliness.

As the apparent meanings of all these traditions were in conflict, the jurists decided the issue on the basis of one of two methods: the method of preference or the method of reconciliation. Those who applied the method of preference, either dropped the obligation of ablution after sleep completely on the basis of the apparent meaning of the traditions that drop it, or imposed it always after sleep, whether short or prolonged, on the basis of traditions that impose it, that is, in accordance with the prescribing tradition that was preferred by them or in accordance with the tradition that dropped it. Those who adopted the method of reconciliation interpreted the traditions prescribing ablution to apply to extended sleep, and interpreted the traditions waiving ablution to apply to a short sleep. This, as we have said, is the opinion of the majority, and reconciliation is better than preference, as far as it is possible, according to most experts on *uṣūl al-fiqh*.

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[53] Qurʾān 5 : 6.

Al-Shāfiʿī interpreted the traditions so as to exempt, from among the positions of the person sleeping, the sitting posture alone, as this was established to be an authentic report about the Companions, that is, they used to sleep while sitting and then prayed without performing ablution. Abū Ḥanīfa made it obligatory only after sleep while reclining on the side, as this has been stated in a *marfūʿ* tradition, and in a saying of the Prophet (God's peace and blessings be upon him): "Ablution is obligatory on one who sleeps reclining on one side". The narration has been established from ʿUmar. Mālik said: Since sleeping can be a cause of annulment of ablution only on account of the fact that it makes easy the release of the cause of *ḥadath*. In forming his views, Mālik took into account three things: soundness, duration, and posture. He did not stipulate either duration or soundness for a posture that usually facilitates the occurrence of *ḥadath*, but he did do so for postures that normally do not do so (like standing or sitting).

1.1.4.3. Issue 3: Touching women

The jurists disagreed about the obligation of ablution for a person who touches a woman with his hand or with other sensuous limbs. One group held that one who touches a woman reaching out for her when there is no barrier or covering between the touching skins, is obliged to perform ablution. Similarly, one who kisses her, as a kiss, according to them, is a kind of touching, whether or not he derives pleasure from it. This opinion was upheld by al-Shāfiʿī and his disciples, except that he once made a distinction between the person touching and the person being touched, making ablution obligatory for the person touching to the exclusion of the person touched; another time he held that it was obligatory on both. A third time he made a distinction between women in the prohibited degree and a wife, making ablution obligatory in the case of (touching) the wife, but not in the case of women in the prohibited degree, while another time he held them to be similar. Others made ablution obligatory only when lustful pleasure is felt or it was intended. Upholders of this view go into details making a distinction in the case of the existence of a covering or otherwise, and in the case of particular limbs whose touching is harmful. In the case of kissing, they did not stipulate pleasure. This is the opinion of Mālik and the majority of his disciples. Some negated the obligation of ablution for the person touching women, which is the opinion of Abū Ḥanīfa. Each of these schools has predecessors from among Companions (holding these views), except the stipulation of pleasure, for I do not remember that any Companion stipulated this.

The reason for disagreement is the equivocality of the term "touching" in the usage of the Arabs. The Arabs apply it sometimes for touching that is by hand, and sometimes use it as an allusion to intercourse. A group of jurists, therefore, held that touching causing ablution according to the words of the Exalted, "or ye have touched women . . .",[54] means intercourse (which leads to major ablution, that is, bathing). Others maintained that the meaning here is that of touching by hand, and among them are those who considered it to be a general term intended for the particular, and, therefore, stipulated pleasure in it. There were those among them who deemed it a general term intended for the general, because of which they did not stipulate pleasure (for annulment). Those who stipulated pleasure were drawn to this by what restricts the generality of the verse, namely, the tradition that says that the Prophet (God's peace and blessings be upon him) used to touch ʿĀʾisha while prostrating, and perhaps she did too. The traditionists recorded the tradition of Ḥabīb ibn Abī Thābit from ʿUrwah from ʿĀʾisha: "He the Prophet (God's peace and blessings be upon him) used to kiss some of his wives and then go out to pray, but did not perform ablution. I said, 'Who could that be, but you, and she smiled'". Abū ʿUmar said that this tradition was deemed feeble by the scholars of Ḥijāz, but was considered *ṣaḥīḥ* by those of Kūfa. Yet, he held it to be authentic, saying that this tradition was also related through Maʿbad ibn Nubāta. Al-Shāfiʿī said that if the tradition of Maʿbad ibn Nubāta about kissing is established, I do not maintain the obligation of ablution for it, or for touching.

Those who made ablution obligatory upon touching by hand, argued that the term "touching" is used in its primary application to touching by hand and is applied metaphorically to intercourse, and if the word vacillates between the primary and metaphorical uses, it is better to confine it to the primary meaning, unless an evidence indicates the metaphorical meaning. The others could have said that when the use of a metaphorical term becomes frequent it is more expressive in its metaphorical sense than in its actual meaning, like the term *ghāʾiṭ*, which is more expressive in denoting a visit to the privy than it is in denoting depressed ground, which is its actual meaning. What I believe is that the word "touching", though it is equally expressive of both meanings, or almost equal, is more vivid, in my view, for denoting intercourse though it is a metaphor, as Allāh, the Glorious and Exalted, has used the terms *mubāshara*, "contact", and *mass*, "touching", for copulation and they denote the meaning of touching. It is on the basis of this interpretation of the verse that the argument is made for the permissibility of *tayammum* in the case of one with a major impurity, without requiring the assumption of advancing or delaying in the order of the words in the relevant texts, as will be coming up in what follows, and the conflict between the verse and the traditions is also removed on the basis of the other interpretation.

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[54] Qurʾān 5 : 6.

The opinion of those who understood from the verse both meanings of touching (by hand or by way of intercourse) is weak, as the Arabs, when they use an equivocal term, intend thereby one of the meanings that can be indicated by the term and not all the meanings that may be indicated. This itself is obvious in their language.

1.1.4.4. Issue 4: Touching the penis

The jurists differed about it expressing three opinions. There are those who made ablution obligatory because of it, whatever the nature of the touch. This is the opinion of al-Shāfiʿī, his disciples, Aḥmad, and Dāwūd. Some of them did not make ablution obligatory at all in this case. These are Abū Ḥanīfa and his disciples. Both parties have predecessors among the Companions and the Tābiʿūn. A group of jurists made a distinction between touching it in a certain state and touching it in a different state. These jurists are further divided into sub-groups. Some made a distinction based on whether the person derives pleasure from it. Others made a distinction on the basis of whether he touches it with the inner part of the hand (palm) or with the outer part. They made ablution obligatory in the case of pleasure, but not in its absence; similarly, they (the other group) made it obligatory in the case of touching with the palm, but not in the case of touching with the outer part. These two considerations are related from the disciples of Mālik. It was as if the consideration of the inner part of the hand refers to the derivation of pleasure. Some jurists made a distinction on the basis of intention and forgetfulness, making ablution obligatory in the case of intention, but not in case of forgetfulness. This is related from Mālik, and is the opinion of Dāwūd and his disciples. Still others held that ablution following touching is recommended and not obligatory. Abū ʿUmar said that this is the settled view related from Mālik by his disciples from among the residents of *al-Maghrib*, but the narration varies.

The reason for disagreement is that there are two conflicting traditions in this. First is the tradition related from Busrah (daughter of Ṣafwān) that she heard the Messenger of Allāh (God's peace and blessings be upon him) saying, "When one of you touches his penis he should perform ablution". This is the best known tradition laid down about the obligation of ablution from touching the penis, is recorded by Mālik in his *al-Muwaṭṭā*ʾ, and has been authenticated by Yaḥyā ibn Maʿīn and Aḥmad ibn Ḥanbal, but has been declared weak by the jurists of Kūfa. It is also related in the same meaning from Umm Ḥabība, and Aḥmad ibn Ḥanbal declared it to be authentic. A version similar in part is related through Abū Hurayra. Ibn al-Sakan held it to be authentic, though it has not been recorded by al-Bukhārī or Muslim. The second tradition, which opposes this, is related from Ṭalq ibn ʿAlī, who said, "We came up to the Messenger of Allāh (God's peace and blessings be upon him) and there was a man with him, who appeared to be a bedouin. He said, 'O Messenger of Allāh! What do you say about a man who touches his penis after performing ablution?' He said, 'Is it not but a part of you?'" This has also been recorded by Abū Dāwūd and al-Tirmidhī, and has been declared authentic by many scholars among the Kūfīs and others.

The jurists chose to interpret these traditions in one of two ways: acceptance of one and rejection of the other by the method of preference or abrogation, or the method of reconciliation. Those who preferred the tradition of Busra or considered it to have abrogated the tradition of Ṭalq ibn ʿAlī upheld the obligation of ablution after touching of the penis, while those who preferred the tradition of Ṭalq ibn ʿAlī dropped the obligation of ablution resulting from the touch. Those who desired to reconcile the two traditions made ablution obligatory in one case, but not in the other, or they interpreted the tradition of Busra to indicate recommendation and the tradition of Ṭalq ibn ʿAlī to indicate the negation of obligation. The arguments adduced by each party for preferring the tradition of its choice are (too) many and their discussion is lengthy. They are available in their books, but the points of disagreement are those that we have indicated.

1.1.4.5. Issue 5: Eatables prepared on fire

The jurists in the first period disagreed about the obligation of ablution after eating what was cooked on fire, because of the conflict of the traditions related about it from the Messenger of Allāh (God's peace and blessings be upon him). The majority of the jurists of the regions after the first period agreed about dropping the obligation, for it was established for them that such was the practice of the four Caliphs, and also because of the tradition related from Jābir, who said, "One of the last commands of the Messenger of Allāh (God's peace and blessings be upon him) was to relinquish ablution after consuming what was cooked on fire". It is recorded by Abū Dāwūd. But a group of scholars from the traditionists, Aḥmad, Isḥāq, and a group besides them held that ablution is obligatory only after eating camel meat, because of an established tradition on this point from the Prophet (God's peace and blessings be upon him).

1.1.4.6. Issue 6: Laughter during prayer

Abū Ḥanīfa expressed a deviant opinion as he made ablution obligatory for one who laughs during prayer, because of a *mursal* tradition[55] of Abū al-ʿĀliyah, which states that a group of people laughed during prayer and the Prophet (God's peace and blessings be upon him) ordered them to repeat ablution and prayer. The majority rejected this tradition for its being a *mursal* and opposed to the principles, as it makes something a cause of invalidating ablution during prayer, but not when one is not praying. It is, however, a *mursal* that is sound.

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[55] A *mursal* tradition is one in the *isnād* of which the Companion supposed to be its first narrator is not mentioned.

1.1.4.7. *Issue 7: Ablution after carrying the dead*

One group of jurists deviated by making ablution obligatory because of carrying the dead. There is a tradition for it that is weak, "One who bathes the dead let him take a bath, and one who carries them let him perform ablution".

It is necessary to know that the majority of the jurists made ablution obligatory due to the loss of senses, whatever its cause, like fainting, insanity, or intoxication. All of them held it to be analogous to sleep, that is, they maintained that if sleep makes ablution obligatory in a state that normally leads to *ḥadath*, namely, sound sleep, it is appropriate that the loss of reason should cause this too.

These are the issues of this chapter that are agreed upon or are widely known to be disputed. We must now move to the fifth chapter.

1.1.5. Chapter 5 Identification of Acts for which this form of Purification is Stipulated

The basis of this chapter are the words of the Exalted, "O ye who believe! When ye rise up for prayer, wash your faces, and your hands up to the elbows, and lightly rub your heads and (wash) your feet up to the ankles",[56] and the words of the Prophet (God's peace and blessings be upon him), "Allāh does not accept prayer without purification nor charity from misappropriated proceeds".

The jurists, therefore, agreed that purification is one of the conditions of prayer, because of these evidences, though they differed on whether it is a condition of validity or a condition of obligation. They did not disagree that it is a condition for all forms of prayer, except the funeral prayer and prostration, that is, the prostration of recitation, for there is some deviant disagreement about that. The reason for this are the different possibilities in the meaning of the term "*ṣalāh*" (prayer). They differed as to whether the term applies to the funeral prayer and prostration on reciting certain Qurʾānic verses. Those who maintained that the term "*ṣalāh*" applies to the funeral prayer and to prostration (of recitation) itself, and these are the majority, stipulated this form of purification for it, while those who held that the term does not apply to them, as the funeral does not involve bowing or prostrations, and there is no standing or bowing in prostrations (of recitation) either, they did not stipulate this form of purification for it. There are four issues related to this chapter under this main issue.

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[56] Qurʾān 5 : 6.

1.1.5.1. Issue 1: Is this purification a condition for touching the muṣḥaf?

Mālik, Abū Ḥanīfa, and al-Shāfiʿī held that it is a condition for touching the *muṣḥaf* (copy of the Qurʾān), while the Ẓāhirites held that it is not. The reason for disagreement is whether the meaning of the words of the Exalted, "Which none toucheth save the purified",[57] refers to humans or angels, or whether this statement implies a prohibition or is just a report. Those who deemed the word "purified" to mean humans, and interpreted the statement as a prohibition, said that it is not permitted for anyone, but the purified to touch the *muṣḥaf*. Those who interpreted it as a report and interpreted the word "purified" as an allusion to angels said that there is no indication in the verse about the stipulation of purification as a condition for touching the *muṣḥaf*. And as there is no evidence in the Book or in the *sunna*, the matter is to be left to the original rule of non-liability, which is permissibility.

The majority argued for their opinion on the basis of the tradition of ʿAmr ibn Ḥazm "that the Prophet (God's peace and blessings be upon him) wrote: 'None but the purified touch the Qurʾān.'". The traditions of ʿAmr ibn Ḥazm are disputed among the scholars with respect to the obligation of acting upon them, as a writing error (*taṣḥīf*) occurred in them, though I have seen Ibn al-Mufawwaz declaring them as *sahīh* when reported by reliable narrators, for they are letters of the Prophet (God's peace and blessings be upon him). The same is said about the traditions of ʿAmr ibn Shuʿayb from his father from his grandfather, though the Ẓāhirites reject them. Mālik made an exemption in the case of minors touching the *muṣḥaf* when they are not purified, as they have not reached the age of liability.

1.1.5.2. Issue 2: Obligation of (minor) ablution for one involved in a major impurity

The jurists disagreed about the obligation of (performing the minor) ablution for a person who was sexually defiled, in certain cases. The first is when, having committed a major *ḥadath*, he wishes to continue sleeping. The majority upheld the recommendation of ablution, but not its obligation. The

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[57] Qurʾān 56 : 79.

Ẓāhirites maintain that it is obligatory, because it is established from the Prophet (God's peace and blessings be upon him) through the tradition of ʿUmar that he asked the Messenger of Allāh (God's peace and blessings be upon him) what he had to do when he is involved in a major *ḥadath* (like intercourse or seminal discharge) during the night. The Messenger of Allāh (God's peace and blessings be upon him) said to him, "Perform ablution and wash your penis, and then go to sleep". This is also related from him through ʿĀʾisha. The majority chose to construe the command as a recommendation and to relegate the literal meaning due to its incompatibility with the obligation of purification when the intention is to go to sleep, that is, legal compatibility.

They (the majority) also argued for this on the basis of other traditions, the most authentic of which is the tradition of Ibn ʿAbbās that the Messenger of Allāh (God's peace and blessings be upon him) once returned from the privy and was brought food. It was said to him, "Should we not bring you (water for) purification?" He replied, "Am I going to pray that I should perform ablution?" In some versions, it was said to him, "Would you perform ablution?" He replied, "I have not resolved to pray as yet, so that I may perform ablution". Seeking support from this is weak, for it is one of the weakest kinds of implication of the text. They also argued on the basis of the tradition of ʿĀʾisha "that the Messenger of Allāh (God's peace and blessings be upon him) used to go to sleep after being involved in a major *ḥadath* without touching water". This, however, is a weak tradition.

Likewise, they disagreed about the obligation of ablution for the person with a major *ḥadath* when he wishes to eat or drink, or one who wishes to re-copulate. The majority decided to drop the obligation due to the lack of (legal) compatibility of purification with all these things, as purification has been prescribed in the law for solemn occasions (ritual) like prayers. In addition to this, there is a conflict of traditions on this issue. It is related from the Prophet (God's peace and blessings be upon him) "that he ordered that a person with *janāba*, wishing to repeat intercourse, should perform ablution". It is also related that he used to cohabit and then repeat it without performing ablution. Similarly, the prohibition of eating and drinking for a person with *janāba* is related from him, unless the person performed ablution. Its permissibility is also related from him.

1.1.5.3. Issue 3: Ablution for circumambulation (*ṭawāf*)

Mālik and al-Shāfiʿī stipulated ablution for circumambulation, while Abū Ḥanīfa held it to be unnecessary. The reason for disagreement is the vacillation of the *ḥukm* of circumambulation whether it should be associated with the *ḥukm* of prayers. On the one hand, there is the established report "that the Messenger of Allāh (God's peace and blessings be upon him) prohibited circumambulation to the menstruating woman, just as he prohibited her to pray". From this aspect *ṭawāf* resembles prayer. In some traditions circumambulation has been called prayer.

Abū Ḥanīfa's argument is that purification is not a condition for everything that is prohibited during menstruation, when it is to be performed after the cessation of menstruation. For example, fasting in the opinion of the majority (does not need ablution).

1.1.5.4. Issue 4: Reciting the *Qurʾān* and remembering *Allāh* without ablution

The majority maintained that it is permitted for a person who has not performed ablution to recite the Qurʾān and engage in the remembrance of Allāh. A group of jurist said that this is not permitted, unless he performs ablution.

The reason for disagreement are two established conflicting traditions. The first is the tradition of Abū Jahm, who said, "The Messenger of Allāh (God's peace and blessings be upon him) was coming from the side of *Biʾr Jamal* when he met a man who greeted him (with a *salām*). The Prophet did not return the greeting till he reached the side of the wall, where he rubbed his face and hands, and then returned the greeting". The second tradition is that of ʿAlī, "that nothing prevented the Messenger of Allāh (God's peace and blessings be upon him) from the recitation of the Qurʾān, except *janāba*".

The majority maintained that the second tradition had abrogated the first, while those who made ablution obligatory for the remembrance of Allāh preferred the first tradition.

1.2. THE BOOK OF BATHING (*GHUSL*) (THE MAJOR ABLUTION)

The basis for this kind of purification are the words of the Exalted, "And if ye are involved in a major *ḥadath*, purify yourself".[58] The discussion covering its rules—after having learned its obligation, on whom it is obligatory, and the identification of the thing to be used, which is unadulterated water—is undertaken in three chapters. The first chapter relates to the identification of the acts involved in this purification. The second relates to the factors invalidating it. The third chapter covers the *aḥkām* of the invalidation of this purification.

About the person on whom it is obligatory, it is incumbent upon each person who is under an obligation to pray, and there is no dispute about this.

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[58] Qurʾān 5 : 6. Pickthall's translation changed.

Similarly, there is no dispute about its obligation, and its evidences are the same as those for ablution, which we have mentioned. Likewise, the *aḥkām* relating to the categories of water, whose discussion has preceded.

1.2.1. Chapter 1 Identification of the Acts of this Category of Purification

There are four issues related to this chapter.

1.2.1.1. Issue 1: Running the hand over the entire body

The jurists disagreed over whether running the hand over the entire body (i.e. massaging the skin while water is running over it) is a condition for this purification, as is the case in the purification of limbs while performing ablution, or whether it is sufficient to let water flow over the entire body without running the hand over the body. The majority of the jurists maintained that letting water flow over the body is enough. Mālik, most of his disciples, and al-Muzanī from among the disciples of al-Shāfiʿī held that if the person undertaking purification misses a single spot of his body over which he does not pass his hand, his purification remains incomplete.

The reason for disagreement is the equivocality of the term "*ghusl*", and the conflict of the apparent meanings of the traditions related about the description of bathing with the analogy of bathing based upon ablution. In the established traditions relevant to the subject of the Prophet's bath, and which are related through ʿĀʾisha and Maymūna, there is no mention of massaging the body; they only mention the flowing of water over it. In the tradition of ʿĀʾisha, she says, "When the Messenger of Allāh (God's peace and blessings be upon him) took a bath after sexual engagement, he would first wash his hands. He then poured water from his right hand over to the left hand with which he washed his genitals. Then he performed a minor ablution, like he did for his regular daily prayers. Thereafter, taking up water he would insert his fingers down to the roots of his hair and pour three handfuls of water over his head. Finally, he would let water flow over his entire body".

The description given in the tradition of Maymūna is similar to this, except that here he delayed washing his feet up to the end of the purification. In the tradition of Umm Salama too, when she asked the Prophet (God's peace and blessings be upon him) "whether she should undo her plaits while bathing after sexual engagement. The Prophet (God's peace and blessings be upon him) said, 'It is enough if you splash over your head three handfuls of water, then let water flow over yourself, and with that you are purified'". This is the most persuasive tradition about dropping the requirement of massaging as compared to the other traditions, for it is not possible that a person describing her own purification would omit mentioning massage if it were included in his description for her of all the conditions of this ablution. Because of this, the jurists agreed that the descriptions provided in the traditions of ʿĀʾisha and Maymūna are complete descriptions, but what is laid down in the tradition of Umm Salama covers the obligatory essential elements (*arkān*), and minor ablution performed before the major ablution (bathing) is not a condition for it, except for an odd opinion attributed to al-Shāfiʿī, although his opinion exhibits some strength derived from the apparent meaning of the traditions The opinion of the majority exhibits analytical strength, for it is obvious that purification is a condition for the validity of ablution, and it is not ablution that is a condition for the validity of purification. This is a case of conflict between analogy and the apparent meaning of a tradition, and al-Shāfiʿī's method is to give predominance to the apparent meaning of a tradition over analogy.

A group of jurists adopted, as we have noted, the apparent meaning of the traditions and gave it predominance over analogy constructed upon ablution; therefore they did not make massaging obligatory. Others gave predominance to the analogy of this purification, built upon ablution, over the apparent meaning and made massaging of the body obligatory, as is the case in ablution. Those who preferred analogy made massaging obligatory, while those who preferred the apparent meaning over analogy did not consider massaging to be an obligation. I mean by analogy, the analogy of (this) purification based upon ablution.

There is weakness in the argument based on the application of the term "*ghusl*" to bathing, whether it is with massaging or without it, as the terms "purification" and "bathing" are applied, in the usage of the Arabs, equally to both meanings.

1.2.1.2. Issue 2: Intention as a prerequisite

They disagreed on whether intention is included in the conditions of this purification (*ghusl*), just like their disagreement in the case of the minor ablution. Mālik, al-Shāfiʿī, Aḥmad, Abū Thawr, Dāwūd, and his disciples held that intention is one of its conditions. Abū Ḥanīfa, his disciples, and al-Thawrī held that intention is not required, as in the case of minor ablution.

The reason for disagreement on the question of intention is the same as that in the case of the minor ablution, which has preceded.

1.2.1.3. Issue 3: Rinsing of the mouth and snuffing up water into the nostrils

They disagreed about *maḍmaḍa* and *istinshāq* in this category of purification too, like their disagreement in the case of the minor ablution, that is whether they are obligatory. A group of jurists held that these are not obligatory in bathing, while another group considered them obligatory. Those who maintained a negation of obligation include Mālik and al-Shāfiʿī, while those who made it obligatory include Abū Ḥanīfa and his disciples.

The reason for disagreement is the conflict of the apparent meaning of the tradition of Umm Salama with the traditions that were transmitted about the description of the Prophet's performance of minor ablution prior to his purification (bathing), because the traditions transmitted about the description of his minor ablution prior to his purification mention *maḍmaḍa* and *istinshāq*, while the tradition of Umm Salama mentions neither *maḍmaḍa* nor *istinshāq*. Those who considered the traditions of ʿĀʾisha and Maymūna as elaborations of the unexplained parts of the tradition of Umm Salama, and also as an explanation of the words of the Exalted, "And if ye are involved in a major *ḥadath*, purify yourselves",[59] made rinsing of the mouth and snuffing of water into the nostrils obligatory, while those who considered them as conflicting reconciled them so as to construe the implication of the traditions of ʿĀʾisha and Maymūna for a recommendation, and the implication of the tradition of Umm Salama as an obligation.

Because of this, they disagreed about the *ḥukm* of letting the hair loose, so as to let water reach its roots on the head (*takhlīl*), whether it is obligatory for this category of purification. Mālik deems it recommended, while others view it as obligatory. Those who made *takhlīl* obligatory supported their opinion with the report from the Prophet, "Under each hair is *janāba* (major *ḥadath*), so beautify the skin and let the hair get wet".

1.2.1.4. Issue 4: Continuous and sequential performance

They disagreed on whether a condition for this category of purification is continuous and sequential performance, as was their disagreement in the case of the minor ablution. The reason for disagreement is whether the acts of the Prophet are to be construed as obligatory or recommended. It has not been transmitted from the Prophet (God's peace and blessings be upon him) that he ever performed ablution, except in an ordered and sequential manner. A group of jurists held that sequence in this category of purification (*ghusl*) is more pertinent than it is in the minor ablution with respect to the head and the rest of the body, because of the words of the Prophet (God's peace and blessings be upon him) in the tradition of Umm Salama, "It is enough for you to splash over your head three handfuls of water, and then let water flow over your body". The conjunction particle "*thumma*" (then) implies sequence, without dispute, according to lexicologists.

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[59] Qurʾān 5 : 6.

1.2.2. Chapter 2 Identification of the Factors Causing the Nullification of this Purification

The basis of this chapter are the words of the Exalted, "And if ye are involved in *janāba*, purify yourself",[60] and His words, "They question thee (O Muhammad) concerning menstruation. Say: It is a suffering, so let women alone at such times and approach them not till they are cleansed. And when they have purified themselves, then go in unto them as Allāh has enjoined upon you".[61]

The jurists agreed about the obligation of this major ablution (full washing) arising from two kinds of *ḥadath* (ritual pollution). First, is the flowing of *maniyy* (this is known as the major *ḥadath*) in sound health during sleep, or while awake, both in the case of a male and of a female, except for what is related from al-Nakhaʿī, who did not require bathing for a woman after a wet dream. The majority agreed about the similarity of women to men with respect to wet dreams because of the established tradition of Umm Salama. She said, "O Messenger of Allāh! If a woman sees in her sleep what a man sees, does she have to take a bath?" He replied, "Yes, if she finds moisture". The second tradition, whose authenticity they also agreed about, relates to menstruation, and requires that bathing be performed, when it ceases. This is also based on the words of the Exalted, "They question thee (O Muhammad) concerning menstruation. Say: It is a suffering, so let women alone at such times and approach them not till they are cleansed. And when they have purified themselves, then go in unto them as Allāh has enjoined upon you".[62] Furthermore, it is based upon reports of the Prophet's instructions to ʿĀʾisha and other women about bathing. They differed in this chapter about two issues that are like basic principles.

1.2.2.1. Issue 1: Obligation of purification after cohabitation

The Companions, may Allāh be pleased with them, disagreed about the obligation of purification following cohabitation. Some of them said that purification is obligatory after contact of the genitals, irrespective of the occurrence of ejaculation. This is upheld by the majority of the jurists of the provinces, Mālik, his disciples, al-Shāfiʿī, his disciples, and a group of the Ẓāhirites. Another group of the Ẓāhirites maintained the obligation of purification in case of coition only.

The reason for their disagreement over this issue stems from the conflict of relevant traditions, for there are two established traditions whose authenticity is agreed upon by the traditionists. The Qāḍī (Ibn Rushd) said: "When I say established, I mean by it a tradition recorded by al-Bukhārī or Muslim, or one that is recorded by by both". One of these is the tradition of Abū Hurayra from the Prophet (God's peace and blessings be upon him), who said, "If he places himself between the four parts (thighs) of a woman, joining his genitals with hers, bathing becomes obligatory". The second tradition is from ʿUthmān, when it was said to him, "What do you think of the man who cohabits with his wife, but does not ejaculate?" He replied, "He is to perform (the minor) ablution like he does for prayers—I heard this from the Prophet (God's peace and blessings be upon him)".

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[60] Qurʾān 5 : 6.

[61] Qurʾān 2: 222. Pickthall's translation changed.

[62] Qurʾān 2: 222. Pickthall's translation changed.

The jurists were divided into two opinions about these traditions. The first is based upon abrogation, while the second follows what is agreed upon in case of conflict when neither preference nor reconciliation is possible. The majority maintained that Abū Hurayra's tradition abrogates that of ʿUthmān. Their argument is based upon what is related from Ubayy ibn Kaʿb, who said, "The Messenger of Allāh (God's peace and blessings be upon him) granted a concession in the early days of Islam, but later ordered bathing". It is recorded by Abū Dāwūd. Those who held that the conflict between these two traditions cannot be resolved through reconciliation or by preference maintained that recourse to what is agreed upon becomes necessary, which is the obligation of purification upon ejaculation. The majority preferred Abū Hurayra's tradition on the basis of analogy, saying that as consensus has occurred on the point that the contact of the genitals invokes the *ḥadd* penalty, it must also be the cause giving rise to bathing. They related that the analogy has been derived from the practice of the four Caliphs. The majority preferred it also on the basis of ʿĀʾisha's tradition and her reports from the Messenger of Allāh (God's peace and blessings be upon him), as recorded by Muslim.

1.2.2.2. Issue 2: Seminal discharge invoking purification

The jurists differed about the condition of seminal discharge that gives rise to the obligation of the major purification. Mālik took it into account when accompanied by (lustful) pleasure, while al-Shāfiʿī said that mere emission leads to the obligation of purification, irrespective of accompanying sensual pleasure. There are two reasons for their disagreement. The first is whether the term "*junub*" (being in a state of major ritual pollution) is also applicable to one who is involved in this way, though not in the normal manner. Those who held that it applies only to one who has become ritually polluted in the normal manner, did not require purification upon seminal discharge unaccompanied by pleasure. Those who held that it applies to seminal discharge whatever the manner, made purification obligatory because of it, even when unaccompanied by pleasure.

The second reason is the similarity of emission without pleasure with the blood of the irregularly bleeding woman. They disagreed whether the flow of such blood should give rise to the obligation of purification. We shall mention this in the chapter on menstruation, though it pertains to this topic too.

In Mālik's school there is a case discussed under this topic, which relates to a person who derives pleasure on provocation, but he ejaculates later after the pleasure has subsided (coitus interruptus). If he has bathed before this pleasureless ejaculation, it is said that he has to renew purification, while it is also said that he need not repeat it. The reason is that this type of ejaculation is accompanied by pleasure for part of the copulation, but not thereafter. Those who gave predominance to the state of pleasure said that purification is obligatory, while those who considered the absence of pleasure significant said that purification is not obligatory.

1.2.3. Chapter 3 *Aḥkām* of *Jánāba* and Menstruation

1.2.3.1. *Section 1*: Janāba

The *aḥkām* about the form of major ritual pollution designated as *janāba* are covered in three issues.

1.2.3.1.1. Issue 1: Entry into the mosque in a state of *janāba*

The jurists disagreed about the entry of the *junub* into the mosque, expressing three opinions. One group of jurists prohibited this absolutely, which is the opinion of Mālik and his disciples. Another group, including al-Shāfiʿī, prohibited staying in the mosque and permitted one who is passing through it. The third group, including Dāwūd and his disciples, permitted this for all.

The reason for disagreement between al-Shāfiʿī and the Ẓāhirites is based on the vacillation of words of the Exalted, "O ye who believe! Draw not near unto prayer when ye are drunken, till ye know that which ye utter, nor when ye are [ritually] polluted, save when journeying upon the road, till ye have bathed",[63] between two interpretations. Is the use of words metaphorical, so that an implied word "place" is to be assumed inserted, that is, to read "Draw not near unto the place of prayer (the mosque)", and that the exemption for the traveller relates to the prohibition of staying in the place of prayer, or, whether no word is to be assumed implied and the verse is to be read as it is, where the traveller is in a state of *janāba* (sexual defilement), who lacks water (and can therefore perform *tayammum* and pray)? Those who held that a word is implied in the verse, permitted the *junub* to pass through the mosque, but those who did not take this to be the case did not have any evidence from the verse for prohibiting the *junub* from staying in the mosque. I do not know of any evidence for those who prohibited the *junub* to pass through the mosque, except the literal meaning of what is related from the Prophet (God's peace and blessings be upon him) that he said, "(Entry into) the mosque is not permitted to a *junub* nor to one menstruating." It is a tradition that is not established according to the traditionists. The disagreement of the jurists related to one menstruating, for purposes of this topic, is the same as that for the *junub*.

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[63] Qurʾān 4 : 43.

1.2.3.1.2. Issue 2: Touching the *muṣḥaf* in a state of ritual pollution

A group of jurists decided to permit this, but the majority prohibited it,[64] and they are those who prohibited touching it without ablution. The reason for their disagreement (over the case of the *junub*) is the same as that relating to the person who has not performed the minor ablution, that is, it is based on the words of the Exalted, "Which none toucheth save the purified".[65] We have already discussed the disagreement over the meaning of the verse. It is exactly the same disagreement as that relating to touching by the menstruating woman.

1.2.3.1.3. Issue 3: Recitation of the Qur'ān by the *junub*

The jurists differed about this, with the majority prohibiting it, and a group of jurists permitting it. The reason for their differences is the possibility of different interpretations of the tradition attributed to ʿAlī in which he states: "Nothing prevented the Prophet (God's peace and blessings be upon him) from the recitation of the Qur'ān, except *janāba*". One group of jurists said that the tradition does not give rise to a *ḥukm*, as it is only the impression of the narrator. Otherwise, how could one know that Qur'ān was not to be recited because of *janāba*, unless he informed him of this? The majority maintain that ʿAlī (God be pleased with him) would not say such a thing out of his own impression or conviction, and he said it after attaining sound knowledge.

A group of jurists considered the menstruating woman in the same position as the *junub*, while another group made a distinction between them, permitting the menstruating woman some recitation through *istiḥsān*, because of the length of the period of her menstruation. It is Mālik's opinion.

These, then, are the *aḥkām* of *janāba*.

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[64] That is, they prohibited not only the *junub*, but also a person with a minor *ḥadath* from touching the *muṣḥaf*.

[65] Qur'ān 56 : 79.

1.2.3.2. *Section 2: The types of blood flowing from the uterus and related* aḥkām

The discussion of the principles related to the types of blood flowing from the uterus is covered in three subsections. The first is about the types of blood flowing from the uterus. The second is about the identification of indications of change from purity to menstruation, the signs denoting the transfer from menstruation to the period of purity or into extended menstruation, and of extended menstruation (unhealthy bleeding) into the period of purity. The third relates to the identification of the *aḥkām* of menses and extended menstruation, that is, acts prohibited and acts obligatory during it.

In each of these subsections, we shall mention issues that are like rules and principles for all that is covered in this chapter, in accordance with our aim of discussing issues agreed upon as well as those disputed.

1.2.3.2.1. *Sub-section 1: The types of blood flowing from the uterus*

The jurists agreed that the types of blood flowing from the uterus are three: menstrual blood, which flows (monthly) in a state of health; bleeding outside the regular monthly cycle of menstruation, which flows in a state of illness and is not menstrual blood according to the saying of the Prophet (God's peace and blessings be upon him), "It is blood from the (ailment of the) veins and not menstruation"; and (thirdly) postnatal bleeding, which occurs after childbirth.

1.2.3.2.2. *Sub-section 2: Indications of change from one to the other*

The identification of the indications distinguishing some of these types of blood from the others, and of the changing of the period of purity into menstruation and vice versa is based mostly on the knowledge of the usual dates of menstruation and those of purity. We will mention those that are like principles, and these are seven issues.

1.2.3.2.2.1. Issue 1: Maximum and minimum number of days for menstruation

The jurists disagreed about the maximum and minimum number of days of menstruation and the minimum number of days of the period of purity. It is related from Mālik that the maximum number of days for menstruation is fifteen, which is also al-Shāfiʿī's opinion. Abū Ḥanīfa said that the maximum number of days is ten. There is no minimum limit for the period of menstruation according to Mālik, who said that it could be a single flow of blood, though he does not take this minor discharge into account in calculating the periods in divorce. Al-Shāfiʿī said that the minimum period of menstruation is one day and a night. Abū Ḥanīfa said that the minimum is three days.

Narrations from Mālik differed about the minimum period of purity. It is related from him that it is ten days, it is related that it is eight days, and it is related that it is fifteen days, which was the inclination of his Baghdādī disciples. This is also the opinion of al-Shāfiʿī and Abū Ḥanīfa. Some jurists said that this period is seventeen days, which is the maximum according to consensus, as far as I think. There is no limit set for the maximum period of purity in their view. These are the views of the jurists regarding this subject. Those who have a minimum limit for menstruation regarded discharge for less than this minimum to be of the category of *istiḥāda* (unhealthy bleeding). Those who do not have a minimum fixed for menstruation, held that even a single flow must amount to menstruation. For those who have a maximum limit for menstruation, bleeding in excess of this limit is *istiḥāda*.

The summary of Mālik's views regarding this topic of menstruation, however, is that women are of two types: a starter and the experienced. A woman who has just started menstruating is to give up prayers upon seeing the first drop of blood till a period of fifteen days (if bleeding continues for so long). If it does not cease, she is from then on a *mustaḥāda* and is to start praying (after bathing). This was also al-Shāfiʿī's opinion. However, where Mālik said that she is to begin praying (only after fifteen days of bleeding) when she realizes that (further bleeding is not menstruation and) she is a *mustaḍāda*, al-Shāfiʿī required her (in addition to her fresh obligations) to pray *qaḍāʾ* for fourteen days that she has missed, except (she is not to repeat prayers for) the minimum period (which) for him is one day and one night. Another opinion from Mālik is that she is to count the number of days of someone her own age and then add three days. If bleeding has not ceased by then, she is deemed a *mustaḥāda*.

Mālik has two opinions about the woman who has been menstruating regularly but begins to suffer irregularity in bleeding. The first is that her menstruation is her usual period plus three days up to a total of fifteen days, which is the maximum period of menstruation. The second is to wait till the maximum period of menstruation, or she may try to distinguish (between the types of blood) if she is able to do that. Al-Shāfiʿī said that she acts in accordance with her usual period of menstruation.

All these opinions given by *fuqahāʾ* about the minimum period of menstruation, its maximum, and the minimum period for purity have no revelatory basis. The basis is experience and what each believed to be the usual occurrence. Each one of them said what he thought the common experience of women to be. It is difficult, however, to fix by experience limits for such things, because of the differences among women. The differences that arose about such things are those that we have mentioned.

They agreed generally that if bleeding extends beyond the maximum period of menstruation it is to be considered as *istiḥāda*, due to the words of the

Messenger of Allāh (God's peace and blessings be upon him) related by Fāṭima bint Hubaysh, who was told by the Prophet, "When menstruation commences, you should stop praying, and when the normal number of days for menstruation is over wash the blood away from you and pray".

The woman whose bleeding extends beyond the maximum period of menses will necessarily have gone beyond menstruation. Al-Shāfiʿī and Mālik, may Allāh have mercy on him, held, in one of two narrations from him (Mālik), about the woman accustomed to menstruation that she is to act according to her usual course, because of the tradition of Umm Salama recorded in *al-Muwaṭṭaʾ*: "A woman at the time of the Messenger of Allāh (God's peace and blessings be upon him) used to bleed copiously, so Umm Salama consulted the Messenger of Allāh (God's peace and blessings be upon him) concerning her. He said, 'She should take into account the number of days and nights for which she used to menstruate in a month prior to this affliction. She should give up praying for such a period each month. When this period is over she should take a bath, tie her private parts with a cloth, and pray'". They linked the *ḥukm* of the woman who is doubtful about menstruation with the *ḥukm* of a woman suffering from unhealthy bleeding (*istiḥāda*), who is in doubt about her normal menstruation. He (Mālik) also held the view about a woman who has started menstruating, upon reaching the age, that she should take into account the period of women her own age, for their periods are similar to hers. He, thus, deemed their *ḥukm* to be the same. As to the three additional days, to be sure, it is something unique to Mālik and his disciples, may Allāh have mercy on them. All other *fuqahāʾ*, except for al-Awzāʿī, opposed them in this, as it is not mentioned in the established traditions, though they relate a weak tradition for it.

1.2.3.2.2.2. Issue 2: The case of the woman whose menstruation ceases then begins again

Mālik and his disciples held that a woman whose bleeding is sporadic, bleeding for a day or two and becoming pure for the next day or two, is to add up the number of days for which she had a flow of blood, ignoring the days of purity. She is to bathe each day that she finds herself to be pure and pray, because even though she is not sure, it may be a period of purity. If the days of bleeding have added up to fifteen, she is a *mustaḥāda* from then on. This opinion was also upheld by al-Shāfiʿī. It is also related from Mālik that she is to add up her days of bleeding and measure them against her usual menstrual period. When these are equal she is to add another three days for the flow to cease, otherwise she is a *mustaḥāda*.

Considering the days in which there is no flow of blood as excluded from the count is incomprehensible, for they are either days of purity or of menstruation. If they are days of menstruation, it is necessary that they be added to the days of bleeding, but if they are the days of purity, then, there is no need to add up the (remaining) days of bleeding, since they are separated by the days of purity. What conforms with his (Mālik's) principles is that these are days of menses and not of purity, as the minimum period for purity is limited in his view, and it is more than a day or two. Think over this, and it will be evident, God willing.

The truth is that menstrual and postnatal blood flows and then ceases for a day or two, flowing again till the menstrual or postnatal period is over, just as it may flow for an hour or two in a day and then stop.

1.2.3.2.2.3. Issue 3: The minimum and maximum periods for postnatal bleeding

They disagreed about the maximum and minimum periods of postnatal bleeding. Mālik held that there is no minimum limit for it, which was also upheld by al-Shāfiʿī, Abū Ḥanīfa and a group of jurists maintained that it is limited. He said that it is fifteen days, while Abū Yūsuf, his disciple, said that it is eleven days. Al-Ḥasan al-Baṣrī fixed it at twenty days. As to the maximum period, Mālik once said that it is sixty days, retracting from it later and saying that women should be asked about it, but his disciples stood firm on the first opinion. This was also al-Shāfiʿī's opinion. The majority of the jurists from among the Companions maintained that it is forty days, which was upheld by Abū Ḥanīfa. It is said, however, that the periods of women in the same condition should be taken into account, and if she goes beyond that she is a *mustaḥāda*. Some jurists made a distinction between the birth of a male or female child, saying that for the male there are thirty days, for the female forty.

The reason for disagreement is the difficulty in relying upon experience, due to differences in women, and because there is no authoritative source that can be acted upon, as is the case in their disagreement about the days of menses and purity.

1.2.3.2.2.4. Issue 4: Blood seen by the pregnant woman

The jurists, both early and later, disagreed whether the blood seen by a pregnant woman is to be deemed as *ḥayḍ* or *istiḥāda*. Mālik, al-Shāfiʿī, in his more reliable opinion, and other jurists held that a pregnant woman can menstruate. Abū Ḥanīfa, Aḥmad, al-Thawrī, and others said that the pregnant woman does not menstruate, and the blood discharged from her is that of illness, unless she is having labour pains, in which case they agreed that it is to be deemed as postnatal bleeding and her *ḥukm* is the *ḥukm* of a menstruating woman with respect to the prohibition of prayers and other related *aḥkām*.

From Mālik and his disciples there are conflicting narrations about a menstruating pregnant woman with extended bleeding as to the shifting of the *ḥukm* of normal menstruation to that of *istiḥada*. One opinion is that her *ḥukm* is that of a menstruating woman, that is, she either bleeds for the maximum number of days for menstruation and then becomes a *mustaḥāda*, or she adds three days to her usual menstrual course, as long as the total does not exceed fifteen days. It is further said that she remains a normally menstruating woman for a period double that of the maximum for menstruation. It is also said that she doubles the maximum period of menstruation as a multiple of the month past in the gestation period; thus, in the second month she doubles the maximum number of days of menstruation twice, thrice in the third month, four times in the fourth, and so on as the months increase.

The reason for their disagreement on this issue stems from the difficulty of relying on experience and the obscurity of the subject. Sometimes the blood that a pregnant woman sees is the blood of menstruation, which is the case of an exceptionally strong woman and where the foetus is small, and it could be a double pregnancy as is related from Hippocrates and Galen, and the rest of the physicians. Sometimes the blood that she witnesses could be due to the weakness of the fetus, and its illness generally depends upon her frailty and illness, in which case it is the blood of a defect and illness, and usually it is the blood from a defect.

1.2.3.2.2.5. Issue 5: Mucus and pus (leucorrhoea)

The jurists disagreed about the yellow and brownish discharge (leucorrhoea) whether it amounts to menstruation. A group of jurists held that it is menstruation during the days of menstruation, which was the opinion of al-Shāfiʿī and Abū Ḥanīfa, and the same is related from Mālik. In *al-Mudawwana* it is related from him that the yellow and brown discharges are to be considered as menstruation during the menstrual days as well as in others, irrespective of the flow of blood with it. Dāwūd and Abū Yūsuf said that the yellow and brown discharges are not menstruation, unless accompanied by blood.

The reason for their disagreement is the conflict of the apparent meaning of the tradition of Umm ʿAṭiyya with that of ʿĀʾisha. It is related from Umm ʿAṭiyya that she said, "We did not attach significance to the yellow and brown discharge after bathing". It is related from ʿĀʾisha "that the women used to send her a folded scroll containing cotton on which there was the yellow and brown discharge from menstrual blood, asking her about prayers". She said, "*Do not hasten things till you see that the white mucus* [which denotes the end of menstruation and the beginning of purity] is *white*". Those who preferred ʿĀʾisha's tradition deemed the yellow and brown discharges as menstruation, whether it was found in the days of menstruation or otherwise, with blood or without it, because the *ḥukm* of a single thing cannot differ within itself (from its constituents). Those who desired to reconcile the two traditions said that the tradition of Umm ʿAṭiyya relates to the case after the cessation of bleeding, while ʿĀʾisha's tradition relates to the time immediately following it, or that the tradition of ʿĀʾisha relates to the period of menstruation, and that of Umm ʿAṭiyya relates to days free from menstruation.

A group of jurists followed the literal meaning of Umm ʿAṭīya's tradition and did not attach any significance to the yellow and brown discharges, either during days of menstruation or on other days, either immediately following the blood or after its cessation, because of the words of the Messenger of Allāh (God's peace and blessings be upon him), "The blood of menstruation is dark, and can be identified", and because the yellow and brown discharges are not blood. They are like all other discharges released by the womb, which is the opinion of Abū Muḥammad ibn Ḥazm.

1.2.3.2.2.6. Issue 6: Indications of purity

The jurists disagreed about the indications of purity. One group of jurists said that the indication of purity is when seeing the mucus becoming dry, which was the opinion of Ibn Ḥabīb from among the disciples of Mālik; this is so whether it is the practice of the woman to see the white mucus or reach purity by becoming dry. She becomes pure whichever one of these she sees. Another group of jurists made the distinction that if a woman is accustomed to seeing the white liquid, she does not become pure unless she actually sees it, but if she does not habitually get it, then her purity is attainedwhen she becomes dry. This is related in *al-Mudawwana* from Mālik. The reason for their disagreement is that some of them took into account the regular habit, while others considered the cessation of blood alone. It is also said that the one who is accustomed to reaching purity by becoming dry may reach purity by seeing the white matter, but the woman accustomed to seeing the white matter does not become pure by merely becoming dry. The opposite is also maintained, and all this is from Mālik's disciples.

1.2.3.2.2.7. Issue 7: When is the *mustaḥāda* considered to be menstruating normally

The jurists disagreed about a *mustaḥada*—if her bleeding continues indefinitely—as to when she will be considered as menstruating normally, just as they disagreed about a woman with normal menstruation when her bleeding is extended, as to when she becomes a *mustaḥāda*, the discussion of which has preceded.

Mālik said that the *ḥukm* of the continuously bleeding woman is the same as the woman in purity, till the description of the blood changes to that of menstruation. This happens when the unhealthy bleeding continues beyond the minimum period of purity, and it is then that she is to be considered as menstruating normally, that is, when these two things come to pass together, the change in the blood and the passage of days in extended bleeding that can possibly be a period of purity, otherwise she is a *mustaḥāda*.

Abū Ḥanīfa said that she takes into account her normal days of menstruation, if she has experienced menstruation before, but if she has just begun menstruating, she passes the maximum period of menstruation, which is ten in his view. Al-Shāfiʿī said that she should try to distinguish between the distinctive signs, but if she has had menstrual experience earlier, she should follow that experience. If both factors are relevant to her, then there are two opinions from him. First, that she should follow the distinguishing signs, and second that she should follow her regular course.

The reason for their disagreement is that there are two conflicting traditions related to this. First is the tradition of ʿĀʾisha about Fāṭima bint Abī Ḥubaysh "that the Prophet (God's peace and blessings be upon him) ordered her, when she was having an extended bleeding, to give up praying for the number of days that she used to menstruate prior to this affliction, and then bathe and pray". The tradition of Umm Salama, which has preceded, and has been recorded by Mālik, has the same implication. The second tradition is recorded by Abū Dāwūd from the tradition of Fāṭima bint Abī Ḥubaysh that she had a sustained *istiḥāda* menstruation and the Messenger of Allāh (God's peace and blessings be upon him) said to her, "The blood of menstruation is dark, and can be identified. If it is like that then refrain from prayer, but if it is different then perform ablution and pray for it is blood from the veins". This tradition is declared authentic by Abū Muḥammad ibn Ḥazm.

Some jurists adopted the method of preference, while others adopted the method of reconciliation. Those who preferred Umm Salama's tradition, as well as others with the same implication, upheld the reckoning of days. Mālik, may Allāh be pleased with him, took into account the number of days alone in the case of a menstruating woman, when she was in doubt about the prolonged flow, but he did not take them into account for the woman who was in doubt about normal menstruation, that is, neither their number nor their dates within the month, as these were known. The text, however, pertains to a woman with an extended flow, who is in doubt about her normal menstruation. He (Mālik) applied the *ḥukm* to a sub-issue, but did not apply it to the main problem. This is strange, so think over it.

Those who preferred the tradition of Fāṭimah bint Abī Ḥubaysh took into account the colour (of blood). Some of them considered, along with the colour of blood, the passage of days that could be a period of purity during the extended bleeding. This is Mālik's opinion as related by ʿAbd al-Wahhāb. There were others who did not consider this. Those who reconciled the two traditions said that the first pertains to the woman who can identify the number of days in a month and their timing, while the second pertains to one who neither knows their number nor their timing, but recognizes the colour of blood. Some of these jurists held that even if she is not one of those who can distinguish (the blood) or the timing of the days, or one who knows their number, she is to abide by the tradition of Ḥamna bint Jaḥsh, which has been declared authentic by al-Tirmidhī. It states that the Messenger of Allāh (God's peace and blessings be upon him) said to her, "It is the gush of the devil. Observe menstruation for six or seven days, Allāh knows what (number) it is, then take a bath". The complete tradition will be coming up in the discussion of the *ḥukm* relating to the woman with extended bleeding in the period of purity.

These are the widely known issues in this chapter, and as a whole they come under four points. First, the identification of the change from purity to menses. Second, identification of the transfer from menses to purity. Third, identification of the transfer from normal to extended bleeding. Fourth, identification of the transfer from extended bleeding to normal menstruation, for which the traditions have been laid down. As to the other three cases, they are not expressly mentioned in the texts, that is, with respect to their determination. Same is the case with the transfer from postnatal bleeding to extended bleeding.

1.2.3.2.3. *Sub-section 3: The identification of the* aḥkām *of normal and extended bleeding*

The basis for this section are the words of the Exalted, "They question thee (O Muhammad) concerning menstruation. Say: It is an illness, so let women alone at such times and go not in unto them till they are cleansed. And when they have purified themselves, then go in unto them as Allāh has enjoined upon you",[66] and also the traditions pertaining to this, which we will be quoting.

The Muslim jurists agreed that menstruation prohibits four things. First, the act of the daily prayer and its obligation, that is, it is not obligatory for the menstruating woman to perform the prayer as *qaḍāʾ* (compensatory performance), unlike fasting (which has to be made up). Second, it prohibits the act of fasting, but not its delayed performance (*qaḍāʾ*). This is based on an established tradition from ʿĀʾisha, who said, "We were ordered to make up the days of fasting (which we missed on account of menstruation), but we were not ordered to perform compensatory prayers". A group of the Khārijites maintained that compensatory performance of prayer is obligatory. The third, in my reckoning, is circumambulation (*ṭawāf*) due to ʿĀʾisha's tradition when the Messenger of Allāh ordered her to do all that the pilgrims do except circumambulation of the House (as she was menstruating then). The fourth is coition due to the words of the Exalted, "So let women alone at such times and go not in unto them till they are cleansed".[67]

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[66] Qurʾān 2 : 222.

They differed about the *aḥkām* in a number of issues, and we shall mention those known most widely. These are five:

1.2.3.2.3.1. Issue 1: Cohabitation with the menstruating woman and what acts are permitted

The jurists disagreed about cohabitation with the menstruating woman and about the acts that are permissible. Mālik, al-Shāfiʿī, and Abū Ḥanīfa said that he can access the area above the waist (wrapper). Sufyān al-Thawrī and Dāwūd al-Ẓāhirī said that it is obligatory upon him to avoid only the outlet of blood.

The reason for their disagreement is the conflict of the apparent meaning of the traditions laid down on this issue with the likely interpretations of the verse of menstruation (*ḥayḍ*). It is stated in authentic traditions from ʿĀʾisha, Maymūna, and Umm Salama that the Prophet (God's peace and blessings be upon him), when one of them was menstruating, would order her to tie a waist-wrapper around her and then he would lie down with her. It is also related in the tradition of Thābit ibn Qays from the Prophet (God's peace and blessings be upon him) that he said, "Do everything with the menstruating woman, except coition". Abū Dāwūd has related from ʿĀʾisha that the Messenger of Allāh (God's peace and blessings be upon him) said to her, when she was menstruating, "Uncover your thighs." She said: "I did so, and he placed his cheek and his chest on my thighs. I leaned upon him till he was warm, for the cold had given him pains".

In the verse of menstruation, the words of the Exalted, "So let women alone at such times and go not in unto them till they are cleansed", vacillate between interpretation according to their general implication, except for what is restricted by an evidence, and between implying a general meaning intended for the particular, on the basis of the words of the Exalted, "Say: It is an illness", as the illness is confined to the outlet of blood. Those who interpreted the verse in its general meaning, that is, construing it in the general meaning till it is restricted by an evidence, exempted contact for what is above the waist-wrapper on the evidence from the *sunna*, for the restriction of the Book by the *sunna* is well-known to the experts of *uṣūl*. Those for whom the meaning was general intended for the particular, preferred this verse over the traditions prohibiting what is below the waist-wrapper, seeking support from traditions conflicting with the traditions prohibiting what is below the waist-wrapper.

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[67] Qurʾān 2 : 222.

There were some jurists who tried to reconcile these traditions with the meaning of the verse that is emphasized in the communication that it is an illness. They interpreted the traditions prohibiting what is below the waist-wrapper to imply mere undesirability, and interpreted the permitting traditions and the verse for permissibility. They preferred this interpretation of theirs on the basis of the *sunna* indicating that no part of the body of the menstruating woman is polluted, except for the outlet of blood. This is the tradition where "the Messenger of Allāh (God's peace and blessings be upon him) asked ʿAʾisha to fetch him a mat when she was menstruating. She said, 'I am menstruating.' He replied, 'Your menstruation is not in your hand'". Further, what is established about his resting his head on her thighs, when she was menstruating, and the saying of the Prophet (God's peace and blessings be upon him) "A believer is never unclean".

1.2.3.2.3.2. Issue 2: Intercourse in the period of purity before bathing

They disagreed about cohabiting with a woman (wife or slave girl) during the interval between the moment of cessation of blood and the time when she takes a bath. Mālik, al-Shāfiʿī, and the majority held that this is not permitted till she has a bath. Abū Ḥanīfa and his disciples held that this is permitted if she has been pure beyond the maximum period of menstruation, which according to him is ten days. Al-Awzāʿī held that if she has washed her private parts with water, cohabiting with her is permitted, that is, each menstruating woman becomes free from *ḥadath* once she purifies herself (after the cessation of bleeding). This was also Abū Muḥammad ibn Ḥazm's opinion.

The reason for their disagreement is based upon the possible interpretations of the words of the Exalted, "And when they have purified themselves, then go in unto them as Allāh has enjoined upon you",[68] whether the implication is purification by the termination of menstruation or purification with water. Further, if the purification is with water, does it imply purification of the entire body or purification of the private parts? "Purification" in the usage of the Arabs and in the technical legal meaning is an equivocal word used for these three meanings.

The majority preferred their view on the basis that the form of the verb "*tafaʿala*" is applied to the act of the subject (*mukallaf*), not to the act of others. Thus, the words of the Exalted, "*fa'idhā taṭahharna*" are clear in their meaning about washing with water as compared to the meaning of purity resulting from the termination of menstruation. It is obligatory to follow the apparent meaning, unless an evidence indicates the contrary. Abū Ḥanīfa preferred his view by maintaining that the word with the form *yafʿulna* in the words of the Exalted, "*ḥattā yaṭhurna*" is stronger in the meaning of purity that results from termination of menstruation, as compared to purification with water. The issue, as you see, is a matter of probability. It is necessary for those who understood one of these three meanings from the word derived from the root meaning "purity" in the words of the Exalted, "till they are cleansed", must infer the same meaning from the other derivation in the words of the Exalted, "And when they are purified, then go in unto them as Allāh has enjoined upon you". This is because it is not possible, or it is difficult (at the least), to accommodate within the same verse the two differing meanings, that is, cessation of blood from the word "*yaṭhurna*", and "full washing with water" from the word *taṭahharna*, as interpreted by the Mālikites, when arguing for Mālik. It is not customary with the Arabs to say, "Do not give so and so a *dirham* till he enters the house, and when he enters the mosque give him a *dirham*", but they say, "Do not give so and so a *dirham* till he enters the house, and when he enters the house give him a *dirham*", for the second sentence emphasizes the meaning contained in the first. Those who interpreted the words of the Exalted, "*till they are cleansed*", in the sense of termination of menses, and the words of the Exalted, "And when they have purified themselves", to mean purification with water are in the position of the person saying, "Do not give so and so a *dirham* till he enters the house, and when he enters the mosque give him a *dirham*". This meaning is not understood in the usage of the Arabs, unless there is an implied word and the assumed reading is, "And when they are cleansed [by cessation of blood] and have purified themselves [with full washing], then go in unto them as Allāh has enjoined upon you". This, however, is a far-fetched assumption, and no evidence is adduced by the person who claims it, unless he were to say that the obvious meaning of purification in the term "washing", is an evidence, but this is opposed by the greater and clearer probability of no implied assumption in the verse. This is because the implied assumption (of a word) is figurative, and interpreting the text in its actual connotation is better than construing it figuratively.

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[68] Qurʾān 2 : 222.

Consequently, it is the duty of the *mujtahid* here, when he reaches a point in his investigation like the one in this case, to weigh the two apparent probabilities, and the one he prefers in comparison with the other, he should accept. I mean by the two "apparent probabilities" that he is to compare the apparent meaning of the phrase "when they have purified themselves", indicating washing with water, against the obvious absence of an implied word in the verse, when preferring to interpret the word "*yathurna*" in its clear sense of cessation of blood. Whichever of the two clear probabilities is preferable in his view, he should act according to it. Thus, he should either not read an implied word into the verse and interpret the words, "when they have purified themselves", to mean purification (by termination of menses) or he should read the verse with an implied word and should interpret the words, "when they have purified themselves", to mean purification with water. On the other hand, he may measure the apparent meaning of the words, "when they have purified themselves", implying purification with water against the apparent meaning of the word "cleansed" implying purification (by termination of menses), then, whichever meaning appears appropriate to him should be assigned by interpretation to the other word too, and he should act upon it as if both words in the verse bear an identical meaning, that is, either in the sense of termination of the menses or of purification with water.

It is not in the nature of legal analysis to penetrate beyond this in such matters, so ponder over it, and here one is inclined to say: "Each *mujtahid* is right".

As to the consideration of the maximum period of menstruation by Abū Ḥanīfa in this issue, the argument is weak.

1.2.3.2.3.3. Issue 3: Cohabitation while the woman is menstruating

The jurist disagreed about the man who has intercourse with his wife when she is menstruating. Mālik, al-Shāfiʿī, and Abū Ḥanīfa said that he should seek Allāh's forgiveness and is not liable for anything. Aḥmad ibn Ḥanbal said that he should (in addition) give one or one-half *dīnār* as charity (atonement). A group of the traditionists said that if he has intercourse while she was bleeding, he would owe one *dīnār*, but if he cohabits with her after the bleeding has ceased he would owe one-half *dīnār*.

The reason for their disagreement over this is based on their dispute about the authenticity of the relevant traditions, or their weakness. It is related from Ibn ʿAbbās from the Prophet (God's peace and blessings be upon him) about the person who cohabits with his wife when she is menstruating that he should give one *dīnār* as charity. It is also related from him that he should give one-half *dīnār*. Another version of this tradition of Ibn ʿAbbās states that if he cohabits while she is bleeding he would be liable for one *dīnār*, but if he cohabits after the flow has ceased he is liable for one-half *dīnār*. In the same tradition it is related that he should give two-fifths of a *dīnār* as charity, which was al-Awzāʿī's opinion.

Those for whom these traditions were authentic acted according to them, while those for whom not a single one of these was authentic, and they are the majority, acted upon the principle of dropping the *ḥukm* till it is established through an evidence.

1.2.3.2.3.4. Issue 4: The woman with extended bleeding

The jurists disagreed about the woman with extended bleeding. A group of jurists made a single (full) purification (bathing) obligatory for her, which was to take place when she saw that her menstruation period was over in accordance with one of its indications, the discussion of which has preceded according to the opinions of these jurists. These jurists, who made a single purification obligatory for her, are divided into two groups. One group made it obligatory for her to perform (the minor) ablution for each prayer, while the other group recommended this, but did not make it obligatory. Those who made a single purification obligatory for her include Mālik, al-Shāfiʿī, Abū Ḥanīfa, their disciples, and the majority of the jurists of the regions with most of them making it obligatory for her to perform ablution for each prayer. Some of them did not make it obligatory, but recommended it, which is Mālik's opinion.

Another group, besides these groups, held that a woman with extended bleeding must purify (bathe) herself for each prayer, while a second group held that the obligation is to delay the noon prayer till the time of the middle prayer, and she should then purify herself and combine the prayers. Similarly she should delay the sunset prayer till the end of its time and the beginning of the time of *ʿishāʾ*, when she should purify herself a second time and combine the two prayers, and finally, she should purify herself a third time for the morning prayer. Thus, they made three purifications obligatory for her in one day and a night. One group of jurists held that she is obliged to purify herself only once for each period of one day and one night. Some of them did not fix a time for this, which is related from ʿAlī. Some maintained that she should purify herself from one period to the next.

Four opinions are thus arrived at in this issue. First that there is only one purification for her after the menstrual blood ceases to flow. Second, that she is to purify herself for each prayer. Third, that she is under an obligation to purify herself thrice in one day and night. Fourth, that she should purify herself once during one day and night.

The reason for their disagreement on this issue derives from the conflict of the apparent meaning of the traditions laid down in this regard. These are four widely known traditions, with one being agreed upon for its authenticity and three disputed. The tradition agreed upon for its authenticity is ʿĀʾisha's, who said, "Fāṭima daughter of Abū Ḥubaysh came to the Messenger of Allāh (God's peace and blessings be upon him) and said, 'O Messenger of Allāh! I am a woman who menstruates and is never pure. Should I abandon prayer?'

The Prophet (God's peace and blessings be upon him) said to her, 'No, for this is the blood of the veins and is not menstruation. When menstruation begins give up praying, but when it turns around, wash the blood from yourself and pray'". In some of the versions of this tradition the words, "And perform ablution for each prayer", are added. This addition is not recorded either by al-Bukhārī or by Muslim, but it is recorded by Abū Dāwūd and is authenticated by a group of traditionists.

The second tradition from ʿĀʾisha about Umm Ḥabība daughter of Jaḥsh, the wife of ʿAbd al-Raḥmān ibn ʿAwf, "that she menstruated continuously so the Messenger of Allah (God's peace and blessings be upon him) ordered her to wash for each prayer". This tradition is recorded as such by Isḥāq from al-Zuhrī, but the rest of the disciples of al-Zuhrī related "that she menstruated continuously and asked the Messenger of Allāh (God's peace and blessings be upon him) about it, so he said to her, 'It is the blood of the veins and not menstruation'". He then ordered her to wash and pray, and she used to wash for each prayer, for that was what she understood from him not that this is transmitted in the words of the Prophet (God's peace and blessings be upon him). This is the narration recorded by al-Bukhārī.

The third is the tradition of Asmāʾ bint ʿUmays, "She said, 'O Messenger of Allāh! Fāṭima bint Ḥubaysh has a prolonged menstruation'. The Messenger of Allāh (God's peace and blessings be upon him) said, 'Let her wash once for *ẓuhr* and *ʿaṣr*, once for *maghrib* and *ʿishāʾ*, and then let her wash for *fajr*, performing ablution for what is between these'". This is recorded by Abū Dāwūd.

The fourth tradition is that of Ḥamna bint Jaḥsh, which records: "The Messenger of Allāh (God's peace and blessings be upon him) gave her a choice between washing once for all the prayers, when she found that the blood of menstruation had ceased to flow, and between washing thrice in one day and night". This conforms with the tradition of Asmāʿ bint ʿUmays, except that in the latter case it apparently is an obligation, while in the former case it is an option.

As the apparent meanings of these traditions were in conflict, the jurists interpreted them differently formulating four opinions: an opinion based on abrogation, an opinion based on preference, an opinion based on reconciliation, and an opinion based on structure *bināʾ*. The difference between reconciliation and structure is that the person structuring them does not find a conflict in the traditions and combines them, but the person who reconciles them finds a conflict in the apparent meanings of the traditions; so think about this, the distinction is obvious.

Those who adopted the method of preference include those who preferred the tradition of Fāṭima bint Ḥubaysh, because of the existence of an agreement about its authenticity, and they acted on its obvious meaning, that is, to the effect that the Prophet (God's peace and blessings be upon him) did not order her to wash for each prayer, nor did he order her to combine the prayers after one purification or to do anything else required in the other opinions. This was adopted by Mālik, Abū Ḥanīfa, al-Shāfiʿī, and their disciples, and these jurists form the majority. Those who considered the addition stated in this tradition, that is, the order to perform ablution for each prayer, made this obligatory for her, but those who did not consider it as authentic did not deem it obligatory.

Those who adopted structured interpretation maintained that there is essentially no conflict between the traditions of Fāṭimah and Umm Ḥabība, one of whose narrators is Ibn Isḥāq. What is contained in the tradition of Umm Ḥabība is an addition over the content of Fāṭima's tradition. What is contained in the tradition of Fāṭima is a reply to a question whether that was the type of menstrual blood that prohibits prayer. The Prophet (God's peace and blessings be upon him) informed her that it is not menstrual blood that prevents the performance of prayers, but he did not inform her at all whether she was to purify herself for each prayer or at the time of the cessation of the menstrual flow. In Umm Ḥabība's tradition, he ordered her to do only one thing, which was purification for each prayer. The majority may nevertheless say that the delay of an explanation from the time of its need is questionable. If purification was necessary prior to each prayer, he would have informed her about it, and the contender cannot claim that there was no need as she was already aware of that. How could we assume that she was so knowledgeable when she was unaware even of the difference between extended bleeding and normal menstruation? The Prophet did not mention in his words "It is not menstruation" the obligation of purification after the cessation of menstrual blood, for it was known from his (God's peace and blessings be upon him) *sunna* that the termination of menstruation makes bathing obligatory. Therefore, he did not inform her about it as she was already aware of it. The case of purification before each prayer, however, is different unless the contender were to say that this addition had not been established before. This leads to the well-known issue, whether an addition amounts to abrogation. It is related in some versions of Fāṭima's tradition that the Prophet (God's peace and blessings be upon him) ordered her to take a bath. This, then, is the position of those who adopt interpretations based on preference and structure.

Jurists adopting the method of abrogation said that the tradition of Asmāʾ bint ʿUmays abrogated Umm Ḥabība's tradition. They argued for this on the basis of what is related by ʿĀʾisha "that Sahla bint Suhayl had extended bleeding and the Messenger of Allāh (God's peace and blessings be upon him) ordered her to bathe before each prayer. As this was strenuous for her, he ordered her to combine *ẓuhr* and *ʿaṣr* with a single bath, *maghrib* and *ʿishāʾ* with another, and that she should bathe a third time for the morning prayer".

Jurists adopting the method of reconciliation maintained that Fāṭima bint Ḥubaysh's tradition is to be interpreted as being addressed to a woman who can distinguish the days of normal menstruation from others, while Umm Ḥabība's tradition is interpreted as being addressed to a woman who cannot make such a distinction, and wastherefore ordered to bathe frequently for each time of prayer as a precaution. Because it is likely that each time she was about to pray she had reached the period of purification; and it was thus obligatory upon her to wash for each prayer. Asmāʾ bint ʿUmays's tradition, on the other hand, is to be interpreted as having been addressed to a woman who cannot distinguish between the days of normal menstruation and extended bleeding (due to the irregularity of the flow), as the flow ceases at times. When the flow ceases, this woman is under an obligation to bathe and to pray two prayers after the bath (*ẓuhr* and *ʿaṣr* together with one bath, *maghrib* and *ʿishāʾ* with another bath, and *ṣubḥ* with a third).[69]

Another group of jurists adopted the opinion based on an option between the traditions of Umm Ḥabība and Asmāʾ, arguing for this on the basis of Ḥamna bint Jaḥsh's tradition, which contains the words "that the Messenger of Allāh (God's peace and blessings be upon him) granted her an option". Among these jurists are some who said that the woman with an option is one who cannot distinguish the days of her menstrual flow, and there are others who said that she is the *mustaḥāda* irrespective of her being able to distinguish her menstrual cycle. This is the fifth opinion within the issue, but the option contained in Ḥamna bint Jaḥsh's tradition is between saying all the five daily prayers with one washing and purifying thrice in one day and a night. Jurists maintaining that she should bathe once each day made this obligatory for her, perhaps on the basis of doubt, and I am not aware of a tradition for this.

1.2.3.2.3.5. Issue 5: Cohabitation with a woman having extended bleeding

The jurists disagreed about cohabitation with a woman with extended bleeding, into three opinions. One group said that it is permitted to cohabit with her, and this is the opinion of the jurists of the provinces, and has been related from Ibn ʿAbbās, Saʿīd ibn al-Musayyab, and a group of the Tābiʿūn. Another group said that it is not permitted to cohabit with her, which is related from ʿĀʾisha, and is the opinion of al-Nakhʿī and al-Ḥakam. A third group said that her husband is not to cohabit with her, unless it becomes prolonged, which is Aḥmad ibn Ḥanbal's opinion.

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[69] Statement in parentheses added to avoid possible misinterpretation.

The reason for disagreement stems from the dispute about whether permissibility of prayer in her case is an exemption resulting from the prescription of the obligation of prayer, or whether prayer has been permitted to her because her *ḥukm* is the same as that of a woman in a state of ritual purity? Those who maintained that this is an exemption did not permit the husband to cohabit with her, while those who maintained that her *ḥukm* is the same as that of a ritually pure person permitted it for her. On the whole, it is an issue that is not expressly stated in the texts. The distinction between a prolonged and a short period, on the other hand, is based upon *istiḥsān*.

1.3. THE BOOK OF *TAYAMMUM* (ABLUTION WITH CLEAN EARTH)

A comprehensive discussion of the principles of this subject is covered in seven chapters. The first chapter relates to the identification of the purification for which this purification forms a substitute. The second chapter is about the person to whom this form of purification is permitted. The third chapter is about the conditions for the permissibility of this purification. Chapter four is about the description of this purification. Chapter five relates to the thing with which this purification is performed. The sixth chapter is about factors nullifying it. Chapter seven is about acts for the validity and permissibility of which this purification is a condition.

1.3.1. **Chapter 1 Identification of Purification for which *Tayammum* is** a Substitute

The jurists agreed that this purification is a substitute for minor (*ṣughrā*) purification (i.e. *wuḍūʾ*), but they differed about major purification (*kubrā*). It is related from ʿUmar and Ibn Masʿūd that they did not view it as a substitute for major purification. ʿAlī and other Companions maintained that *tayammum* is a substitute for major purification, which was the view adopted by jurists generally.

The reason for their disagreement is the likelihood of different interpretations of the verse for *tayammum*, and that the traditions about *tayammum* for a person involved in *janāba* (the major *ḥadath*) did not prove to be authentic in their view. With respect to the different interpretations of the verse of *tayammum*, it is possible that the addressee in the words of the Exalted, "And ye find not water, then go to high clean soil and rub your faces and your hands (therewith)",[70] is just the person who has acquired a minor *ḥadath*, and it is also possible that it is addressed to both. Those for whom the term "touching", in the words of the Exalted, "Or ye have touched women", means copulation, the pronoun refers to both. Those for whom it means touching with the hand, it is more likely that the addressee is the person with a minor *ḥadath*. This is because the pronouns usually refer to the last mentioned thing. (The verse cannot have one possibility) unless a reading with a rearranged order in the verse is assumed, so that it is read as: "O ye who believe! When ye rise up for prayer, or one of you has come from the closet, or you have touched women, wash your faces, and your hands up to the elbows, and lightly rub your heads and [wash] your feet up to the ankles. And if ye are *junub* purify [bathe] yourself, and if ye are sick or on a journey, and ye find not water, then go to clean, high ground and rub your faces and your hands with some of it". Such an assumed reading is not allowed, except on the basis of an evidence, because an assumed reading is figurative, and it is better to read the text in its actual connotation instead of interpreting it figuratively. It may be said that there is a reason that necessitates the assumption of rearrangement; namely that its present order implies that illness and journey are causes of *ḥadath*. Yet this is not the case, if the conjunction "or" (*aw*), is considered here in the meaning of "and" which is found in the usage of the Arabs. This is one of the reasons that led to a disagreement over the issue.

Their disagreement over traditions relevant to this issue is obvious from what has been recorded by al-Bukhārī and Muslim "that a man came to ʿUmar, may Allāh be pleased with him, and said, 'I have been involved in *janāba* and cannot find water (to bathe).' He [ʿUmar] said, 'Do not pray.' ʿAmmār said, 'Do you not remember, O Amīr al-Muʾminīn [Commander of the believers], when you and I were tending the camels and became *junub*, but did not find water. As for you, you did not pray, but I rolled in the earth and prayed? The Prophet (God's peace and blessings be upon him) [on hearing our story] said, 'It would have been enough for you to stroke the earth with your hands, then to shake (the dust off) them, and then rub your face and hands'. ʿUmar said, 'Fear Allāh, O ʿAmmār.' He (ʿAmmār) said, 'If you like, I will not relate it' ". In some versions it is stated that ʿUmar said to him, "Let it be at that". Muslim relates from Shaqīq that he said, "I was sitting with ʿAbd Allāh ibn Masʿūd and Abū Mūsā, when Abū Mūsā said, 'O Abū ʿAbd al-Raḥmān, what do you think about the person who becomes *junub* and does not find water for a month? How would he pray?' ʿAbd Allāh replied to Abū Mūsā saying, 'He is not to perform *tayammum* even if he does not find water for a month'. Abū Mūsā said, 'Then what about this verse in *sūrat al-Māʾida*,

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[70] Qurʾān 5 : 5.

"And ye find not water, then go to high clean soil and rub your faces and your hands (therewith)?" ʿAbd Allāh said, 'If this concession were made for them, they would be ready to perform *tayammum* with earth when water appears cold to them'. Abū Mūsā said to ʿAbd Allāh, 'Did you not hear what ʿAmmār said to ʿUmar?'" He then proceeded to relate the preceding tradition. "ʿAbd Allāh replied, 'Did you not see that ʿUmar was not convinced by ʿAmmār's statement'".

The majority, however, maintained that this had been established by the traditions of ʿAmmār and ʿImrān ibn al-Ḥuṣayn, both recorded by al-Bukhārī, and that the forgetfulness of ʿUmar is not effective in the obligation to act upon the tradition of ʿAmmār. Further, they argued for the permissibility of *tayammum* for the *junub* and the menstruating woman on the basis of the general implication of the words of the Prophet (God's peace and blessings be upon him), "The earth has been deemed a mosque for me, and a means of purity". The tradition of ʿImrān ibn al-Ḥuṣayn states "that the Messenger of Allāh (God's peace and blessings be upon him) saw a person who had isolated himself and was not praying with the group. He said, 'Is it not good enough for you to pray with the group?' He said, 'O Messenger of Allāh (God's peace and blessings be upon him), I am *junub* and there is no water.' The Prophet (God's peace and blessings be upon him) said, 'You have the earth, that is good enough for you'".

They differed, because of the likelihood of such interpretations, about the person who does not have water whether he can cohabit with his wife? I mean, those who permit the *junub* to perform *tayammum*.[71]

1.3.2. Chapter 2 Persons Permitted to Undertake this Form of Purification

The jurists agreed unanimously that the persons permitted to undertake this purification are of two types: the sick and the traveller, when there is a lack of water. They disagreed about four other types: the sick person who can find water, but is afraid to use it; the resident who has no water; the healthy traveller who can find water, but fear prevents him from reaching it; and the person who is afraid to use water due to extreme cold.

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[71] This is difficult to understand. *Ṭahāra* is not a requirement for copulation, unless the author means that in the absence of water intercourse will cause *janāba*, and the person will be unable to pray. This can, however, be true in the view of those who deny *tayammum* for the *junub*. Maybe, there is an omission in the text and it was meant to read: "I mean those who do *not* permit . . ."

About the *marīḍ* (sick person) who can find water, but is afraid to use it, the majority said that *tayammum* is permitted to him; similarly, in the case of the healthy person who fears death or severe illness because of the extreme coldness of water, and the person who is afraid to go out and reach the water, except that most of the jurists consider it obligatory for him to repeat prayers when he finds water. ʿAṭāʾ maintained that sick as well as the healthy persons who find water are not permitted to perform *tayammum*. Mālik and al-Shāfiʿī upheld the permissibility of *tayammum* for the healthy resident who lacks water. Abū Ḥanīfa said that *tayammum* is not permitted for the healthy resident, even if there is a lack of water.

The reason for their disagreement over these four issues are the fundamentals of this chapter. About the *marīḍ*, who is afraid to use water their disagreement centres on whether there is an implied additional word in the verse, that is in the words of the Exalted, "And if ye are sick or on a journey". Those who held that there is such an implied addition and the text means, "And if ye are sick, not able to use water", and that the pronoun "ye" in the words of the Exalted, "And ye find not water", refers to the traveller alone, (they) permitted *tayammum* for the sick person who is afraid to use water. Those who said that the pronoun in "And ye find not water", refers both to the *marīḍ* as well as the traveller, and that there is no implied addition in the verse, did not permit the *marīḍ* to perform *tayammum* if he can find water.

Their disagreement about the resident who lacks water relates to the dispute whether the pronoun in the words of the Exalted, "And ye find not water", refers to all kinds of persons in the state of *ḥadath*, that is, residents and travellers, or to travellers alone. Those who maintained that it refers to all types of persons in a state of *ḥadath*, permitted *tayammum* to residents, while those who maintained that it refers to the travellers alone, or to the sick and the travellers, did not permit *tayammum* to the resident who lacks water.

Their disagreement about the person who is afraid to go out and reach the water, was caused by their dispute over its analogy drawn from the person who cannot find water. Likewise, their disagreement over the case of the person who is afraid of using extremely cold water is caused by their differences over its analogy drawn from the case of the sick person who is afraid to use water.

Those who upheld the permissibility of *tayammum* for the *marīḍ*, supported their opinion on the basis of the tradition of Jābir about the wounded person, who bathed and died, and the Prophet (God's peace and blessings be upon him) permitted *masḥ* for such a person, saying: "They killed him, woe to them". In the same way they compared the healthy person, who is afraid to use water, to the case of the sick person on the basis of what is related about it from ʿAmr ibn al-ʿĀṣ, when he became *junub* on a cold night. He performed *tayammum* and recited the words of the Exalted, "Kill not yourself. Lo! Allāh is ever Merciful unto you".[72] He mentioned this to the Prophet (God's peace and blessings be upon him) who did not reprimand him.

1.3.3. Chapter 3 Conditions of Validity for this Form of Purification

The identification of the conditions of this type of purification relates to three issues, which are like principles. First, whether intention is a condition for this purification? Second, whether searching for water, when it is lacking, is a condition for the permissibility of this purification? Third, whether the advent of the time (of prayer) is a condition for the validity of *tayammum.*

1.3.3.1. Issue 1: Intention

The majority maintain that intention is a condition for *tayammum*, because it is a ritual non-rational worship. Zufar deviated saying that intention is not one of its conditions, and there is no need for intention. This is also related from al-Awzāʿī and al-Ḥasan ibn Ḥayy, but the claim is weak.

1.3.3.2. Issue 2: Seeking water

Mālik, may Allāh be pleased with him, stipulated the seeking of water (to ascertain non-availability prior to shifting to *tayammum*), as did al-Shāfiʿī. Abū Ḥanīfa did not lay down this condition. The reason for their disagreement over this is whether the person who does not find water without seeking it can be termed as one who lacks water, or whether the person lacking water is one who has sought it but could not find it? The truth is that the person convinced about a lack of water, either due to a prior (unsuccessful) search or without it, is one who lacks water. The person acting merely on his whim, however, cannot be one who lacks water. It is for this reason that the opinion in the school requiring repeated search in the same location is deemed weak, whereas the opinion stipulating initial search, when there is no convincing information about lack of water is deemed strong.

1.3.3.3. Issue 3: The advent of time (of prayer)

Some of the jurists stipulated this, which is the opinion of al-Shāfiʿī and Mālik, while others did not, which is the opinion of Abū Ḥanīfa, the Ẓāhirites, and Ibn Shaʿbān from among the disciples of Mālik.

The reason for their disagreement is whether the apparent meaning of the verse of ablution implies that *tayammum* and *wuḍūʾ* are not permitted, except when it is time for prayer, as in the words of the Exalted, "O ye who believe! When ye rise up for prayer . . ."[73] Thus, they made *wuḍū'* and *tayammum* obligatory at the time of rising up for prayer, which occurs when it is time for prayer. It follows from this that the *ḥukm* of *wuḍū'* and *tayammum* here is the same as the *ḥukm* for *ṣalāh*, that is just as time is a condition for the validity of prayer so, similarly, time is a condition for the validity of *wuḍū'* and *tayammum*. The *shar'* however has made an exemption in the case of ablution. Does *tayammum* then retain the original rule, or is this not an apparent implication of the verse and the words of the Exalted, "O ye who believe! When ye rise up for prayer . . ."[74] mean, "When ye resolve to undertake prayers?" Further, even if there is no assumption of an implied meaning in the verse, the only implication would be that the obligation of ablution and *tayammum* becomes due at the time of obligation of prayer, not that performance of *wuḍū'* and *tayammum* before the time of prayer is invalid, unless the rule is based upon the analogy of observing prayer before its time. In such a case, it would be preferable to say that the reason for disagreement in this is the analogy of *tayammum* upon prayer, but it is weak because its analogy upon *wuḍū'* would be better. This is a weak issue, so think over it, that is those who stipulate the advent of the time of prayer for its validity and render it a form of worship bound by time.

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[72] Qurʾān 4 : 29.

Limitations of time for the different kinds of worship are not imposed, except through a transmitted evidence. Imposition of a timing for *tayammum* would be justified if the finding of water were postponed till just before the advent of time, in which case this would not be a time-bound worship, but the issue would fall under the principle that the time arises when the lack of water is the moment of the beginning of the period of prayer. This is so as it is only at the beginning of the period of prayer that he can be sure of the availability or non-availability of water. It is for this reason that the school differed over the question: when should he perform *tayammum*? Is it to be at the beginning of the prescribed time (for prayer), in the middle, or at the end? Yet, there are certain situations in which it is known with certainty that he would not come across water, except at the time of prayer. Further, if water becomes available (after the performance of *tayammum*) he will only be obliged to terminate his *tayammum* (that is perform *wuḍū'*), not that it is invalid. The possibility of coming across water just before the beginning of the time of prayer and after its commencement is equal. Why, then, has the *ḥukm* of *tayammum* before the time of prayer been considered different from its *ḥukm* at its commencement, that is the undertaking of *tayammum* is prohibited before time, but it is not prohibited at the advent of such time. Such views are not to be formulated, except on the basis of a transmitted evidence.

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[73] Qur'ān 5 : 6.

[74] Qur'ān 5 : 6.

It follows from this logic that *tayammum* is to be delayed till close to the end of the time (for prayer), so think over it.

1.3.4. Chapter 4 Descripton of this Form of Purification

As to the description of this form of purification, it relates to three issues, which are the principles of this chapter.

1.3.4.1. Issue 1: The part of the hands to be rubbed

The jurists had four different opinions about the extent of the hands that Allāh has commanded people to rub in His words, "And ye find not water, then go to clean, high ground and rub your faces and your hands with some of it".[75] First, that the prescribed limit for this is the same as the limit in *wuḍū'* itself, which is up to the elbows. This is the widely known opinion in the school, and is upheld by the jurists of the provinces. Second, the obligation is to rub the palm of the hand only and this is maintained by the Ahl al-Ẓāhir and the traditionists. Third, that it is recommended up to the elbows, but the obligation is (to rub) the palms of the hands. This is related from Mālik. The fourth opinion is that the obligation extends up to the shoulder. This is a deviant opinion and has been related from al-Zuhrī and Muḥammad ibn Masalma.

The reason for their disagreement stems from the equivocality of the term "*yadd*" in the language of the Arabs. This is so as the term "*yadd*", in the language of the Arabs is used in three meanings: the hand only, which provides the primary use; the hand and the forearm; the hand, forearm, and upper arm. The second reason arises from the conflict of relevant traditions. The widely known tradition of ʿAmmār, in its various established channels, says, "It would have been enough for you to stroke with your hand, then shake it off them, and rub your face (with them) and your hands". In some versions it is stated that the Prophet (God's peace and blessings be upon him) said, "And that you rub your hands up to the elbows". It is also related from Ibn ʿUmar that the Prophet (God's peace and blessings be upon him) said, "*Tayammum* consists of two strokes: a stroke for the face, and another for the hands, up to the elbows". This is also related through Ibn ʿAbbās and other narrators.

The majority preferred these traditions over the tradition of ʿAmmār relying on the supporting analogy for it, that is the analogy of *tayammum* upon *wuḍū'*, the same factor which impelled them to prefer interpreting the term *yadd* in the sense which includes the palm and the forearm as against the hand alone, which is the apparent meaning. Those who claimed that it applies to both equally, and is not primarily applied to one of them as compared to the other, has erred, for "*yadd*", even if it is an equivocal term, primarily denotes hand, and is metaphorical for the part in excess of the hand. Every equivocal term is not obscure (*mujmal*). A term that is both obscure and equivocal is one that has been applied initially as an equivocal term. The jurists have held that it is not proper to argue on the basis of such a term. It is for this reason we say that the correct view is to believe that the obligation relates to the hands alone. This is so as the term *yadd* either applies primarily to hands as compared to all other limbs or its indication of the rest of the limbs, forearm and upper arm, is equal. It is necessary to decide on the basis of the established tradition when the meaning is more obvious. Giving predominance to analogy here over the tradition is incomprehensible. It is also incomprehensible to prefer on the basis of analogy traditions that have not been established. The *ḥukm* on the basis of the Book and the *sunna* is evident here, so ponder over it.

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[75] Qur'ān 5 : 6.

Those who held the limit to be up to the armpits maintained this as it is related in some versions of ʿAmmār's tradition that he said, "We used to perform *tayammum* along with the Messenger of Allāh (God's peace and blessings be upon him), and rubbed our faces and hands up to the shoulders". To construe those traditions as implying recommendation and the tradition of ʿAmmār as implying obligation is commendable as a method, for reconciliation is considered better than preference according to the experts of the juristic method, except that it is necessary to ascertain that the traditions are proved authentic.

1.3.4.2. Issue 2: Striking the earth

The jurists disagreed about the number of times the earth is to be struck for the purpose of *tayammum*. Some of them said it is once, while others said that it is twice. Those who said that it is twice include some who said that one stroke is for the face and one for the hands. These are the majority. When I say "majority", then the three (leading) jurists are counted among them, that is, Mālik, al-Shāfiʿī, and Abū Ḥanīfa. Some of them said that there are two strokes for each of them, that is two strokes for the hands and two strokes for the face.

The reason for their disagreement is that the verse gives no details about this, and the traditions are in conflict, while the analogy of *wuḍū'* for *tayammum* in all its instances is not agreed upon. What is stated by the established tradition of ʿAmmār about this is one stroke both for the face and the hands, but there are traditions in which it is required twice. The majority preferred these traditions on the basis of analogy of ablution for *tayammum.*

1.3.4.3. Issue 3: Earth reaching the limbs

Al-Shāfiʿī disagreed with Mālik, Abū Ḥanīfa, and others about the obligation of the earth reaching the limbs that are the object of *tayammum*. Abū Ḥanīfa did not consider this as obligatory, nor did Mālik, but al-Shāfiʿī upheld it as obligatory.

The reason for their disagreement is the equivocality found in the word "*min*" in the words of the Exalted, "And rub your faces and your hands with some of it (*minhu*)".[76] This is so as the word *min* is sometimes used to indicate a part, while at other times it is used to make a distinction between the categories. Those who held that it has been used here to indicate a part, made the transfer of the earth to the limbs of *tayammum* obligatory. Those who maintained that it indicates a distinction among categories said that transferring it is not obligatory. Al-Shāfiʿī preferred the interpretation implying a part on the basis of the analogy of ablution for *tayammum*, but this is opposed by the tradition of ʿAmmār that has preceded, for it contains the words, "then shake it off", and also the Prophet's performing *tayammum* at the wall.

The disagreement of the jurists about the obligation of a sequential order (of acts) in *tayammum*, as well as over the obligation of immediate performance (i.e. there should be no interval separating the rubbing of the face and the rubbing of the hands), is exactly the same as their disagreement about it in ablution, and the causes for disagreement there are the causes here; thus there is no point in reiterating them.

1.3.5. Chapter 5 The Material Used for this Form of Purification

This involves a single issue. They agreed about its validity with clean cultivable soil, but disagreed about its performance with what is besides soil from among the constituent parts found on land, like stones. Al-Shāfiʿī held that *tayammum* is not permitted except with pure earth. Mālik and his disciples held that *tayammum* is permitted, according to the widely known opinion, with whatever is found upon the surface of land with all its constituents, like pebbles, sand, and earth. Abū Ḥanīfa added to this saying (that it is permitted) with all kinds of solid matter produced by the earth, like lime, arsenic, gypsum, clay, and marble. Some of them, and these are the majority, when it is time for prayer, as in the words of the Exalted, "O ye who believe! When ye rise up for prayer . . ."[73] Thus, they made *wuḍūʾ* and *tayammum* obligatory at the time of rising up for prayer, which occurs when it is time for prayer. It follows from this that the *ḥukm* of *wuḍūʾ* and *tayammum* here is the same as the *ḥukm* for *ṣalāh*, that is just as time is a condition for the validity of prayer so, similarly, time is a condition for the validity of *wuḍūʾ* and *tayammum*. The *sharʿ* however has made an exemption in the case of ablution. Does *tayammum* then retain the original rule, or is this not an apparent implication of the verse and the words of the Exalted, "O ye who believe! When ye rise up for prayer . . ."[74] mean, "When ye resolve to undertake prayers?" Further, even if there is no assumption of an implied meaning in the verse, the only implication would be that the obligation of ablution and *tayammum* becomes due at the time of obligation of prayer, not that performance of *wuḍūʾ* and *tayammum* before the time of prayer is invalid, unless the rule is based upon the analogy of observing prayer before its time. In such a case, it would be preferable to say that the reason for disagreement in this is the analogy of *tayammum* upon prayer, but it is weak because its analogy upon *wuḍūʾ* would be better. This is a weak issue, so think over it, that is those who stipulate the advent of the time of prayer for its validity and render it a form of worship bound by time.

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The reason for their disagreement stems from the equivocality of the term "*yadd*" in the language of the Arabs. This is so as the term "*yadd*", in the language of the Arabs is used in three meanings: the hand only, which provides the primary use; the hand and the forearm; the hand, forearm, and upper arm. The second reason arises from the conflict of relevant traditions. The widely known tradition of ʿAmmār, in its various established channels, says, "It would have been enough for you to stroke with your hand, then shake it off them, and rub your face (with them) and your hands". In some versions it is stated that the Prophet (God's peace and blessings be upon him) said, "And that you rub your hands up to the elbows". It is also related from Ibn ʿUmar that the Prophet (God's peace and blessings be upon him) said, "*Tayammum* consists of two strokes: a stroke for the face, and another for the hands, up to the elbows". This is also related through Ibn ʿAbbās and other narrators.

The majority preferred these traditions over the tradition of ʿAmmār relying on the supporting analogy for it, that is the analogy of *tayammum* upon *wuḍūʾ*, the same factor which impelled them to prefer interpreting the term *yadd* in the sense which includes the palm and the forearm as against the hand alone, which is the apparent meaning. Those who claimed that it applies to both equally, and is not primarily applied to one of them as compared to the other, has erred, for "*yadd*", even if it is an equivocal term, primarily denotes hand, and is metaphorical for the part in excess of the hand. Every equivocal term is not obscure (*mujmal*). A term that is both obscure and equivocal is one that has been applied initially as an equivocal term. The jurists have held that it is not proper to argue on the basis of such a term. It is for this reason we say that the correct view is to believe that the obligation relates to the hands alone. This is so as the term *yadd* either applies primarily to hands as compared to all other limbs or its indication of the rest of the limbs, forearm and upper arm, is equal. It is necessary to decide on the basis of the established tradition when the meaning is more obvious. Giving predominance to analogy here over the tradition is incomprehensible. It is also incomprehensible to prefer on the basis of analogy traditions that have not been established. The *ḥukm* on the basis of the Book and the *sunna* is evident here, so ponder over it.

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Those who held the limit to be up to the armpits maintained this as it is related in some versions of ʿAmmār's tradition that he said, "We used to perform *tayammum* along with the Messenger of Allāh (God's peace and blessings be upon him), and rubbed our faces and hands up to the shoulders". To construe those traditions as implying recommendation and the tradition of ʿAmmār as implying obligation is commendable as a method, for reconciliation is considered better than preference according to the experts of the juristic method, except that it is necessary to ascertain that the traditions are proved authentic.

1.3.4.2. Issue 2: Striking the earth

The jurists disagreed about the number of times the earth is to be struck for the purpose of *tayammum*. Some of them said it is once, while others said that it is twice. Those who said that it is twice include some who said that one stroke is for the face and one for the hands. These are the majority. When I say "majority", then the three (leading) jurists are counted among them, that is, Mālik, al-Shāfiʿī, and Abū Ḥanīfa. Some of them said that there are two strokes for each of them, that is two strokes for the hands and two strokes for the face.

The reason for their disagreement is that the verse gives no details about this, and the traditions are in conflict, while the analogy of *wuḍūʾ* for *tayammum* in all its instances is not agreed upon. What is stated by the established tradition of ʿAmmār about this is one stroke both for the face and the hands, but there are traditions in which it is required twice. The majority preferred these traditions on the basis of analogy of ablution for *tayammum.*

1.3.4.3. Issue 3: Earth reaching the limbs

Al-Shāfiʿī disagreed with Mālik, Abū Ḥanīfa, and others about the obligation of the earth reaching the limbs that are the object of *tayammum.* Abū Ḥanīfa did not consider this as obligatory, nor did Mālik, but al-Shāfiʿī upheld it as obligatory.

The reason for their disagreement is the equivocality found in the word "*min*" in the words of the Exalted, "And rub your faces and your hands with some of it (*minhu*)".[76] This is so as the word *min* is sometimes used to indicate a part, while at other times it is used to make a distinction between the categories. Those who held that it has been used here to indicate a part, made the transfer of the earth to the limbs of *tayammum* obligatory. Those who maintained that it indicates a distinction among categories said that transferring it is not obligatory. Al-Shāfiʿī preferred the interpretation implying a part on the basis of the analogy of ablution for *tayammum*, but this is opposed by the tradition of ʿAmmār that has preceded, for it contains the words, "then shake it off", and also the Prophet's performing *tayammum* at the wall.

The disagreement of the jurists about the obligation of a sequential order (of acts) in *tayammum*, as well as over the obligation of immediate performance (i.e. there should be no interval separating the rubbing of the face and the rubbing of the hands), is exactly the same as their disagreement about it in ablution, and the causes for disagreement there are the causes here; thus there is no point in reiterating them.

1.3.5. Chapter 5 The Material Used for this Form of Purification

This involves a single issue. They agreed about its validity with clean cultivable soil, but disagreed about its performance with what is besides soil from among the constituent parts found on land, like stones. Al-Shāfiʿī held that *tayammum* is not permitted except with pure earth. Mālik and his disciples held that *tayammum* is permitted, according to the widely known opinion, with whatever is found upon the surface of land with all its constituents, like pebbles, sand, and earth. Abū Ḥanīfa added to this saying (that it is permitted) with all kinds of solid matter produced by the earth, like lime, arsenic, gypsum, clay, and marble. Some of them, and these are the majority, stipulated that the soil must be on the surface of the earth. Aḥmad ibn Ḥanbal said that *tayammum* may be performed with dust from a garment or from wool.

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[76] Qurʾān 5 : 6.

The reason for their disagreement is based upon two factors. First, the equivocality of the term *ṣaʿīd* in the language of the Arabs, as it is sometimes applied to clean earth, and at other times to all the constituents on the surface of land, so much so that the interpretation of the derivatives of this term *ṣaʿīd* led Mālik and his disciples to permit it, in one of the narrations, with grass and snow; they said that these are also called *ṣaʿīd* in the primary use of the term, that is being upon the surface of the earth, but this argument is weak.

The second reason is the unqualified use of the term *arḍ* with respect to the permissibility of its use in some versions of the widely known tradition, and its restriction in others. It is the saying of the Prophet (God's peace and blessings be upon him), "The earth has been made a mosque for me, and a means of purity". In some versions the words, "The earth has been made a mosque for me, and a means of purity", have been recorded, while another version reads: "The earth has been made a mosque for me, and its soil a means of purity". Experts in juristic discourse have differed on whether the qualified term is to be construed as indeterminate or vice versa. The better known opinion in their view is that the indeterminate term is to be construed in terms of the qualified, but this is disputed. The opinion of Ibn Ḥazm is that the qualified term is to be construed in terms of the indeterminate, as the unqualified term has an additional meaning. Those who construed the unqualified term through the qualified term, and assigned the meaning of earth to clean surface material did not permit *tayammum* except with earth. Those who construed the qualified term through the unqualified term, and interpreted the term *ṣaʿīd* as all that is found on the surface of the earth, including its constituents, permitted *tayammum* with sand and pebbles.

That *tayammum* permits the use of all that is produced by the earth, however, is a weak claim since the term *ṣaʿīd* does not encompass all that is produced by the earth. The widest possible connotation of the term *saʿīd* points to all that is included in the soil, but not including lime and arsenic nor snow and grass. Allāh knows best.

The equivocality found in the word *ṭayyib* is also one of the causes of disagreement.

1.3.6. Chapter 6 Factors nullifying this form of purification

About the factors nullifying this form of purification, the jurists agreed that *tayammum* is invalidated by things that invalidate the original purification, which is ablution or bathing. They disagreed in this over two issues. First, does the intention of offering an obligatory prayer other than the obligatory *ṣalāh* that was intended with the *tayammum* invalidate it? Second, whether the existence of water invalidates it?

1.3.6.1. Issue 1: Intention to perform another obligatory prayer

Mālik maintained that the intention of a second prayer invalidates purification for the first prayer. The views of others are opposed to this. The basis for this disagreement revolves around two things. First, whether in the words of the Exalted, "O ye who believe! When ye rise up for prayer . . ", there is an implied text, that is, when ye arise from sleep, or when ye arise in an unclean state? Those who maintained that there is no implied text said that the apparent meaning of the verse indicates *wuḍūʾ* or *tayammum* for each prayer, but the *sunna* has restricted the meaning for *wuḍūʾ*, so *tayammum* retains the original rule. It cannot, however, be argued for Mālik on the basis of this (argument), because Mālik maintains that the verse contains an implied text, according to what he has related from Zayd ibn Aslam in his *al-Muwaṭṭaʾ*.

The second reason is based on the recurrence of the command with the advent of time for each prayer. This is what follows from Mālik's principles, that is, this argument may be adduced on his behalf, and the discussion of this issue has preceded. Those for whom the command does not recur, and they assumed an implied text in the verse, did not uphold that the intention to perform a second *ṣalāh* invalidates *tayammum.*

1.3.6.2. Issue 2: The existence of water

The majority held that the existence of water invalidates this purification. A group of jurists, however, maintained that its invalidation results only from the occurrence of a *ḥadath*. The basis of this disagreement is whether the existence of water removes the prevailing purification that was achieved with earth or whether it negates the initiation of purification with it (earth)? Those who maintained that it negates only the commencement of purification with earth (water being available) said that it is invalidated only by the occurrence of a *ḥadath*. Those who maintained that it (availability of water) invalidates the prevailing purity said that it is invalidated. The definition of the invalidating factor (water) is the eliminator of the prevailing purity.

The majority argued for their opinion on the basis of an established tradition, which is the saying of the Prophet (God's peace and blessings be upon him), "The earth has been made a mosque for me, and a means of purity, as long as water is not found". It is possible to understand from this that as soon as water is found this purification is terminated and removed, while it is also possible to understand it as implying that when water is found it is not valid to undertake this form of purification. The strongest support for the majority comes from the tradition of Abū Saʿīd al-Khudrī, which states that the Prophet (God's peace and blessings be upon him) said, "When you have found water let it touch your skin". The command here is interpreted by the majority to indicate immediate compliance, though it also leads to the preceding possibility, so think over it. Al-Shāfiʿī's acceptance, that the existence of water eliminates this purification, led him to say that *tayammum* does not, in fact, remove the *ḥadath*, that is, it does not generate purification removing the impurity, it merely has the effect of permitting prayer with the existence of the impurity. This is without foundation, as Allāh has called it purification. Some of the disciples of Mālik upheld this opinion saying that *tayammum* does not remove *ḥadath*, for had it done so, only a *ḥadath* would have invalidated it. The answer is that in the case of this purification the existence of water itself is a sort of *ḥadath* specific to it, according to the opinion that the existence of water eliminates it.

Those who upheld that the existence of water invalidates purification agreed that it does so before the commencement of prayer and after it, but they disagreed on whether it invalidates it during prayer. Mālik, al-Shāfiʿī, and Dāwūd held that the availability of water does not invalidate purification during prayer. Abū Ḥanīfa, Aḥmad, and others besides them maintained that it does invalidate it if water becomes available during prayer, and they are closer to preserving the original principle, for it is incompatible with the law to say that the availability of something does not invalidate purification during prayer, but invalidates it at other times. (Paradoxically) Abū Ḥanīfa's opinion had been denounced for a similar contradiction, that is, for holding that laughter during prayer invalidates *wuḍūʾ* (but not outside of prayer), though he was relying on a supporting tradition. Think over this issue, for the answer is evident. There is no evidence in what they (the critics of Abū Hanīfah) desired to use in support of their opinion; namely, the apparent meaning of the words of the Exalted, "And render not your actions vain",[77] as such a person is not annulling his prayer of his own volition; the prayer is annulled by the availability of water, as if he had acquired a *ḥadath* (such as passing wind).

1.3.4. Chapter 7 Acts for which this Form of Purification is a Condition

The majority agreed that acts whose validity or permissibility depends upon this form of purification are those for which ablution (*wuḍūʾ*) is a condition, like prayer, touching the *muṣḥaf*, and so on. They disagreed on whether more than one (obligatory) prayer is permissible with it (i.e. with one *tayammum*)? It is widely known in the Mālik's school that two mandatory prayers are never permitted with it. His opinion differed about two lapsed prayers. It is well-known that one *tayammum* is enough if one of the two prayers is mandatory and the other is supererogatory, if he prays the mandatory first, but if commences with the supererogatory, he cannot observe them with one *tayammum*. Abū Ḥanīfa held that it is permitted to observe two mandatory prayers with a single *tayammum*.

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[77] Qurʾān 47 : 33.

The basis for this disagreement is whether *tayammum* is required for each prayer, either due to the apparent meaning of the verse, or due to the obligation of the recurrence of the command, or due to both.

1.4. THE BOOK OF REMOVAL OF IMPURITIES (*NAJASĀT*)

The comprehensive discussion of the principles and rules of this form of purification is covered in six chapters. The first chapter is about the identification of the *ḥukm*, that is, whether it is obligatory or recommended from the aspect of being absolute, or is stipulated only as a condition for *ṣalāh*? The second chapter relates to the identification of the kinds of impurities. The third chapter is about the objects from which the removal of such impurities is obligatory. The fourth chapter is about the thing with which they are to be removed. The fifth chapter deals with the manner of their removal from each object. The sixth chapter relates to the etiquettes of the privy.

1.4.1. Chapter 1 The *Ḥukm* of this Form of Purification

The source of this chapter from the Book are the words of the Exalted, "Thy raiment purify",[78] and from the *sunna* the words of the Prophet (God's peace and blessings be upon him), "One who performs ablution should snuff up water and reject it, and one who uses stones [in purifying himself after excretion] should use the odd number [like three, five, etc.]". There is also the command of the Prophet (God's peace and blessings be upon him) for cleaning menstrual blood from clothes, and for pouring a pitcher of water over urine, as in the case of the bedouin. In addition, there is his saying about passing a grave in which two persons were buried that "they are being given some torment, but not for a major sin; one of them did not cleanse himself after urinating . . ."

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[78] Qur᾿ān 75 : 4.

The jurists agreed, because of the existence of these transmitted texts, that removal of impurities has been commanded by the law, but they differed over whether this was by way of obligation or recommendation, that is, as a *sunna*, as indicated earlier. One group of jurists said that the removal of impurities is obligatory, which was the opinion of Abū Ḥanīfa and al-Shāfiʿī. Another group of jurists said that it was *sunna muʾakkada* (emphatic), but is not an obligation (*farḍ*). One group said that it is an obligation when remembered, but is waived in the case of forgetfulness. Both opinions are related from Mālik and his disciples.

The reason for their disagreement over this issue stems from three factors. First, there is disagreement about the words of the Exalted, the Glorious, "Thy raiment purify"; whether these are to be taken literally or figuratively. The second reason is the conflict between the apparent meanings of the traditions with respect to this obligation. The third reason is their disagreement about the prescribed commands and proscriptions as related to a rational underlying cause; whether the underlying cause understood from these commands and proscriptions is a corroborative fact that moves the command from an obligation to a recommendation, and the proscription from a prohibition to disapproval, or whether it is not a corroborative fact, and that there is no difference here between rational and non-rational worship. Those who made such a distinction did so because most of the rational *aḥkām* in the law relate to ethical norms or to juristic interests, which are mostly recommended. Those who interpreted the words of the Exalted, "Thy raiment purify", to mean physical raiment said that purification from impurities is obligatory, while those who considered it as symbolic of purity of the *qalb* (heart) did not find any legal evidence in them.

Included in the conflicting traditions in this issue is the widely known tradition about two buried persons and the words of the Prophet (God's peace and blessings be upon him) that "they would be given some torment, but not for major sins; one of them did not cleanse himself after urinating". The apparent meaning of this tradition implies an obligation as torment relates only to an obligation. The tradition opposing this is that established from the Prophet (God's peace and blessings be upon him), that when he was assaulted while praying with the blood and viscera of a slaughtered camel placed upon him, he did not terminate his prayers. The apparent meaning of this is that had the removal of impurities (*najāsa*) been obligatory like the obligation of purification from ritual impurity (*ḥadath*), he would have terminated his prayers. Another related tradition is as follows: "While the Prophet (God's peace and blessings be upon him) was praying once in his sandals he cast them off; the people (praying with him) followed suit but he denied the need for this and said, 'I cast them off as Jibrīl informed me that there was filth on them'".

The apparent meaning is that had it been obligatory why would he have continued the prayer?

Those who adopted the method of preferring the apparent meaning of these traditions upheld obligation when the tradition requiring obligation was preferred, and upheld recommendation when the two traditions requiring a recommendation were preferred; I mean, that the two traditions imply that the removal of the sandals is in the category of an emphatic recommendation. Those who adopted the method of reconciliation include two groups. The first said that it is obligatory when remembering and when able to perform, and that the obligation is dropped in the case of forgetfulness and the incapacity to perform. The other group said that it is always an obligation, but is not a condition for the validity (proper performance) of prayer. This is the fourth opinion on the issue, and (the second part of it) is weak, because *najāsa* is to be removed during prayer.

In the same way, some of the jurists who distinguished between rational and non-rational forms of worship, that is, who deemed the non-rational as emphatic for purposes of obligation, made a distinction between a command prescribed for purification from legal impurity (*ḥadath*) and the command for actual impurity (*najāsa*), as it is known that the purpose of purification from *najāsa* is cleanliness, which is an ethical norm. Purification from *ḥadath*, on the other hand, is non-rational. They also sought support from the corroborating evidence of praying in sandals, as they did from the consensus about ignoring slight filth in some cases, when it is evident that one usually treads on filth with them.

1.4.2. Chapter 2 The Kinds of Impurities

The jurists agreed that the kinds of impurities are essentially four. First, carrion of warm-blooded animals not living in water. Second, flesh of swine, whatever the cause of its death. Third, blood of an animal that does not live in water, and is extracted from a living or dead animal when it flows out, that is, when it is excessive. Fourth, the urine and excrement of human beings. Most of the jurists agreed about the impurity of *khamr*, but there is disagreement about this among some of the traditionists. The jurists disagreed about things besides these. The principles of this chapter are covered in seven issues.

1.4.2.1. Issue 1: Carrion and dead sea animals

They disagreed about carrion that has no blood in it, and about dead sea animals. A group of jurists said that a carcass of a bloodless creature is clean; similarly, the dead sea creatures. This is Mālik's opinion and that of his disciples. A group of jurists maintained equivalence, with respect to impurity, between carrion of a warm-blooded and bloodless creatures, unless it was something over which there is agreement that it is not carrion like worms and what is produced in eatables, but they exempted dead marine animals from this, which is al-Shāfiʿī's opinion. Another group considered carrion and dead sea animals to be the same, exempting bloodless carrion, which is Abū Ḥanīfa's opinion.

The reason for their disagreement is based on their dispute over the meaning of the words of the Exalted, "Forbidden unto you are carrion . . ."[79] The reason, I think, is that they agreed that it belongs to a category of a general word intended for the particular, after which they differed as to which particular is meant here. Some of them exempt from this dead sea animals and carrion of bloodless creatures, some exempted dead sea animals only, while others made an exemption in the case of carrion of bloodless creatures alone. The reason for a disagreement over these exemptions is based upon their disagreement over the restricting evidence. The apparent argument of those who exempted bloodless carrion is based upon the established tradition from the Prophet (God's peace and blessings be upon him) relating to flies when they fall into food. They said that this indicates the cleanliness of flies, and there is no underlying reason for this except the fact that they are bloodless.

Al-Shāfiʿī's view is that this is particular to flies, because of the words of the Prophet (God's peace and blessings be upon him), "In one of its wings is disease and in the other its cure". Al-Shāfiʿī deemed weak the derivation from the tradition that the apparent meaning of the verse implies two separate prohibited impurities: carrion and blood. The first is acted upon by ritual slaughter for purification, because of which a slaughtered animal is permitted for consumption by agreement, while blood is not purified by slaughter and has a separate *ḥukm*. Thus, how is it possible to combine the two and maintain that blood is the cause of the prohibition of carrion? This is (a) strong (argument) as you can see, for if blood had been the cause of prohibition of carrion, the prohibition of eating (dead) animals would not have been lifted by slaughter. The prohibition of the blood still remaining in it and which has not been eliminated yet would have subsisted, and permissibility would only apply after the complete exhaustion of the blood from the animal; the cause having been removed, the effect would necessarily follow. If the cause is found, but the effect is absent, then, this is not the real cause. An example of this is the case of grape juice. If the prohibition is lifted from grape juice, it necessarily follows that intoxication be absent, that is if we believe intoxication to be the cause of prohibition.

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[79] Qur'ān 5 : 3.

Those who exempted dead sea animals, adopted the established tradition of Jābir, which states "that they ate for several days of the whale that had been thrown out of the sea and that they derived their supplies from it. When they informed the Messenger of Allāh (God's peace and blessings be upon him) about this, he approved their act saying, 'Is something left of it?'" This is an evidence indicating that he did not permit this out of necessity arising from exhaustion or lack of food. They also argued on the basis of the words of the Prophet (God's peace and blessings be upon him), "Its water is pure and its dead creatures are permitted (for consumption)".

Abū Ḥanīfa, on the other hand, preferred the general meaning of the verse over this tradition, either because the verse is definitive and the tradition probable, or he held that this was an exemption for them, that is, the exemption in the tradition of Jābir, or because he held that the whale had died due to a cause, which was the turbulence of the sea that threw it out on the shore, as carrion is that which dies of its own without an external cause.

Another reason for their disagreement here is whether the pronoun in the words of the Exalted, "[The catch of the sea] and its food is permissible for you, a provision for you and for seafarers",[80] refers to the sea or to the fish itself. Those who associated it with the sea said that its food is that which is on the surface, while those who associated it with the catch said that what is permissible is only what is caught. In addition to this, the Kūfīs also relied on a tradition in which the prohibition of consuming fish floating on the surface is laid down, but which is weak according to the others.

1.4.2.2. Issue 2: Parts of dead animals

Just as the jurists differed about the (*ḥukm* of the) kinds of carrion they disagreed about (the *ḥukm* of) the parts of dead animals, which they had deemed as carrion by agreement. Thus, they concluded that flesh of the parts of *mayta* was also *mayta*, but they disagreed about bones and hair. Al-Shāfiʿī held that bones and hair were also *mayta*, while Abū Ḥanīfa held that they are not. Mālik made a distinction between hair and bones saying that bones are *mayta*, but not hair.

The reason for their disagreement relates to their dispute as to what activity in the limbs can be assigned the term "life". Those who maintained that the activity of growth and food intake depicts life said that when the activity of growth and food intake is absent from hair and bones they become *mayta*. Those who maintained that the term "life" is only applied to the senses, and as hair and bones do not possess the capacity to sense, they are not *mayta*. Those who distinguished between the two, assigned to bones the capacity to sense, but not to hair. There is a disagreement about the capacity of the bones to sense, and the matter is disputed among the physicians. The evidence proving that food intake and growth are not that kind of life to the absence of which the term *mayta* can be applied is the agreement of all jurists that a part of an animal cut off when it is alive is *mayta*. This is based on a tradition, which is the saying of the Prophet (God's peace and blessings be upon him), "Whatever is cut off from an animal, when it is alive, is *mayta*". They agreed, however, that hair sheared from an animal is clean. Further, if the term *mayta* were to be applied to things whose growth and food intake has stopped, the uprooted vegetation would also be termed as *mayta*, as vegetation also shows growth and food intake. To this al-Shāfiʿī may reply that food intake, to the absence of which the term death is applied, is limited to beings endowed with the capacity to sense.

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[80] Qurʾān 5 : 96. Pickthall's translation changed.

1.4.2.3. Issue 3: Skins of dead animals

They disagreed about the utilization of skins of dead animals. A group of jurists upheld the unconditional permissibility of the utilization of skins, whether tanned or not, while another group held the opposite view, that is, they are not to be utilized at all, even when tanned. A third group of jurists made a distinction between tanned an untanned skins, maintaining that tanning purifies them, which is al-Shāfiʿī's and Abū Ḥanīfa's opinion. There are two narrations from Mālik about this. The first is the same as that of al-Shāfiʿī, while the second is that tanning does not purify them, but they can be used if no moisture is involved. Those who maintained that tanning is a purifying factor, agreed that it purifies the skins of the animals that can be ritually slaughtered, that is, those permissible for consumption, but they disagreed about those to which ritual slaughter does not apply. Al-Shāfiʿī held that it purifies the skins of ritually slaughtered animals only, as slaughter is a substitute for the purpose of purification. Abū Ḥanīfa maintained the effectiveness of tanning in purifying the skins of all animals with the exception of swine. Dāwūd said that it purifies all, even the skins of swine.

The reason for their disagreement is the conflict of traditions on this issue. The absolute permissibility of its utilization is laid down in Maymūna's tradition, when the Prophet (God's peace and blessings be upon him) was passing by a carcass he said, "Would that you had made use of its skin". Its absolute prohibition is derived from the tradition of Ibn ʿAkīm, which states that "the Messenger of Allāh (God's peace and blessings be upon him) wrote that neither its hide nor its sinew are to be utilized". This was a year before his death. In some traditions the command conveys (the permissibility of) their utilization after tanning, but not before. The established tradition for this is that of Ibn ʿAbbās that the Prophet (God's peace and blessings be upon him) said, "When the hides are tanned they become purified".

The conflict of these traditions led the jurists to differ in their interpretation. One group adopted the method of reconciliation on the basis of the tradition of Ibn ʿAbbās, distinguishing between tanned and untanned skins. Another group adopted the method of abrogation, and relied on the tradition of Ibn ʿAkīm, because they date it as late as one year before the Prophet's death. A third group preferred Maymūna's tradition maintaining that it entails an addition over the tradition of Ibn ʿAbbās, as the prohibition of utilization prior to tanning cannot be derived from Ibn ʿAbbās's tradition, which speaks of purity, but utilization is different from purification. While each pure thing may be utilized, it is not necessary that each usable thing is pure.

1.4.2.4. Issue 4: Prohibition of blood

The jurists agreed that blood of land animals is unclean, but they differed about the blood of fish. Similarly, they disagreed about small quantities of blood of animals other than those of the sea.

A group of jurists said that the blood of fish is clean, and this is one of two opinions from Mālik and is also the opinion of al-Shāfiʿī. Another group of jurists said that it is unclean on the basis of the rule for blood. This is Mālik's opinion in *al-Mudawwana*. Similarly, a group of jurists said that small quantities of blood are overlooked, while others said that the *ḥukm* of large and small quantities is the same. The former view is held by the majority.

The reason for their disagreement over the blood of fish relates to their disagreement whether dead fish is *mayta*. Those who considered dead fish to be included in the general prohibition for *mayta*, deemed its blood to be the same, while those who exempted it from the general prohibition, exempted its blood on the same analogy. There exists a weak tradition related to this, and this is the saying of the Prophet (God's peace and blessings be upon him), "Two kinds of *mayta* and two kinds of blood have been permitted to us, locust and whale, and liver and spleen".

Their disagreement over large and small quantities of blood relates to the imposition of the qualified meaning over the absolute or the imposition of the absolute meaning over the qualified. The prohibition of blood has been laid down in absolute terms in the words of the Exalted, "Forbidden unto you are carrion and blood and swine-flesh",[81] while it is found in qualified terms in His words: "Say: I find not in that which is revealed to me aught prohibited to an eater that he eat thereof, except it be carrion, or blood poured forth, or swine-flesh—for that verily is foul".[82] Those who imposed the qualified meaning over the absolute meaning, and these are the majority, said that it is only blood that is "poured forth" that is prohibited and unclean. Those who decided according to the absolute meaning in preference to the qualified, said that blood "poured forth" is blood in large quantities, while that which is not "poured forth" is blood in small quantities, and both are prohibited. They also supported their view by saying that a thing which is unclean in essence cannot be clean in its constituent parts.

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[81] Qurʾān 5 : 3.

1.4.2.5. Issue 5: Pollution of urine

The jurists agreed about the uncleanliness of human urine and excrement, except for the urine of a male infant. They disagreed about what is besides this with respect to all animals. Al-Shāfiʿī and Abū Ḥanīfa held that urine and excrement of all animals are unclean, while a group of jurists upheld their absolute cleanliness, that is, offal of all animals from urine and excrement. A group of jurists said that the *ḥukm* of their urine and dung is dependent upon the *ḥukm* of their flesh. The animals whose flesh is prohibited, their urine and dung are prohibited and unclean, while the animals that are fit for consumption their urine and dung are clean, except for those animals that consume filth. The animals that are considered abominable (for food), their urine and dung are also abominable. This was Mālik's opinion, as well as that of Abū Ḥanīfa with respect to beasts of prey.

There are two reasons for their disagreement. The first is their dispute over the significance of the ordained permissibility of praying in the resting place of animals, the permission granted by the Prophet (God's peace and blessings be upon him) to the ʿUrniyīn to drink the urine and milk of camels, as well as the meaning of the prohibition of praying in the resting place of camels. The second reason is the analogy, for this purpose, of all other animals upon man. Those who constructed the analogy of all other animals upon man, maintaining that this belongs to the category of higher *qiyās*, did not consider the permissibility of praying in the resting places of animals as implying the cleanliness of their urine and dung, but deemed it to be a *ḥukm* resting upon a revelatory non-rational source. Those who interpreted the prohibition of praying in the resting places of camels to imply uncleanliness, and deemed the permissibility of drinking the urine of camels in the case of the ʿUrniyīn as medication, which is permitted on principle, said that all urine and dung is unclean. Those who interpreted the tradition permitting prayer in the resting places of animals as implying the cleanliness of their excrement and urine, as also in the case of the ʿUrniyīn, and deemed the prohibition of praying in the resting places of camels an act of worship and as conveying a meaning other than uncleanliness, the difference, according to them, between man and animals being that the excrement of man is repulsive by nature, while that of animals is not, deemed the excrement as being dependent upon (the permissibility) of the flesh of animals. Allāh knows best. Those who based the analogy of all other animals upon domesticated animals, deemed all excrement to be clean and not prohibited, except for the excrement of man.

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[82] Qurʾān 6 : 146.

The issue is subject to interpretation, and had it not been disallowed to issue an opinion that no one has expressed before among the widely known opinions, even when the issue is disputed, it would be said that the distinction be based upon those emitting an offensive smell and are considered filthy and those that do not emit such an odour and are not deemed filthy, especially those that have a pleasing smell, due to their agreement about the permissibility of ambergris, which according to most is the excrement of a marine animal, and about musk, which is a residue from the blood of an animal in which musk is formed, as is known.

1.4.2.6. Issue 6: Negligible filth

The jurists disagreed about small amounts of filth into three opinions. A group of jurists held that small and large quantities are the same. Among those who held this opinion is al-Shāfiʿī. Another group of jurists held that small amounts of filth are overlooked, and they fixed this to be an amount equal to the size of an impure (alloyed) *dirham*. Among those who held this opinion is Abū Ḥanīfa. Muḥammad ibn al-Ḥasan deviated from this saying that if the filth covers one-fourth or less of the dress, prayer is permitted in it. A third group of jurists held that small and large quantities of filth are the same, except in the case of blood as has been mentioned. This is Mālik's opinion. There are two narrations from him about menstrual blood, the one widely known being that it is similar to all other kinds of blood.

The reason for their disagreement is related to their dispute over the analogy of minor uncleanliness upon the exemption disregarding the remaining trace of filth in the case of cleaning with stones. Those who permitted such an analogy upheld the permissibility of minor uncleanliness, and for this reason they limited it to the size of a *dirham*, the size of which is the same as the size of the outlet. Those who held that these and other exemptions cannot serve as a basis for analogy, did not allow it.

The reason for the exemption granted by Mālik in the case of blood has already preceded, while the explanation of Abū Ḥanīfa's opinion is that filth is divided, according to him, into gross and light. In the case of gross filth, the amount of exemption is limited to the size of a *dirham*, while light filth is exempted up to the extent of a fourth of the dress. Light filth in his view is like the excrement of beasts of burden and those from which the streets are seldom free. This division by him into gross and light is excellent.

1.4.2.7. Issue 7: Semen

They disagreed about semen, whether it is unclean. A group, from among them, Mālik and Abū Ḥanīfa, held that it is unclean, while another group maintained that it is clean, which was the opinion of al-Shāfiʿī, Aḥmad, and Dāwūd.

There are two reasons for their disagreement. First is the variation in ʿĀʾisha's tradition. In some versions it says, "I used to wash off semen from the clothes of the Messenger of Allāh (God's peace and blessings be upon him), and he would go out to pray in them with water-marks on them." In others it says, "I used to scrape off semen from the clothes of the Messenger of Allāh (God's peace and blessings be upon him)", and that "he used to pray in them". The addition is recorded by Muslim. The second reason is the vacillation of semen between resemblance with the unclean excrements of the body and between resemblance with other clean secretions, like milk etc.

Those who reconciled all the traditions, interpreting washing to be for the purpose of cleanliness, and derived from scraping that does not purify an evidence of its purity, and made an analogy for semen upon other pure secretions, did not deem it unclean. Those who preferred the traditions of washing over those of scraping, and considered semen to be unclean, as it resembled, in their view, to unclean excrements more than clean secretions, maintained that it is unclean. So also those who believe that uncleanliness is removed by scraping. They said that scraping itself indicates its uncleanliness, as does washing. This is Abū Ḥanīfa's opinion. On this basis there is no proof with those who maintain their opinion (that semen is clean) on the words that "he used to pray in them", on the other hand, there is evidence in it for Abū Ḥanīfa that uncleanliness can be removed without water, which is contrary to the opinion of the Mālikites.

1.4.3. Chapter 3 The Objects from which Impurities are to be Removed

The objects from which impurities are to be removed are three, and there is no dispute about them. First is the body, then clothes, and finally the mosques and the places of prayer. The jurists agreed about these three objects as they are expressly mentioned in the Book and the *sunna*.

Clothes are mentioned in the words of the Exalted, "Thy raiment purify", according to those who interpreted this literally, and in the commands of the Prophet (God's peace and blessings be upon him) about washing away the blood of menstruation from clothes and about pouring water over the parts affected by the urine of the child who urinated in his lap. The mosques are covered by the command of the Prophet (God's peace and blessings be upon him) to pour a pitcher of water over the urine of the bedouin, who had urinated in a corner of the mosque. Similarly, it is established from the Prophet (God's peace and blessings be upon him) that "he ordered the washing of *madhy* from the affected parts of the body and the washing away of impurities from the two outlets".

The jurists differed aboutwhether the entire penis is to be washed because of *madhy* (prostatic secretion prior to cohabitation). This is based on the widely known tradition of ʿAlī from the Prophet (God's peace and blessings be upon him) when he was asked about prostatic fluid. He said, "He should wash his penis and perform ablution". The reason for the disagreement is whether the obligation relates to the entire affected object or to the actually affected parts of it. Those who maintained that it applies to the whole, that is, to the entire object to which the term is applied, said that the entire penis is to be washed, while those who maintained that it applies to the essential minimum part of the object said that only the affected part is to be washed on the analogy of urination.

1.4.4. Chapter 4 The Means of Removal

The Muslim jurists agreed that clean purifying water removes impurities from those three objects. They also agreed that stones can remove impurities from the two outlets. They disagreed about removal (of impurities) with what is besides these from among fluids and solid substances. A group of jurists held that anything clean can remove impurities whether it is a fluid or a solid, and whatever the affected object. This was upheld by Abū Ḥanīfa and his disciples. Another group of jurists said that impurities cannot be removed by things other than water, except for stones, which are agreed upon. This was upheld by Mālik and al-Shāfiʿī.

They also disagreed about the removal of impurities with bones and dung in the case of *istinjāʾ*. A group of jurists prohibited this, but permitted their use with other things that can clean, though Mālik exempted from these esteemed eatable things like bread. The same is said about things the use of which would be immoderate like gold and gems. One group restricted cleaning to stones only, which is the opinion of the Ẓāhirites, while another group permitted it with bones, but not dung, though this was considered abominable by them. Al-Ṭabarī deviated from all this and permitted in *istinjāʾ* wiping with all things clean and unclean.

The reason for their disagreement about the removal of impurities with things other than water and for objects other than the outlets is their dispute as to whether the purpose of removing impurities with water is only the destruction of the essence of the impurity, in which case other things destroying the essence would be deemed equivalent to water, or whether water has an additional attribute not found in other things. Those to whom no additional attribute was visible in water, upheld the validity of cleaning with all clean fluids and solids. This meaning was supported by the agreement over the removal of impurities from the outlets with things other than water. It is also supported by what is laid down in a tradition from Umm Salama who said to the Prophet (God's peace and blessings be upon him), "I am a woman having a long trailing dress and I walk over filthy spots". The Messenger of Allāh (God's peace and blessings be upon him) said to her (Umm Salama), "It (the impurity) is cleansed by what follows". In addition to this, there are traditions about similar cases recorded by Abū Dāwūd, like the words of the Prophet (God's peace and blessings be upon him), "If one of you walks over filth in his sandals, the dust is their purifier", as well as other similar reports.

Those who perceived an additional attribute in water, prohibited such cleaning except for the exempted case, which is that of the outlets (with stones). When the Ḥanafites demanded from the Shāfiʿites an explanation of such an additional attribute for water, the latter resorted to the argument that it is an act of worship, for they were not able to provide a rational reason for it. They even conceded that water does not do away with impurity in a rationally satisfying way, and the removal is assigned a legal recognition. There were extended discourses and polemics between them over the question of whether the removal of impurity with water is an act of worship or has a rational cause coming down as a precedent. The Shāfiʿites were constrained to establish a (special) legal virtue for water, which is not found in other things, in meeting the *aḥkām* of uncleanliness, though it is similar to other things in the (actual) removal of the substance (of pollutions).

The purpose (the Shāfiʿites added) is to meet the (requirements of the) *ḥukm* that singles out water as effective in the removal of the substance of impurities, as sometimes the impurity is already removed, but the *ḥukm* subsists. They thus relegated the purpose, although they had previously agreed with the Ḥanafites that purification from uncleanliness is not a legal purification, that is *sharʿī* and did not therefore require intention (*niyya*). If they had tried to distinguish themselves from them (the Ḥanafites) by saying that they did perceive in water a quality of dissolving impurity and contamination and of extracting them from clothes and bodies, a quality not found in other things—for which reason people rely on water for cleansing their bodies and clothes—it would have been a better statement, while others are far from convincing. Perhaps it would be necessary to believe that the *sharʿ* (law) has relied on water for washing in each instance because of this inherent quality. If they had said so, they would have introduced into the prevailing *fiqh* something consistent with its meaning. The jurist resorts to saying that it (a certain thing) is an act of worship when his method imposes constraints upon him in arguing with the contender. Ponder over this, for it is evident from their treatment (of issues) on most occasions.

The reason for their disagreement about (the use of) animal droppings (in cleaning) is based on their dispute about the meaning of the proscription reported from the Prophet about it, that is, the prohibition by the Prophet (God's peace and blessings be upon him) that *istinjāʾ* is not to be performed with bones or dung. Those for whom the proscription indicated the invalidity of the thing itself did not permit it while those who did not view it as such, as uncleanliness has a rational meaning, interpreted this to mean abomination, but did not consider it as invalidating *istinjāʾ* itself. Those who made a distinction between bones and dung, did so because they considered dung as unclean.

1.4.5. Chapter 5 The Description of the Act of Removal

The jurists agreed about the manner with which impurities are removed, and it is of three types, washing, wiping, and sprinkling, because these have been mentioned in the law and established through the traditions. They agreed that washing applies to all kinds of impurities and for all locations of uncleanliness, and that wiping is permitted with stones for the outlets and with dry herbage for boots and sandals. They agreed, likewise, that the long trailing part of the female dress is purified by the dry herbage in accordance with the apparent meaning of the tradition of Umm Salama.

They disagreed on three points related to these things and which form the principles of this chapter. The first is about sprinkling, as to what kind of impurity that can be purified with it. The second is about wiping, as to what is its object and the kind of impurity it can remove, after agreeing about what we have mentioned. The third point is about the stipulation of number (of repetitions) for washing and wiping.

A group of jurists said that sprinkling is specific to the urine of a child, who has not weaned. Another group of jurists made a distinction in this about the urine of a male and that of a female, saying that the urine of the male is to be sprinkled over, while that of the female is to be washed. A third group said that washing is the prescribed purification for a thing the uncleanliness of which is confirmed, while sprinkling is for that which is doubted. This is the opinion of Mālik ibn Anas, may Allāh be pleased with him.

The reason for their disagreement stems from the conflict of the apparent meanings of the traditions related to the issue, that is, their disagreement over the meanings. This is so as there are two established traditions about sprinkling. First is the tradition of ʿĀʾisha "that children used to be brought to the Prophet (God's peace and blessings be upon him) and he used to pray for them and rub the top of their mouths with dates moistened in his own mouth as well as pet them. A child was brought to him and he urinated on him. He called for water and poured it over the affected spot but did not wash it." In some versions it says, "he sprinkled over it but did not wash it". This has been recorded by al-Bukhārī. The other is the widely known tradition of Anas in which he described the prayer of the Messenger of Allāh (God's peace and blessings be upon him) in his house saying, "I took hold of the mat that had become dark because of old age and sprinkled water over it". Some of the jurists acted in accordance with the implication of ʿĀʾisha's tradition saying that this is specific to the urine of the child, and they exempted it from other categories of urine. Others preferred the traditions about washing to this tradition. This is Mālik's opinion, who confined the use of sprinkling to what is in the tradition by Anas and which relates to a garment the impurity of which is doubted, according to the apparent meaning.

Those who distinguished between the urine of a male child from that of a female relied on what has been related by Abū Dāwūd from Abū al-Samḥ about the saying of the Prophet (God's peace and blessings be upon him), "The urine of the female (child) is to be washed, and that of the male is to be sprinkled over". Those who did not make this distinction relied upon the analogy of the female child over the male in whose case an established tradition is laid down.

A group of jurists permitted wiping of any smeared object, in accordance with Abū Ḥanīfa's opinion, if the substance of the impurity was so removed; similarly, in the use of rubbing on the basis of analogy drawn from the views of those who maintain that each thing that removes the impurity can purify. Another group of jurists did not permit this, except in the cases agreed upon, that is, the outlet, the trailing dress of a woman, and boots, which are to be wiped with dry herbage and not with an unclean or undried object. This is Mālik's opinion. These jurists did not extend wiping to objects other than those mentioned in the law, while another group extended it to other objects.

The reason for their disagreement over this is whether wiping has been laid down in those as an exemption or as a primary *ḥukm*. Those who said that it is an exemption did not extend it to other things, that this, they did not construct an analogy upon it, while those who said that it is a primary *ḥukm* among the *aḥkām* of impurities, like the *ḥukm* of washing, did extend it.

In their dispute about number (of repetitions), a group of jurists stipulated only the removal of impurity in washing and wiping, while another group stipulated number (of repetitions) in wiping with stones as well as in washing. Some of those who stipulated number in washing restricted it to those objects about which number has been specifically mentioned in the transmitted texts, while others extended this to the remaining impurities also. Jurists who did not stipulate number, neither for washing nor for wiping, are Mālik and Abū Ḥanīfa. Those who stipulated number in wiping with stones, that is, three stones and nothing less, include al-Shāfiʿī and the Ẓāhirites. Among those who stipulated number in washing, are some who restricted it to the object that has been mentioned in the texts, that is, washing a utensil seven times after it has been licked by a dog, are al-Shāfiʿī and those who adopted his opinion. Those who extended this stipulating washing of impurities seven times include, to the best of my knowledge, Aḥmad ibn Ḥanbal. Abū Ḥanīfa stipulates washing thrice in the case of impurities that cannot be perceived, that is, which are legal impurities.

The reason for their disagreement about this is the conflict of the interpreted meaning of this form of worship with the apparent implication of the tradition in which number has been laid down. Those for whom the meaning of the command conveyed the removal of the substance of the impurity itself, did not stipulate number at all. They deemed the stipulation of number in wiping with stones, laid down in the established tradition of Salmān that contains the command about not performing *istinjāʾ* with less than three stones, as a recommendation, so as to reconcile the interpreted meaning of the law with the implication of this tradition. They also deemed the number stipulated about washing of the utensil following licking by a dog as an act of worship not based upon impurity, as has preceded concerning Mālik's opinion. Those who decided according to the literal meaning of these traditions, exempting them from the interpreted principle of the law, restricted the prescribed number to stated objects. Those who preferred the literal meaning over the interpreted principle extended the condition of number to all the remaining impurities.

The evidence of Abū Ḥanīfa about washing thrice is the saying of the Prophet (God's peace and blessings be upon him), "When any of you wakes up from sleep let him wash his hand thrice before putting it into his utensil".

1.4.6. Chapter 6 The Etiquette of *Istinjāʾ*

The majority of the *aḥkām* of *istinjāʾ* and of visiting the privy are interpreted by the jurists as a recommendation (*nadb*). These are known through the *sunna*, and include seeking a remote place when answering the call of nature—according to the opinion in the school—refraining from speech, the prohibition of performing *istinjāʾ* with the right hand, not touching the genitals with the right hand, and others besides these that have been laid down in the traditions.

They disagreed about one widely known issue and that is the facing of the *qibla* or turning the back to it while relieving oneself or urinating. The jurists have three opinions about it. First, that it is not permitted at all to face the *qibla* while relieving oneself, whether in the privy or at any other location. Second, that this is permitted absolutely. Third, that it is permitted within settlements and townships, but not in the desert or places other than settlements and towns.

The reason for their disagreement are two established but conflicting traditions. First is the tradition of Abū Ayyūb al-Anṣārī in which the Prophet (God's peace and blessings be upon him) is reported to have said, "When you visit the privy, do not face the *qibla* or turn your back toward it, but turn toward the east or the west".[83] The second tradition is related from ʿAbd Allāh ibn ʿUmar, who said, "I ascended the roof of my sister Ḥafṣa's house and saw the Messenger of Allāh (God's peace and blessings be upon him) on top of two bricks, answering the call of nature, with his face toward Syria and his back toward the *qibla*".

The jurists are divided over these two traditions into three opinions. The first opinion is based upon the method of reconciliation, the second on the method of preference, and the third is the method of resorting to the original permission when there is a conflict. I mean by original permission (*barāʾa aṣlīya*), the absence of a *ḥukm*.

Those who adopted the method of reconciliation construed the tradition of Abū Ayyūb al-Anṣārī to relate to the desert (open spaces), when there is no cover, and construed the tradition of Ibn ʿUmar to relate to the existence of a cover. This is Mālik's opinion.

Those who adopted the method of preference, preferred the tradition of Abū Ayyūb, for in case of conflict of two traditions, one prescribing a law and the other conforming to the general principle, which in this case is the absence of a *ḥukm*, and it is not known which one precedes the other in time, it is necessary to adopt the tradition that lays down a law. The reason for being obliged to act according to one tradition that has been transmitted by reliable narrators and to relinquish the other, although it has also been reported by reliable narrators, and despite the possibility that one of them was later than the other or it was laid down before it, is that we are not permitted to relinquish a law that must be acted upon as an obligation in the face of a conjecture imposing an abrogation for which we have no authority, unless it has been related that this tradition was later. The probabilities that are relied upon for the *aḥkām*, that is, those that impose the *aḥkām* or withdraw them, are limited by the law. Moreover, not every probability that may be agreed upon is accepted. Thus, they say that the liability to act is not imposed by probable conviction, but is imposed by a definitive rule, they mean by it the existence of a definitive rule that makes it obligatory to act according to a probability.

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[83] This is because Medina, where the Prophet lived is north of Mecca, the seat of the *qibla*.

This method that we have described is the method of Abū Muḥammad ibn Ḥazm al-Andalusī. This is an excellent method based on the principles of juristic reasoning, and it relies on the rule that doubt cannot remove what has been established by an evidence from the law. Those who adopted the method of recourse to the underlying principle in case of conflict have erected it on the rule that doubt terminates the *ḥukm* and withdraws it, and it is as if there is no rule. This is the method of Dāwūd al-Ẓāhirī, but Abū Muḥammad ibn Ḥazm opposed him on this issue, even though he is one of his followers.

The Qāḍī (Ibn Rushd) said, "This is what we sought to establish in this book from the issues we thought take the course of principles, and these are what have been expressed more often in the law, that is, most of them relate to issues expressly stated in the law, either directly or inherently. When we remember anything of this nature, we verify it in this book. Most of what I have relied upon, with respect to attributing opinions to their authors, is from *Kitāb al-Istidhkār*,[84] and I permit (request) whosoever finds errors on my part to correct them. It is Allāh Who grants help and success."

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[84] It has been found on certain occasions that opinions have incorrectly been attributed to the Ḥanafites and the Shāfiʿites or to the founders of these schools. This could be the case for other jurists too. Ascertaining whether each and every opinion has been correctly attributed to its author is beyond the scope of this translation.

II

THE BOOK OF PRAYER (*ṢALĀH*)

Prayer is divided initially, and as a whole, into two kinds: obligatory and recommended. The discussion covering the principles of this form of worship is confined to four categories, that is, four parts. Part One is about the identification of the obligation and matters related to it. Part Two is about the identification of its three conditions: the condition of obligation, condition of validity, and the condition of completion. Part Three covers the identification of its acts and words, and these are its essential elements (*arkān*). Part Four is about its delayed performance and the identification of forms of rectification following irregularity, for it is the delayed performance of an act that would not be deemed as lapsed had it been duly performed.

2.1. Part 1: Identification of the Obligation

In this part there are four issues that are taken to be the principles of this topic. The first issue is about the exposition of its obligation. The second issue is about the number of its (daily) obligations. The third issue is about the individual for whom it is obligatory. The fourth issue is about the consequential obligation because of intentional relinquishment.

2.1.1. Issue 1: The obligation

Its obligation is evident from the Book, the *sunna*, and consensus. The fact that it is so widely known makes its discussion unnecessary.

2.1.2. Issue 2: The number of obligatory daily prayers

There are two opinions about the number of daily obligations. First is the opinion of Mālik, al-Shāfiʿī, and the majority, which maintains that only five (daily) prayers are obligatory. The second is the opinion of Abū Ḥanīfa and his disciples which maintains that the *witr* prayer is also obligatory along with the five (daily) prayers. Their disagreement about whether the obligation established from the *sunna* is *wājib* or *farḍ* is of no consequence.[85]

The reason for their disagreement lies in conflicting traditions. The traditions that confine the obligation to five prayers are explicit, widely known and well-established. The most vivid of these is the tradition of *isrāʾ*, "When the obligation reached the number five, Mūṣā (Moses) said to him (Muḥammad), 'Turn back to your Lord, for your *umma* cannot bear this'. He said, 'So I did'. The Exalted said, 'They are five but they are fifty (in reward value), My decree is not altered'". Further, there is the widely known tradition of the bedouin, who asked the Prophet (God's peace and blessings be upon him) about it and the Prophet (God's peace and blessings be upon him) said, "Five prayers in a day and night". He asked (again), "Am I obliged for more besides these?" He replied, "No, unless you observe them voluntarily".

Among the traditions that convey the meaning of the obligation of *witr* is that of ʿAmr ibn Shuʿayb from his father and from his grandfather "that the Messenger of Allāh (God's peace and blessings be upon him) said, 'Allāh has added a prayer for you, and this is the *witr*, so keep it up'". They also include the tradition of Ḥāritha ibn Ḥudhāfa who said, "The Messenger of Allāh (God's peace and blessings be upon him) came out to us and said, 'Allāh has commanded you to observe a prayer, which is better for you than the red camels. This is the *witr*. He has determined that you observe it in the time between the night prayer (*ʿishāʾ*) and the morning prayer (*fajr*)'". In addition, there is the tradition of Burayda al-Aslamī "that the Messenger of Allāh (God's peace and blessings be upon him) said, 'The *witr* stands confirmed, and he who does not observe it is not one of us'".

Those who maintained that an addition (over the five daily prayers) amounts to an abrogation, and for whom these traditions (about *witr*) did not reach a level of authenticity sufficient to abrogate the widely known and established traditions (that confine the obligation to five), preferred them (the latter). Further, the limitation of five is established by the tradition of *isrāʾ* in the words of the Exalted, "My decree is not altered", which apparently imply that nothing is to be increased or decreased, though they convey a stronger probability of decrease. And what is revealed as an informative sentence (not a command) is not subject to abrogation. Those for whom the strength of the traditions, which imply an addition over five prayers, reached a level where it was obligatory to act according to them deemed it necessary to abide by the addition, especially those who held that an addition does not imply abrogation. This, however, is not Abū Ḥanīfa's opinion.

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[85] The distinction between *farḍ* and *wājib* is maintained by the Ḥanafites.

2.1.3. Issue 3: The person for whom prayer is obligatory

The person for whom it is obligatory is every pubescent Muslim, and there is no dispute about this.

2.1.4. Issue 4: The obligation arising from intentional relinquishment

With respect to the obligation in the case of the person who relinquishes it intentionally, and when he is ordered to pray refuses to do so, but does not deny its obligation, a group of jurists said that he should be executed, while another group said that he is to be punished and confined. Among those who maintained that he is to be executed, some made his execution obligatory as a result of his disbelief (*kufr*). This is the opinion of Aḥmad, Isḥāq, and Ibn al-Mubārak. Others, who upheld his confinement and punishment till he resumes praying, determined it as a *ḥadd* penalty, which is the opinion of Mālik, al-Shāfiʿī, Abū Ḥanīfa, his disciples, and of the Ẓāhirites.

The reason for this disagreement stems from the conflict of traditions. It is established from the Prophet (God's peace and blessings be upon him) who said, "Shedding the blood of a Muslim does not become lawful, except in three cases: disbelief after faith, fornication after marriage, and killing a human being when it is not in retaliation for another life". It is also related from the Prophet (God's peace and blessings be upon him) in the tradition of Burayda that he said, "The distinguishing factor between them and us is prayer, so he who relinquishes it has committed disbelief". In the tradition of Jābir, the Prophet (God's peace and blessings be upon him) said, "It is the (basis for) distinction between obedience and disbelief", or he said, "Polytheism is nothing but the relinquishment of prayer". Those who understood from the term disbelief here to be actual rejection deemed this tradition to be a commentary on the words of the Prophet (God's peace and blessings be upon him) "disbelief after faith [occurring in the tradition quoted above]". Those who deemed it (the use of the term disbelief here) merely as censure and reproach said that it means that his acts are like those of the disbelievers and that he resembles the disbelievers. It is just like saying, "a fornicator does not commit fornication and remain a believer" or "a thief does not commit theft and remain a believer". Thus, they held that *ḥadd* penalty is not to be imposed in this case.

The opinion of those who said that he is to be executed by way of *ḥadd* (penalty) is weak. They have nothing to rely on, except for a weak *qiyās al-shabah*, if that is possible here, that is, the comparison of prayer, the foremost command, with murder, the foremost prohibition. The term "*kufr*" is literally applied to mean "denial", and it is known that the person relinquishing prayer is not denying, unless he relinquishes it with such a belief. We, therefore, have two choices. First, if we interpret the tradition in the sense of "disbelief", it is binding on us to construe that the Prophet (God's peace and blessings be upon him) meant a person who rejects it while disbelieving it, thus committing disbelief. Second, to assign to the term "*kufr*" a meaning other than its primary application, and this is possible in two ways. First, by assigning to the individual the *ḥukm* assigned to a disbeliever, that is, with respect to execution and the remaining *aḥkām* for the disbelievers, even when he is not denying belief. Second, by saying that all his acts are like those of the disbelievers by way of censure and deterrence, in view of the fact that a person who fails to perform the prayer resembles the disbelievers in his attitude, for the disbeliever does not pray. This is similar to the saying of the Prophet (God's peace and blessings be upon him), "The fornicator does not commit fornication and remain a believer".

The decision by interpretation that his *ḥukm* is the *ḥukm* of a disbeliever cannot be taken, except through an evidence, for it is a *ḥukm* that has not been established by the law in a way that a decision can be based upon it directly. As there is no evidence indicating actual disbelief, which amounts to denial in our view, it is necessary that it be construed in its allegorical sense and not in a manner that has not been established in the *sharʿ*. In fact, its opposite has been established, which is that the shedding of his blood is not permissible as he does not fall under any of the three cases mentioned in the law. So ponder over this, for it is evident. Allāh knows best. This means that there are two choices for us. We may either imply the existence of an assumed word in the text, if we regard failure to pray tantamount to disbelief, in which case it conforms to its meaning in the law, or we may to interpret it in the metaphorical sense. The interpretation leading to the application of the *ḥukm* of a disbeliever in all its manifestations, while the person is a believer, is something that is inconsistent with the general principles, especially when the tradition establishes the cases in which execution is applied due to disbelief or as a *ḥadd*. For this reason, this opinion is similar to the doctrine of those who impute the sinners with *kufr* (disbelief).

2.2. Part 2: The Conditions of Prayer

This part contains eight chapters. The first chapter is about the identification of the timings. The second is about the call for prayer (*adhān*) and the call for commencement (*iqāma*). The third chapter relates to the identification of the direction in prayer (*qibla*). The fourth chapter relates to the covering of the private parts (*satr al-ʿawra*) and the dress for prayer. The fifth chapter covers the stipulation of purification from impurities in prayer. The sixth chapter is about the identification of places where prayer can be undertaken and those where it cannot. The seventh chapter deals with the conditions of the validity of prayer. The eighth chapter is about intention (*niyya*), and the question of its stipulation in prayer.

2.2.1. Chapter 1 The Timings for Prayer

This chapter is first divided into two sections. The first relates to the identification of the timings for prayer. The second examines the timings during which prayer is forbidden.

2.2.1.1. *Section 1: The prescribed timings*

This section is also divided into two sub-divisions. The first relates to regular prayer timings within which a prayer has to be performed (extended[86] as well as preferred).[87] The second relates to timings for those facing a necessity.

2.2.1.1.1. *Division 1: The obligatory daily prayer timings*

The basis for this topic are the words of the Exalted, "Worship at fixed hours hath been enjoined on the believers".[88] The Muslim jurists agreed that the five (obligatory) prayers have five determined periods, performance of prayer during which is a condition for the validity of the prayer. (They also agreed) that each of these periods is divided into preferred and extended parts. They disagreed about the limits of such preferred and extended parts. There are five issues in this.

2.2.1.1.1.1. Issue 1

They agreed, except for a deviant disagreement attributed to Ibn ʿAbbās and a reported dispute over the time of performing Friday congregational prayer (*jumuʿa*), as will be mentioned, that the beginning of the timing for the midday (*ẓuhr*) prayer, before which praying not allowed, is the declining of the sun. They disagreed with respect to the *ẓuhr* period on two points, the end of its extended timing and the time that is preferable (for prayer).

Mālik, al-Shāfiʿī, Abū Thawr, and Dāwūd said that the end of its extended timing is when the shadow of a thing becomes equal to its length. Abū Ḥanīfa said, in one narration from him, that it is when the shadow of a thing becomes twice its length, which is the beginning of the period of the next prayer (*ʿaṣr*). According to another report from him, the last timing for the noon prayer is when the shadow of a thing is equal to its length, while the first timing for the *ʿaṣr* prayer is when the shadow is twice the length (of a thing), and the period between those when the shadow is the same as the length and when it is twice as much is not suitable for the noon prayer. This (latter opinion) was upheld by his two disciples, Abū Yūsuf and Muḥammad.

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[86] A period of time that is longer than the time needed to perform the prayer prescribed.

[87] A period in which performance of the prayer is considered to have greater merit.

[88] Qur'ān 4 : 103.

The reason for disagreement over this is the conflict of traditions. It is related about the prayer led by Jibrīl (Gabriel) "that he prayed *ẓuhr* with the Prophet (God's peace and blessings be upon him) on the first day when the sun declined, and on the second day when the shadow of each thing was equal to its length. He then said, 'The timing is what is between these' ". It is related that the Prophet (God's peace and blessings be upon him) said, "Your stay on earth compared to that of nations who came before you is like the length of the time which is between the *ʿaṣr* prayer and sunset. The People of the Torah were given the Torah and they acted upon it till it was midday, and became unable (to continue) after that. It was then granted to them *qīrāṭ*[89] after *qīrāṭ*. The People of Injīl (New Testament) were then given the Injīl and they acted upon it till it was the time for *ʿaṣr*, being unable to do so after that. It was then granted to them in *qīrāṭ* at a time. We were given the Qurʾān and we acted upon it till it was sunset. It was then granted to us two *qīrāṭ*s at a time. The People of the Book said, 'O Lord, you have given these people two *qīrāṭ*s at a time, while you gave us one at a time, when our performance was for a greater period?' Allāh, the Exalted, replied, 'Have I done any injustice in compensating you?' They said, 'No'. He said, 'Then it is My benevolence, I grant to whom I will' ".

Mālik and al-Shāfiʿī followed the tradition in which Jibrīl led the Prophet in prayer, while Abū Ḥanīfa followed the apparent meaning in the other tradition. The reason is that if the interval between the beginning of *ʿaṣr* and sunset is shorter than that from the beginning of *ẓuhr* up to the time of *ʿaṣr*, in accordance with the implication of this tradition, it is necessary that the beginning of the time for *ʿasr* be when the shadow is more than the height of a thing, and that this be the end of the time for *ẓuhr*. Abū Muḥammad ibn Ḥazm said, "It is not as they believe. I have examined the matter and found that the shadow is equal to the height when nine hours and a fraction of the day have passed". The Qāḍī (Ibn Rushd) said, "I am doubtful about the fraction, I believe he said a third".

The evidence of those who upheld the continuation of the timings, that is, continuation without a dividing break, is the saying of the Prophet (God's peace and blessings be upon him), "The time of a prayer does not end till the time of the next prayer begins". This is an established tradition.

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[89] *Qīrāṭ* is a measure of small lengths.

Regarding the preferred, more meritorious part of the prayer period, Mālik said that for the individual (praying alone) it is the first part, but it is recommended that in congregational mosques the preferred timing be delayed slightly (to permit worshippers to join). Al-Shāfiʿī said that the first part of the prayer period is always preferred, except in case of extreme heat. The same view has also been related from Mālik. A group of jurists said that the first part is always preferred for the individual as well as the congregation in mild weather, heat as well as in cold.

Disagreement about this is due to the conflict of traditions. There are two established traditions about this. The first is the saying of the Prophet (God's peace and blessings be upon him), "When the heat is intense, delay the prayer till it is cool, for the intensity of heat is a breath of Hell". The second is the report "that the Prophet (God's peace and blessings be upon him) used to say the *ẓuhr* prayer at the time of the hottest hour". The tradition of Khabbāb, related by Muslim, contains the words, "They complained to him about the heat of the *ramḍā'* (scorching heat) and he did not heed their complaint". It is recorded by Muslim. Zuhayr, the narrator of the tradition, said that he asked his Shaykh, Abū Isḥāq, about it saying "Is it about *ẓuhr*?" He replied, "Yes". He said, "Is it about its prompt performance?" He said. "Yes".

A group of jurists preferred the tradition about delaying till it is cool as it is explicit and interpreted the other traditions according to this as these were not so explicit. Another group of jurists preferred the latter traditions, because of the general application of the words of the Prophet (God's peace and blessings be upon him) when he was asked the question, "What acts are the best?" He replied, "Prayer, at the first appointed time". The tradition is agreed upon by al-Bukhārī and Muslim. However, the addition in it, that is, "at the first appointed time", is disputed.

2.2.1.1.1.2. Issue 2

They disagreed about the *ʿaṣr* prayer on two points. The first is about the merging of its first timing with the end of the timing for the *ẓuhr* prayer. Second, about its own end. With respect to the merging of the timings, Mālik, al-Shāfiʿī, Dāwūd, and a group of jurists agreed that the beginning of the timing for *ʿaṣr* prayer is, in fact, the end of the period for *ẓuhr*, and this occurs when the shadow of a thing becomes equal to its height. Mālik, on the other hand, maintained that the last portion of the period for *ẓuhr* and the first portion of the period for *ʿaṣr*—a stretch of time sufficient for four (ordinary) *rakʿas*—is a common time for both prayers. According to al-Shāfiʿī, Abū Thawr, and Dāwūd the end of the period for *ẓuhr* is the point of time at which the timing for *ʿaṣr* begins, and is an indivisible moment. Abū Ḥanīfa, as we have said, maintained that the first timing for *ʿaṣr* is that when the shadow of a thing is twice its height, and the reason for his disagreement with them over this has preceded.

Mālik's disagreement with al-Shāfiʿī, and with those who adopted the same opinion as his on this issue, is based on the conflict of the tradition about Jibrīl with the tradition of ʿAbd Allāh ibn ʿUmar. In the prayer led by Jibrīl, it is stated that he prayed *ẓuhr* with the Prophet (God's peace and blessings be upon him) on the second day at the time at which he had prayed *ʿaṣr* on the first day. The tradition of ʿAbd Allāh ibn ʿUmar is that the Prophet (God's peace and blessings be upon him) said, "The timing of *ẓuhr* continues as long as the timing of *ʿaṣr* has not begun". This has been recorded by Muslim. Those who preferred the tradition about Jibrīl, deemed the timing as merged, while those who preferred the tradition of ʿAbd Allāh, did not consider the timings as merged. In the case of the tradition about Jibrīl, it is possible to interpret it in such a way that would agree with the tradition of ʿAbd Allāh, for it is likely that the narrator (of the tradition about Jibrīl) overemphasized the fact due to the proximity of the timings. The tradition about the *imāma* of Jibrīl has been declared *sahīh* by al-Tirmidhī, while Ibn ʿUmar's tradition has been recorded by Muslim.

In their disagreement about the last timing for *ʿaṣr*, there are two narrations from Mālik. The first maintains that the last timing is when the shadow of each thing is twice its height. This is also al-Shāfiʿī's opinion. The second narration maintains that the last timing continues as long as the sun has not turned yellow. This is also Aḥmad ibn Ḥanbal's opinion. The Ẓāhirites said that the timing ends just one *rakʿa*-time before sunset.

The reason for their disagreement is based on the existence of three traditions, the apparent meanings of which conflict. The first is the tradition of ʿAbd Allāh ibn ʿUmar, recorded by Muslim, which states, "When you pray *ʿaṣr*, there is time for it till the sun turns yellow". Some of the versions say, "The time for *ʿaṣr* prevails till the sun turns yellow". The second is the tradition of Ibn ʿAbbās about the *imāma* of Jibrīl, which states that "he prayed *ʿaṣr* with him on the second day when the shadow of each thing was twice its height". The third is the widely known tradition of Abū Hurayra, "Anyone who has been able to perform a *rakʿa* of the *ʿaṣr* prayer before sunset has caught the time of *ʿaṣr*, and anyone who has been able to perform a *rakʿa* of the morning prayer before sunrise has caught the right time of the morning prayer".

Those who preferred the tradition about the *imāma* of Jibrīl deemed the last permissible[90] timing to be the time when the shadow of a thing is twice its height (, while those who preferred Ibn ʿUmar's tradition deemed the final permissible time to be when the sun turns yellow).[91] Those who decided to prefer Abū Hurayra's tradition said that the timing for *ʿaṣr* continues till the time for a *rakʿa* is left prior to sunset. These (last) are the Ẓāhirites, as we have stated. The majority adopted the method of reconciliation between the tradition of Abū Hurayra, on the one hand, and the traditions of Ibn ʿUmar and Ibn ʿAbbās on the other, as it clearly opposed the other two while the two traditions of Ibn ʿAbbās and Ibn ʿUmar state proximate limits. It is for this reason that Mālik formed one view on the basis of the first and another on the basis of the second. The tradition of Abū Hurayra, however, gives a widely separate limit; therefore they said that the tradition of Abū Hurayra applies to *those who have an excuse (like a woman whose blood discharge (ḥayḍ)* ends just before that time).

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[90] In contrast with the meritorious, preferable early part of the period of prayer.

2.2.1.1.1.3. Issue 3

They disagreed about the evening prayer (*maghrib*), whether it has an extended time like all other prayers? A group of jurists held that it has a limited time that is not extendible. This is the best known report from Mālik and al-Shāfiʿī. Another group of jurists held that it has an extended time between sunset and the disappearance of the evening twilight (*shafaq*). This was the opinion of Abū Ḥanīfa, Aḥmad, Abū Thawr, and Dāwūd, and this opinion has also been related from Mālik and al-Shāfiʿī.

The reason for their disagreement over this arises from the conflict of the tradition of the *imāma* of Jibrīl with the tradition of ʿAbd Allāh ibn ʿUmar. The tradition about the *imāma* of Jibrīl states that he offered the *maghrib* prayer at the same time (at sunset) on both days, while the tradition of ʿAbd Allāh says, "It is time for the *maghrib* prayer till the disappearance of *shafaq*". Those who preferred the tradition about the *imāma* of Jibrīl determined a single (limited) time for it, while those who preferred ʿAbd Allāh's tradition determined an extended time for it. The tradition of ʿAbd Allāh has been recorded by Muslim, while the tradition of the *imāma* of Jibrīl has not been recorded by either of the two shaykhs (al-Bukhārī and Muslim), that is, the tradition of Ibn ʿAbbās, which says that he led the prayer for the Prophet (God's peace and blessings be upon him) in ten prayers that explained the prayer timings and then said, "The time is between these two". What is stated in ʿAbd Allāh's tradition about this is also found in the tradition of Burayda al-Aslamī that has been recorded by Muslim, and is the fundamental source for this topic. They (the jurists) said that the tradition of Burayda is preferable as it is a later tradition belonging to the era of Medina and was in response to a question about the timings of prayer, while the tradition of Jibrīl belongs to the initial stipulation of the duty (of prayer) at Mecca.

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[91] Editor's note: The parenthetical statement is an addition in the manuscript published at Fās. We included it as it was necessary.

2.2.1.1.1.4. Issue 4

They disagreed about the second evening prayer (*ʿishāʾ*) on two points. First, about the beginning of its timing and second, about its end. About the beginning of its timing, Mālik, al-Shāfiʿī, and a group of jurists held that it is the disappearance of the red evening twilight, while Abū Ḥanīfa said that it is the disappearance of the white twilight that comes after the redness.

The reason for their disagreement over this issue stems from the equivocality of the term "*shafaq*" in the Arabic language. Just as *fajr* (morning), is of two kinds, so is *shafaq*: red and white. The disappearance of the white *shafaq* necessarily implies that what follows is the beginning of the night.[92] There is no disagreement among them that it is established from the tradition of Burayda and the tradition about the *imāma* of Jibrīl that he offered the night prayer on the first day at the disappearance of the *shafaq*.

The majority preferred their opinion on the basis of the established report "that the Messenger of Allāh (God's peace and blessings be upon him) used to offer *ʿishāʾ* after the disappearance of the moon on the third night", while Abū Ḥanīfa preferred his opinion on the basis of what is established about delaying *ʿishāʾ* and the recommendation for delaying it in the words of the Prophet (God's peace and blessings be upon him), "If I had not feared hardship for my *umma*, I would have delayed this prayer up to midnight".

They disagreed over the end of its latest timing into three opinions. First, that it is the first third of the night. Second, that it is midnight. Third, that it is up to sunrise. The first opinion, that is, it is the first third of the night, was held by al-Shāfiʿī and Abū Ḥanīfa, and is the widely known view of Mālik. A second report from Mālik is also related, which holds it to be midnight. The third view is that of Dāwūd.

The reason for disagreement over this derives from the conflict of traditions. In the tradition about the *imāma* of Jibrīl it is stated that he prayed with the Prophet (God's peace and blessings be upon him) on the second day at the end of the first third of the night. In the tradition of Anas he says that "The Prophet (God's peace and blessings be upon him) delayed *ʿishāʾ* till midnight". This has been recorded by al-Bukhārī. It is also reported in the tradition of Abū Saʿīd al-Khudrī and that of Abū Hurayra from the Prophet (God's peace and blessings be upon him) that he said, "If I did not fear hardship for my *umma* I would have delayed *ʿishāʾ* up to midnight". In the tradition of Ibn Qatāda it is implied that neglecting sleep is not significant, but what is significant is delaying a prayer till it is time for the next.

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[92] A few lines follow this in the original text and have been placed in parentheses by the editor of the original. He mentions in a note that they occur in the Egyptian manuscript and not in the Fās manuscript. The statement does not sit well with the rest of the text and complicates it. It appears to be a gloss that has crept into the text. This statement has not been included in the translation.

Those who based their opinion on the preference of the tradition about the *imāma* of Jibrīl fixed it as the third of the night, while those who preferred the tradition of Anas said that it is the middle of the night. The Ẓāhirites relied upon the tradition of Abū Qatāda saying that it is general and later in time than the tradition about the *imāma* of Jibrīl, and, therefore, abrogates it. Had it not abrogated it the conflict would have led to dropping the *ḥukm*. It is, therefore, necessary to abide by the prevailing consensus, as they agreed that the time lapses after the coming of the *fajr* time (dawn), but they disagreed about what is before that. In addition, they related from Ibn ʿAbbās that the time, in his view, was up to *fajr*. Thus, it becomes obligatory that the prevailing *ḥukm* about the (latest) time continue, till agreement about its lapsing earlier is found. I believe that this is also upheld by Abū Ḥanīfa.

2.2.1.1.1.5. Issue 5

They agreed that the first timing for the morning prayer is true dawn (the appearance of the morning twilight) and it ends at sunrise, except what is related from Ibn al-Qāsim and some of the disciples of al-Shāfiʿī that the latest timing is when there is light (i.e. daybreak). They disagreed about its preferred timing. The Kūfīs, Abū Ḥanīfa, his disciples, al-Thawrī, and most of the jurists of Iraq maintain that the best time for it is when there is light (the beginning of daybreak), while Mālik, al-Shāfiʿī, his disciples, Aḥmad ibn Ḥanbal, Abū Thawr, and Dāwūd maintained that darkness preceding light is the preferred time for it.

The reason for their disagreement stems from their dispute over the method of reconciling the apparent meanings of the traditions on this issue. It is reported from the Prophet (God's peace and blessings be upon him) through Rāfiʿ ibn Khadīj that he said, "Perform the morning prayer at the time of the daybreak. The more frequently you do so the greater reward there is for it". Yet, the Prophet (God's peace and blessings be upon him) is reported to have said, when asked about the best acts, "Prayer at its first appointed timing". Moreover, it is established about the Prophet (God's peace and blessings be upon him) "that after he offered the morning prayer, women used to depart wrapped in their woolen garments, and could not be recognized due to the darkness". The apparent meaning of this tradition is that this was his usual practice.

Those who maintained that the tradition of Rāfiʿ is particular (*khāṣṣ*), while the saying of the Prophet (God's peace and blessings be upon him) "in its first appointed timing", is general (*ʿāmm*), held that the former restricted the latter according to the well-known rule that the particular restricts the general. In this way they exempted the morning prayer from the general implication and rendered the tradition of ʿĀʾisha as a report of an occasional, and not the usual, practice implying permissibility. Thus, they maintained that "praying into the light is preferable to prayer in the darkness". Those who preferred the general tradition, because it is explicit and evident and also agrees with ʿĀʾisha's tradition, while Rāfiʿ's tradition is subject to interpretation, as it can be interpreted as emphasizing the coming of *fajr* and as such there is no conflict between it and the tradition of ʿĀʾisha nor with the reported generality in this issue, said that the preferred timing is the early portion of the time.

Those who maintained that the latest timing for the morning prayer is the clear light of daybreak confined it to those under compulsion, in the tradition in which the prophet (God's peace and blessings be upon him) said, "He who has performed one *rakʿa* of the morning prayer before sunrise has captured the morning prayer". This resembles what the majority hold about *ʿaṣr*, and it is strange that they turned away from it on this issue (of the morning prayer) and agreed with the Ẓāhirites (on the other issue). The Ẓāhirites, therefore, have a right to question them about the difference between the two (similar situations).

2.2.1.1.2. *Division 2: Timings in case of necessity and excuse*

The jurists of the regions, as we have said have confirmed the special prayer timings for necessity and excuse, while the Ẓāhirites have denied them. The reason for their disagreement has already been mentioned. Those who confirmed them disagreed over three points. First, what are the prayers to which these timings are applicable? Second, what are the limits of these timings? Third, who are the persons with an excuse for whom an exemption has been made with respect to these timings and their *aḥkām*, that is, with respect to the obligation of prayer and its waiver.

2.2.1.1.2.1. Issue 1

Mālik and al-Shāfiʿī agreed that this special timing is applicable to four prayers: a timing common between *ẓuhr* and *ʿaṣr*, and a timing common between *maghrib* and *ʿishāʾ*. They differed about their common aspect, as will be coming up in what follows. Abū Ḥanīfa opposed them saying that this timing is for *ʿaṣr* alone, and there is no timing here that is common between them.

The reason for their disagreement over this is based on their dispute about the permissibility of combining of two prayers (*jamʿ*) during a journey at a time fixed for one prayer. This will be discussed later. Those who acted upon the text laid down for the *ʿaṣr* prayer, that is, the established saying of the Prophet (God's peace and blessings be upon him), "He who is able to observe a *rakʿa* of the *ʿaṣr* prayer prior to sunset has been able to perform *ʿaṣr* (in time)", understood this to imply a concession, and did not permit it as a common timing for combination, because of the words of the Prophet (God's peace and blessings be upon him), "The timing of a prayer does not pass till the coming of the timing for the next". They also used other arguments—that we shall mention under the topic of combination—to maintain that this timing was only for the *ʿaṣr* prayer. Those who permitted a common timing in combination during a journey, permitted it for those facing a necessity on its analogy, as the case of the traveller too is that of necessity and excuse. On this basis they determined a time common between *ẓuhr* and *ʿaṣr*, and another common between *maghrib* and *ʿishāʾ*.

2.2.1.1.2.2. Issue 2

Mālik and al-Shāfiʿī disagreed over the last common timing for two prayers. Mālik said that it continues from the declining of the sun, for *ẓuhr* and *ʿaṣr*, to an extent of four *rakʿa*s for a resident and two *rakʿa*s for the traveller till a time sufficient for four *rakʿa*s for the resident and two *rakʿa*s for the traveller is left of the daytime. Thus, he determined the time specific to *ẓuhr* as the time for four *rakʿa*s in the case of the resident, and two *rakʿa*s for the traveller after the declining of the sun. He determined the time specific to *ʿaṣr* as the time for four *rakʿa*s for the resident and two *rakʿa*s for the traveller prior to sunset. It follows that a person who catches only the specific portion of a the time of prayer is obliged for the prayer that is specific to this time, if prayer was not binding upon him prior to this time.[93] A person who has more time than this is to perform both prayers together. He fixed the last time for capturing the *ʿaṣr* prayer (*ʿadāʾ* not *qaḍāʾ*), as that of one *rakʿa* prior to sunset. He determined similar common timings for *maghrib* and *ʿishāʾ* prayers, except that on one occasion he made the time specific to *maghrib* to be an amount of time enough for three *rakʿa*s prior to the break of the dawn, and at another occasion he deemed it enough for the last prayer, as he did for *ʿaṣr*, saying that it is a time enough for four *rakʿa*s, which agrees with analogy. Moreover, he deemed the last timing for this (as *ʿadāʾ*) to be the time required for one *rakʿa* prior to the break of the dawn.

Al-Shāfiʿī fixed a single limit for these common timings, which is a stretch of time sufficient for one *rakʿa* prior to sunset, and this for *ẓuhr* and *ʿaṣr* together; and the time sufficient for a *rakʿa* prior to the breaking of the dawn in the case of *maghrib* and *ʿishāʾ* together. It is also related from him that he said it is a moment sufficient for pronouncing *takbīr*, that is, a person who is able to pronounce *takbīr* prior to sunset is under an obligation to pray *ẓuhr* and *ʿaṣr* for that day.

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[93] For example, if a woman begins discharging menstrual blood after the declining of the sun by a time sufficient for four *rakʿas*, she has to pray *ẓuhr* when the *ḥayḍ* ceases. And if an adolescent boy or a girl reaches puberty before sunset by a time sufficient for four *rakʿas*, he or she must pray *ʿaṣr*.

Abū Ḥanīfa agreed with Mālik in that the last timing for *ʿaṣr* for those under duress is equivalent to the time of one *rakʿa* prior to sunset, but he did not agree about the common timings nor about timings specific to prayers.

The reason for their disagreement, that is, Mālik's and al-Shāfiʿī's, is whether the assertion about the common timing for two prayers together implies that there are two types of timings, a timing specific for them and a timing common to them, or whether it implies that there is a single common timing alone. Al-Shāfiʿī's argument is that combining (two prayers) indicates only a common timing, and not a timing specific to each. Mālik, on the other hand, constructed an analogy basing the common timings in the case of necessity upon the common extended timings. This means that as the extended timing for *ẓuhr* and *ʿaṣr* has a common timing and an extended timing, it is necessary that the situation be the same in cases of necessity. Al-Shāfiʿī does not agree with him about a common extended timing for *ẓuhr* and *ʿaṣr*.

Their disagreement in this issue is based, Allāh knows best, on their disagreement over the prior issues, so ponder over it, as it is evident, Allāh knows best.

2.2.1.1.2.3. Issue 3

The jurists agreed that these timings, that is, the timings of necessity, pertain to four types of people: a menstruating woman entering the period of purity or who begins menstruating before she has prayed; the traveller who remembers prayer in these timings at a time when he is in a settlement, or a settler who remembers it when he is travelling; a minor who attains puberty during these timings; and a disbeliever who accepts Islam. They disagreed about the person who has fainted. Mālik and al-Shāfiʿī said that his *ḥukm* is like that of a menstruating woman and is entitled to these timings, for he is not obliged to make up (by way of *qaḍāʾ*) for the prayer that he misses because of fainting. According to Abū Ḥanīfa, however, he is obliged to make up for the prayer he has missed when the number of (lapsed) prayers is less than five. Thus, in his view, if he recovers from his fainting spell, he prays whenever he recovers. In the opinion of the others, if he recovers during the timings of necessity, he is obliged for the prayer within whose timing he recovers, but if he does not recover during such a time, the prayer is not binding upon him. The case of the person fainting will be treated in greater detail later.

They agreed that if the woman becomes pure within a prayer timing, this prayer alone is obligatory upon her. According to Mālik, if she becomes pure and enough time for four *rakʿas* is left prior to sunset, then she is obliged for *ʿaṣr* alone, but if the time left is enough for five *rakʿa*s, she is under an obligation for both prayers, *ẓuhr* and *ʿaṣr*. In al-Shāfiʿī's view, if the time for a single *rakʿa* remains, she is obliged to observe both prayers together, as we have said, and according to his second opinion, she is to pray even when the time left is enough for a *takbīr*. The same is the case of the traveller, in Mālik's view, who has forgotten to pray and becomes a resident within these timings, or is a settler who is now travelling. Similarly, in the case of a disbeliever, who converts to Islam during these timings, that is, this prayer is obligatory upon him. The case of the minor is also similar.

The reason for Mālik's considering a *rakʿa* as a part of the last timing, and al-Shāfiʿī's considering a part of a *rakʿa*, like the *takbīr*, as the limit, is the saying of the Prophet (God's peace and blessings be upon him), "Whoever is able to perform a *rakʿa* of *ʿaṣr* prior to the setting of the sun has caught the prayer of *ʿaṣr* (in time)". This, in Mālik's view, is an indication of the minimum pointing to the maximum, while in al-Shāfiʿī's view it is the maximum indicating the minimum. He (al-Shāfiʿī) supported this with the report, "Whoever is able to perform one prostration prior to the setting of the sun has been able to perform *ʿaṣr* (in time)". Since a prostration is just one part of a *rakʿa*, he concluded that whoever is able to pronounce a *takbīr* prior to the setting or the rise of the sun has been able to perform his prayer in time.

Mālik maintains that the time for the menstruating woman is to be reckoned from the time when her period of purity terminates, so also the minor who attains puberty. If she is a disbeliever, her time is reckoned from the moment of conversion to Islam and not the termination of her period of purity, but there is disagreement over this. The person under a fainting spell is, in Mālik's view, like the menstruating woman, while he is like a disbeliever who has converted, in ʿAbd al-Malik's view. Mālik maintains that a menstruating woman, who begins to menstruate at a time before she has observed the prayer, her delayed performance (*qaḍāʾ*) is waived, while al-Shāfiʿī maintains that *qaḍāʾ* is obligatory upon her. *Qaḍāʾ*, in fact, is obligatory in the opinion of those who maintain that prayer becomes obligatory, with the coming of the prayer time Thus, if a woman menstruates after the start of the time for prayer and the passage of a period sufficient for the prayer, *qaḍāʾ* of this prayer is obligatory upon her. This, however, is not the view of those who maintain that prayer becomes obligatory not with the commencement of its time, but by the last part of it, which is Abū Ḥanīfa's view and not Mālik's. This, as you can see, is necessary in accordance with Abū Ḥanīfa's opinion, I mean, conforming with his principles, but not according to the principles of Mālik.

2.2.1.2. *Section 2: The Proscribed timings*

The jurists disagreed about the times during which prayer (ṣalāh) is forbidden. First, about their number, and second, about the types of prayers affected by the proscription.

2.2.1.2.1. Issue 1

The jurists agreed that there are three time-segments in which prayer is proscribed: the time of sunrise, the time of sunset, and the interval between the moment the worshipper has finished the dawn (*ṣubḥ*) prayer and sunrise. They disagreed about two timings: the time of the declining of the sun and the time after performing *ʿaṣr* prayer (up to sunset).

Mālik and his disciples maintained that the proscribed times are four: the times of sunrise, sunset, the time after the dawn prayer up to sunrise, and the time after *ʿaṣr* up to sunset. They permitted prayer at the declining of the sun. Al-Shāfiʿī maintained that all these five time-segments are proscribed, except the time of the declining of the sun on Friday, and he permitted prayer during this time. A group of jurists exempted from this (proscription) the time after *ʿaṣr*.

The reason for disagreement over this is one factor out of two. First, the conflict of a tradition with a tradition, and second the conflict of a tradition with practice, in the view of those who acknowledge practice, that is, the practice of the people of Medina, as is the principle of Mālik ibn Anas. When the proscription had been laid down and there was no opposition through words or acts, the jurists agreed upon it, but when a source of disagreement was found conflict occurred. Their disagreement over the time of the declining of the sun arises from the conflict of a tradition with practice. This is so as it has been established through the tradition of ʿUqba ibn ʿĀmir al-Juhanī that he said, "There were three times in which the Messenger of Allāh used to prohibit us from praying and burying our dead: when the sun begins to rise till it is fully risen, when the sun is at its height till it begins to decline, and when the sun begins to set till it sets completely". It has been recorded by Muslim. The tradition of Abū ʿAbd Allāh al-Ṣanābhī, which has been recorded by Mālik in his *al-Muwaṭṭaʾ*, conveys the same meaning, but its chain of transmission is incomplete.

Some of the jurists prohibited prayer during all these three periods, while others exempted from this (prohibition) the time of the declining of the sun, either always, in Mālik's opinion, or only for Friday, which is al-Shāfiʿī's view. Mālik, who regards the Medinan practice as a source of law, and found only two timings in practice, but not the third, that is, at the time of the declining of the sun, made an exemption for the prohibition and permitted prayer during that time deeming the proscription as abrogated by practice. Those who did not consider Medinan practice to be a source of law abided by the original principle of proscription. We have already talked about practice and its legal force in our book on juristic reasoning, which goes by the name of *uṣūl al-fiqh*.[94]

Al-Shāfiʿī based his opinion on the tradition related by Ibn Shihāb from Thaʿlabah from Ibn Abī Mālik al-Qaraẓī, which proved to be authentic in his view. It states that they used to pray on Fridays until ʿUmar came out (for the Friday prayer), and it is known that ʿUmar used to come out after the declining of the sun, as is established from the tradition about the carpet that was spread next to the western wall of the mosque; ʿUmar used to come out when it was completely covered with the shade of the wall. Further, he relied on what is related by Abū Hurayra "that the Messenger of Allāh (God's peace and blessings be upon him) prohibited prayer at noon till the sun declined, except for Friday". He, therefore, exempted prayer at the time of the declining of the sun on Fridays from this proscription.[95] This tradition was strengthened, in his view, by the practice during the days of ʿUmar, though the tradition itself was deemed weak by him. Those who preferred the established tradition on this issue followed the original proscription (of praying during the declining of the sun even on Fridays).

Their disagreement about prayer after the *ʿaṣr* prayer is based upon the conflict of established traditions, and there are two conflicting traditions about this. First is the tradition of Abū Hurayra that is agreed upon for its authenticity (by al-Bukhārī and Muslim) "that the Messenger of Allāh (God's peace and blessings be upon him) prohibited prayer after the *ʿaṣr* prayer till the sun had set, and prayer after the dawn prayer till the sun had risen (completely)". The second is the tradition of ʿĀʾisha who said, "The messenger of Allāh (God's peace and blessings be upon him) never relinquished two prayers in my house, neither secretly nor publicly, two *rakʿa*s before the dawn prayer and two *rakʿa*s after *ʿaṣr*". Those who preferred Abū Hurayra's tradition upheld prohibition, while those who preferred ʿĀʾisha's tradition, or held it to have abrogated the other, for it was an act that he (God's peace and blessings be upon him) used to undertake up to the time of his death, upheld permissibility. Umm Salama, however, relates a tradition that opposes ʿĀʾisha's tradition, as it states "that she saw the Messenger of Allāh (God's peace and blessings be upon him) praying two

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[94] It has been difficult to ascertain whether this book of the author exists in published or manuscript form. If the manuscript does exist, it deserves to be published.

[95] The dispute here is not about the Friday prayer, which starts like *ẓuhr* prayer does, every day after the declining of the sun. The disagreement is about performing other prayers, like the *nāfila*, at the time of the declining of the sun.

*rakʿa*s after *ʿaṣr* and asked him about them. He said, 'Some people of ʿAbd al-Qays visited me and kept me from praying the two *rakʿa*s after *ẓuhr*, and these are those two *rakʿa*s'".

2.2.1.2.2. Issue 2

The jurists disagreed about the prayers that are not permitted during these prohibited periods. Abū Ḥanīfa and his disciples maintained that prayers are not permitted in these periods at all, neither prescribed obligation, nor a *sunna* prayer, nor the supererogatory prayers, except the *ʿaṣr* prayer of the day. They further said that delayed performance (*qaḍā*ʾ) of the *ʿaṣr* prayer is permitted at sunset if a person has forgotten it.

Mālik and al-Shāfiʿī agreed that delayed performance (*qaḍā*ʾ) of obligatory prayers is permitted during these prohibited periods. Al-Shāfiʿī also held that the only prayers that are not permitted during these periods are the supererogatory prayers without a necessitating cause, but those with a cause, like the funeral prayer, are permitted during such periods. Mālik agreed with him about these prayers after *ʿaṣr* and after the dawn prayer, that is, with respect to all *sunna* prayers, but he exempted those that are observed due to a voluntary cause (pertaining to the worshipper himself), like the two *rakʿa*s upon entering the mosque, for al-Shāfiʿī permits these two *rakʿa*s after *ʿaṣr* and after the dawn prayer, while Mālik does not.

Mālik's opinion differed about the permissibility of *sunna* prayers at sunrise and sunset. Al-Thawrī maintained that the prayers not permitted during these times are those that are not obligatory (*farḍ*) prayers, and he did not make a distinction between the *sunna* and the supererogatory prayers.

Three opinions are thus arrived at in this issue. First, that prayer is not permitted at all (during these prohibited periods). Second, that these are *sunna* or supererogatory prayers, and are not the obligatory prayers. Third, that these are the supererogatory prayers and not the *sunan*. In pursuance of the narration, in which Mālik prohibited the funeral prayer during sunset, we arrive at a fourth opinion. This opinion prohibits the supererogatory prayers alone after the break of dawn and after *ʿaṣr*, and both supererogatory and *sunna* prayers during sunset and sunrise.

The reason for disagreement is their dispute over reconciling the conflicting general implications on this issue, that is, those occurring in the traditions, as to which is restricted by the other. For example, the general meaning of the words of the Prophet (God's peace and blessings be upon him), "When one of you forgets to perform a prayer, let him perform it when he remembers it", implies that he may do so at any time. Yet, the Prophet's saying in the traditions proscribing prayers in these (stated) periods, like "The Messenger of Allāh (God's peace and blessings be upon him) proscribed prayers during these times", implies the inclusion (in the prohibition) of all categories of prayers, obligatory, *sunan*, and supererogatory. When we construe the traditions in their general meanings a conflict occurs between them, which belongs to the category of conflict occurring between the general and particular words, either with respect to the time, or with respect to the term '*ṣalāh*'.

Those who decided to make the exception with respect to time, that is, the exception of the particular from the general, prohibited prayers absolutely during these times.[96] Those who made an exception for the obligatory prayers, whose *qaḍāʾ* is prescribed, did so from the general implication of the term *ṣalāh* that is applicable to the proscribed prayers, prohibiting what is besides the obligatory in these timings.[97]

Mālik preferred his opinion about the exception made for obligatory prayers from the general term *ṣalāh* on the basis of the reported saying of the Prophet (God's peace and blessings be upon him), "He who has been able to pray a *rakʿa* of *ʿaṣr* prior to sunset has performed *ʿaṣr* (in time)". It is for the same reason that the Kūfī jurists made an exemption for the obligatory *ʿaṣr* prayer of the day out of other obligatory prayers, but it was binding upon them, consequently, to have made an exemption for the morning prayer too due to the existence of a text about it. They may not refute this on the basis of their opinion that one observing a *rakʿa* prior to sunrise crosses over into the proscribed timing, while one observing a *rakʿa* prior to sunset moves into a permissible timing. The Kūfīs, however, may respond to this by saying that this tradition does not indicate the exemption of the prescribed obligatory prayers from the general implication of the term *ṣalāh* to which the proscription is related in these periods, as the *ʿaṣr* prayer of the day is not implied in the meaning of the remaining obligatory prayers. Similarly, they could have said the same about the dawn prayer, even if they had conceded that its *qaḍāʾ* may be performed during the proscribed time.

The disagreement of the jurists, in the last analysis, refers to the question of whether the exception contained in the words belongs to a category of a particular word through which the particular is intended, or whether it belongs to a category of the particular word through which the general is implied? The reason is that those who held that the implication here is restricted to the *ʿaṣr* and the dawn prayers that have been mentioned in the text, considered it to be from the category of the particular word intended for a particular meaning, while those who said that the implication here is not for the *ʿaṣr* prayer alone, or for the dawn prayer, but extends to all the obligatory prayers, considered it to be a particular word implying the general. If this is the case, then there is no definitive evidence here that the obligatory prayers are exempted from the term "lapsed prayers", just as there is no evidence here, neither definitive nor probable, for the exemption of the particular time mentioned in the proscribing traditions, from the general implication of timings, laid down in the prescribing traditions, let alone the exemption of a particular prayer, mentioned in the prescribing traditions, from the general implication about prayer, laid down in the prohibiting traditions. This is evident, for when two traditions are in conflict and each carries a general and a particular implication, it is not required to give predominance to one of them without an evidence, I mean, exempting the particular implication of one tradition from the general implication of the other or vice versa. This is clear, Allāh knows best.

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[96] By qualifying the first tradition with the second.

[97] By restricting the second tradition with the first, and by using the term *ṣalāh* in the first tradition to mean obligatory prayers.

2.2.2. Chapter 2 *Adhān* and *Iqāma*

This chapter is also divided into two sections. The first is about *adhān* (the call for prayer). The second is about *iqāma* (the call for the commencement of prayer, or the second call for prayer).

2.2.2.1. *Section 1*: *Adhān*

This section is subdivided into five divisions. First about the description of the *adhān*. Second, about its *ḥukm*. Third, about its timing. Fourth, about its (prescribed) conditions. Fifth, about the response of the listener.

2.2.2.1.1. *Division 1*: *The description of* adhān

The jurists disagreed about *adhān* giving four widely known descriptions. The first prescribes the dual pronouncement of *takbīr*, four repetitions of the *shahāda*, and the dual pronouncement of the remaining (words). This is the opinion of the jurists of Medina, Mālik and the others. The later followers of Mālik preferred *tarjīʿ*, which requires the dual pronouncement of the *shahāda* in a lower tone followed by its dual pronouncement in a louder voice. The second is the Meccan version of the *adhān*, which was upheld by al-Shāfiʿī. It requires four pronouncements of the first *takbīr* and the two *shahāda*s, and the dual pronouncement of the remaining *adhān*. The third description is that of the Kūfīs. It involves four pronouncements of the first *takbīr* and the dual pronouncement of the remaining parts of the *adhān*. This was Abū Ḥanīfa's opinion. The fourth description is that of the *adhān* of the Baṣrans. It requires four pronouncements of the first *takbīr*, three pronouncements of *shahāda*, of *ḥayya ʿala'ṣ-ṣalāh*, and of *ḥayya ʿalaʾl-falāḥ*. The *muʾadhdhin* begins with *ashʾhadu an lā ilāha illaʾllāhu* till he reaches *ḥayya ʿalaʾl-falāḥ*, he then repeats them a second time, I mean, the four sentences, one after the other, and then repeats them a third time. This was the opinion of al-Ḥasan al-Baṣrī and of Ibn Sīrīn.[98]

The reason for the difference between these four descriptions is the conflict of the traditions and the communication of a differing practice to the jurists. The jurists of Medina argue for their opinion on the basis of the continuous practice prevailing in Medina. The same is the case with the Meccans, who argue on the basis of the practice reaching them, so also the Kūfīs and the Baṣrans. Each group has traditions that support their opinion.

The dual pronouncement of *takbīr* in the beginning, in accordance with the view of the jurists of Ḥijāz, is related through authentic chains from Abū Maḥdhūra and ʿAbd Allāh ibn Zayd al-Anṣārī, as is its fourfold pronouncement related from both of them through different chains. Al-Shāfiʿī said that these are additions that it is obligatory to accept, as they are supported by the communication of the practice at Mecca. With respect to *tarjīʿ* that was preferred by the later followers of Mālik, it is related through Abū Qudāma, although Abū ʿUmar said that Abū Qudāma is considered a weak narrator by them (the traditionists). As for the Kūfīs, they rely on the tradition of Ibn Abī Laylā, which says "that ʿAbd Allāh ibn Zayd saw a man in a dream who stood in the gap of a wall wearing two green garments; he made the call for prayer repeating twice, and then made the *iqāma*, repeating twice. He informed the Messenger of Allāh (God's peace and blessings be upon him) about it, after which Bilāl stood up and made the call repeating twice, and then made the *iqāma* repeating twice". The tradition reported by al-Bukhārī is from the report by Anas only, which says, "Bilāl was commanded to proclaim the *adhān* repeating twice and to make *iqāama* in single pronouncements, except the sentence 'prayer is about to commence', which is to be repeated twice". The version recorded by Muslim through Abū Maḥdhūra is in accordance with the description of the *adhān* of Hijāz.

It was due to the existence of this conflict about the versions of the *adhān* that Aḥmad ibn Ḥanbal and Dāwūd maintained that these differing descriptions have been prescribed by way of choice and not as an obligation to follow one of them, and that people have a choice in this matter.

They disagreed about the pronouncement by the *muʾadhdhin* for the morning prayer, "prayer is better than sleep", whether it is to be pronounced or not. The majority maintained that it is to be pronounced, while others held that it is not to be pronounced as it is not a part of the *adhān* practiced as a *sunna*. This was upheld by al-Shāfiʿī. The reason for their disagreement is their dispute whether it was pronounced in the days of the Prophet (God's peace and blessings be upon him), or whether it was added during the reign of ʿUmar.

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[98] Thus, according to their unanimous view, the *adhān* is to be concluded with the words *lā ilāha illaʾllāh*. This comes after the double *takbīr*.

2.2.2.1.2. *Division 2: The* ḥukm *of* adhān

The jurists disagreed about the *ḥukm* of *adhān*, whether it is obligatory or an emphatic *sunna*, and if it is obligatory whether it is a universal obligation or a communal one. It is related from Mālik that *adhān* is an obligation for congregational mosques, and it is related that it is an emphatic *sunna* (for them). He did not consider it an obligation for the individual, or even a *sunna*. Some of the Ẓāhirites said that it is a universal obligation, while others said that it is an obligation upon groups, whether on a journey or in a settlement. Some other Ẓāhirites maintained that it is obligatory for a group during travel. Al-Shāfiʿī and Abū Ḥanīfa agreed that it is a *sunna* for the individual and the group, except that it is emphatic in the case of the group. Abū ʿUmar said that there is complete agreement that it is an emphatic *sunna* or an obligation for persons in a settlement, because of the tradition "that the Messenger of Allah (God's peace and blessings be upon him) did not recite the *adhān* when he heard the call, but he did so when he did not hear it".

The reason for their disagreement is the conflict in understanding the apparent meanings of the traditions. It is established that the Messenger of Allah (God's peace and blessings be upon him) said to Mālik ibn al-Ḥuwayrith and his companion, "When you are on a journey, pronounce the *adhān* and the *iqāma*, and let the eldest among you lead the prayers". Similarly, it is related that this was the continuous practice of the Messenger of Allāh (God's peace and blessings be upon him) (when he was) in a congregation. Those who understood from this an absolute obligation said that it is obligatory (though they differed whether it is so only) upon groups or upon individuals as well. The first opinion is related by Ibn al-Mughallis from Dāwūd. Those who understood it to be an invitation to the group for prayer said that it is a *sunna* for the mosques or an obligation for those locations where the congregation assembles. The reason for disagreement is its (the *adhān's*) vacillation between being one of the pronouncements of prayer as its integral part or a means toward assembly.

2.2.2.1.3. *Division 3: Time for* adhān

The jurists agreed unanimously that *adhān* is not to be proclaimed before the (commencement of the) prescribed period of the prayer, except in the case of the morning prayer, over which they disagreed. Mālik and al-Shāfiʿī held that it is permitted to make the call before *fajr*, but Abū Ḥanīfa prohibited this. A group of jurists maintained that if the call is made before *fajr* another call is to be made after *fajr*, because the obligation in their view is for *adhān* after *fajr*. Abū Muḥammad ibn Ḥazm said that the call must be made after the commencement of the prescribed timing (for prayer), but if the call is made a short while before the timing it is permitted when the interval is short, just sufficient for the first *mu'adhdhin* to descend and the second to ascend.

The reason for their disagreement is that there are two conflicting traditions on this issue. The first is an authentic and widely known tradition, which is the *saying of the Prophet (God's peace and blessings be upon him)*, "Bilāl makes the call when it is still night, so eat and drink till Ibn Umm Maktūm makes the call". Ibn Umm Maktūm was a blind man, who did not make the call till he was told that it is morning. The second tradition is related from Ibn ʿUmar "that Bilāl made the call before the break of dawn, so the Prophet (God's peace and blessings be upon him) ordered him to return and proclaim: 'The servant [of Allah] [that is, Bilāl] had slept'". The tradition of the jurists of Hijāz is more authentic, while the tradition of the Kūfīs has been related by Abū Dāwūd and declared authentic by many traditionists. The jurists decided with respect to these two traditions to adopt either the method of reconciliation or the method of preference. Those who adopted the method of preference were the jurists of Ḥijāz. They maintained that the tradition about Bilāl is more authentic and relying on it is more plausible. The Kūfī jurists adopted the method of reconciliation. They maintained that it is possible the call was made by Bilāl at a time that was mistakenly taken to be the time of *fajr*, as his eyesight was weak, while the call was made by Ibn Umm Maktūm when the time of dawn was certainly due. This is supported by what is related from ʿĀ'isha, who said, "The difference in time between their calls was a moment sufficient for one to descend and the other to ascend".

Those who combine the two, that is, making the call before *fajr* and after it, do so on the basis of the obvious implication of what is related specifically about the morning prayer, I mean, in the time of the Messenger of Allah (God's peace and blessings be upon him) two calls were made by two *mu'dhdhin*s, Bilāl and Ibn Umm Maktūm.

2.2.2.1.4. *Division 4: The conditions of* adhān

This division includes eight issues. The first is whether it is a condition that the person who makes the call be the same person who pronounces the *iqāma*? Second, whether it is a condition of *adhān* that it should not be interrupted by any conversation? Third, whether it is a condition that the *mu'adhdhin* be in a state of ritual purification? Fourth, is it a condition that the *mu'adhdhin* face the *qibla*? Fifth, whether it is a condition that the call be made while standing? Sixth, whether a call made while the *mu'adhdhin* is riding is deemed reprehensible (*makrūh*). Seventh, whether puberty is a condition for the person making the call? Eighth, whether it is a condition that no wages be taken for making the call?

About the issue of two men, one making the call and the other pronouncing the *iqāma*, the majority of the jurists of the regions maintain that this is permitted, while some maintained that this is not permitted. The reason for this disagreement is the existence of two conflicting traditions. First is al-Ṣudāʾī's tradition, who said, "I went up to the Messenger of Allāh, and when it was close to the dawn he ordered me to make the call. He then stood up for prayer and Bilāl came to pronounce the *iqāma*. The Messenger of Allāh said, 'The brother from Ṣudāʾ made the call, and he who makes the call is to pronounce the *iqāma*'". The second is the report that when ʿAbd Allāh ibn Zayd saw the *adhān* in a dream, the Messenger of Allāh ordered Bilāl to make the call. He then ordered ʿAbd Allāh, to pronounce the *iqāma*.

Those who adopted the method of abrogation maintained that ʿAbd Allāh ibn Zayd's tradition is earlier in time, while that of al-Sudāʾī is later. Those who adopted the method of preference said that ʿAbd Allāh ibn Zayd's tradition is more authentic, as al-Ṣudāʾī's tradition is an individual narration from ʿAbd al-Raḥmān ibn Ziyād al-Ifrīqī, who is not acceptable to them.

Their disagreement about (the permissibility of) wages for *adhān* is based on the dispute about the authenticity of the tradition relevant to this issue, that is, the tradition of ʿUthmān ibn Abī al-ʿĀṣ, who said, "One of the last instructions that the Messenger of Allāh gave me was to select a person for *muʾadhdhin* who would not take wages for making the call". Those who prohibited this also made the analogy for *adhān* upon prayer.

The reason for disagreement over the remaining conditions is based upon the analogy of *adhān* upon prayer. Those who constructed such an analogy imposed such conditions as are found for prayer, while those who did not construct the analogy did not impose them. Abū ʿUmar ibn ʿAbd al-Barr said that we have related from Abū Wāʾil ibn Ḥujr the tradition that "it is verified and is a practised *sunna* that no one makes the call unless he is standing, nor when he is ritually purified". He said that the words of Abū Wāʾil, who was one of the Companions, that "it is a *sunna*" moves it to the category of *musnad* (attributed to the Prophet), which is stronger than analogy.

The Qāḍī (Ibn Rushd) said that al-Tirmidhī has recorded (a tradition) from Abū Hurayra that the Prophet (God's peace and blessings be upon him) said, "No one is to make the call except after ablution".

2.2.2.1.5. *Division 5: What the listener says on hearing the* adhān

The jurists disagreed about the response of the listener to the *muʾadhdhin*. A group of jurists said that he repeats, word for word, what the *muʾadhdhin* says till the end of the call, while others said that he repeats what the *muʾadhdhin* says, except that when the *mu'adhdhin* says, "Come for prayer, come for salvation", the listener is to say, "There is no might and no power, but that with Allāh".

The reason for disagreement over this is the conflict of traditions. It is reported in a tradition from Abū Sa'īd al-Khudrī that the Messenger of Allāh (God's peace and blessings be upon him) said, "When you hear the *mu'adhdhin*, repeat what he says". It is reported by way of 'Umar ibn al-Khaṭṭāb and in a tradition from Mu'āwiya that the listener in response to "Come for prayer, come for salvation", should say: "There is no might and no power, but that with Allāh". Those who adopted the method of preference followed the general implication of Abū Sa'īd al-Khudrī's tradition, while those who qualified this general implication with the specific content (of the other tradition), reconciled the two traditions, and this is Mālik ibn Anas's opinion.

2.2.2.2. *Section 2:* Iqāma

They disagreed over *iqāma* on two points: its *ḥukm* and description. According to the jurists of the regions, its *ḥukm* is that of an emphatic *sunna* that is greater in strength than that for *adhān*, for individuals as well as for groups. In the Ẓāhirite view, it is an obligation, but I am not aware of whether it is an independent obligation or as one of the obligatory parts of prayer. The distinction is that according to the former opinion prayer does not become invalid if it is relinquished, but on the basis of the latter view it does. Ibn Kināna, one of the disciples of Mālik, said that if it is relinquished intentionally prayer is invalidated.

The reason for disagreement is their dispute about whether it comprises a part of the acts that were meant to be an unfolding of the unexplained command of performing prayer, and, therefore, it has to be construed as an obligation, because of the words of the Prophet (God's peace and blessings be upon him), "Pray as you see me praying", or whether it comprises acts that have to be construed as a recommendation. The apparent meaning of Mālik ibn al-Ḥuwayrith's tradition implies that it constitutes an obligation, either for the group or for the individual.

Its description, according to Mālik and al-Shāfi'ī, constitutes a *takbīr* in the beginning, which is twice, and the remaining is once, except the words, "Prayer is about to commence", which are pronounced once in Mālik's view and twice in al-Shāfi'ī's. According to the Ḥanafites, the *iqāma* is pronounced in pairs, while Aḥmad ibn Ḥanbal favoured an option between single and double pronouncement, in accordance with his opinion that there is a choice in making calls.

The reason for disagreement springs from the conflict of Anas's tradition about this issue with that of Ibn Abī Laylā, which has preceded. In the authentic tradition of Anas, Bilāl was ordered to call the *adhān* in a double pronouncement and the *iqāma* in a single pronouncement, except the words, "Prayer is about to commence". In Ibn Abī Laylā's tradition Bilāl was ordered to call the *adhān* as well as the *iqāma* in a double pronouncement.

The majority of the jurists maintain that women are under no obligation to pronounce the *adhān* or the *iqāma*. Mālik held that if they pronounce the *iqāma* it is better, while al-Shāfiʿī said that it is preferable if they pronounce both *adhān* and *iqāma*. Isḥāq was of the view that they are under an obligation to pronounce the *adhān* and *iqāma*. It is related from ʿĀʾisha, and recorded by Ibn al-Mundhir, that she used to pronounce the *adhān* as well as the *iqāma*. The disagreement refers to the dispute over whether a woman can lead the prayers. It is said that the original rule is that she has the same duties as a man, unless an evidence is adduced to qualify this, and it is also said that she has the same duties and it is only in some cases that a qualifying evidence is required.

2.2.3. Chapter 3 The *Qibla*

The Muslim jurists agreed that turning toward the direction of the House is one of the conditions for the validity of prayer, because of the words of the Exalted, "And whencesoever thou comest forth [for prayer, O Muḥammad] turn thy face toward the Inviolable Place of Worship. Lo! it is the Truth from thy Lord".[99] If, however, the worshiper can see the House, then the obligation is to face the House itself, and there is no dispute about this. The jurists disagree about two issues, when the Kaʿba is not in sight. First, whether the obligation is to face the Kaʿba itself or to face in its direction. Second, whether the obligation is to be exact about it or estimate the direction, that is, being exact about the Kaʿba itself or about the general direction?

2.2.3.1. Issue 1

Some Jurists maintained that the obligation is for facing the Kaʿba itself, while others maintained that it is for facing its direction. The reason for their disagreement is whether in the words of the Exalted, "And whencesoever thou comest forth [for prayer, O Muḥammad] turn thy face toward the Inviolable Place of Worship", an implied word is to be assumed, so as to read, "And whencesoever thou comest forth [for prayer, O Muḥammad] turn thy face in the direction of the Inviolable Place of Worship", or whether the words are to be read as they are. Those who assumed an implied word maintained that the obligation is for facing in its direction, while those who did not assume an implied word here said that the obligation is to face the Kaʿba itself. It is necessary to interpret the words in their actual meanings, unless an evidence indicates their construction in the metaphorical meaning. It is, however, maintained that the evidence for an implied word here is to be found in the words of the Prophet (God's peace and blessings be upon him), "Whatever is between the east and the west is a *qibla*, if you take the direction of the House". They said that the agreement of the Muslim jurists about a long row of worshipers extending beyond the boundary of the Kaʿba is an evidence that the obligation is not to face the Kaʿba itself, that is when the Kaʿba is not in sight. What I would say is that if the obligation had been to aim at the Kaʿba itself it would have amounted to hardship, and the Exalted has said, "He hath chosen you and hath not laid upon you in religion any hardship".[100] Aiming directly at a thing is not possible without approaching it by the use of geometry and (astronomical) observation, and yet the result is approximate; then, how is it possible without these to determine the direction by way of *ijtihād*? We are not under the obligation of discovery by means of geometry based upon astronomical observation from which the whole length and breadth of the land may be derived.

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[99] Qurʾān 2 : 149.

2.2.3.2. Issue 2

Is the obligation of a person striving to determine the *qibla* (the attainment of) accuracy or is it just the exercise of effort to discover it? Thus, if we say that the obligation is to accurately determine it, he is to pray again if he discovers that he made a mistake (in determining the true direction). If we maintain that the obligation is only for exerting effort, he does not have to pray again if he makes an error, and also if he had prayed before an effort to discover the direction. Al-Shāfiʿī thought that the obligation was for accurate determination, and if it becomes obvious to the person that he had made a mistake, he was to pray again, always. A group of jurists said that he does not pray again if he has finished praying, unless he did so intentionally (that is, prayed in the wrong direction) or prayed without making an effort to discover the direction. This was the opinion of Mālik and Abū Ḥanīfa, except that Mālik recommended praying again if there was still time.

The reason for disagreement in this is the conflict between a tradition and analogy, along with a dispute over the authenticity of the tradition. The analogy is based on the similarity of (the obligation to face the) direction to time, that is, the timing for prayer. They agreed (about time) that the obligation was for the worshipper to hit the time accurately. If the subject realizes that he prayed before time his prayer becomes invalid, and he must pray again, invariably. There is, however, a slight deviation reported from Ibn ʿAbbās and al-Shaʿbī, as well as the report from Mālik that if a traveller is unaware of the timing and prays *ʿishāʾ* before the disappearance of twilight discovering later that he had prayed before this time, his prayer remains valid. The basis for the resemblance between them is that these are the bounds of timing just as those are the bounds of direction.

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[100] Qurʾān 22 : 78.

The tradition is found in the report of ʿĀmir ibn Rabīʿa, who said, "We were travelling with the Messenger of Allāh (God's peace and blessings be upon him) on a dark night, and the direction of the *qibla* became obscure to us. Each one of us prayed in a certain direction, as we guessed, but when it was morning we found that we had prayed in a direction other than that of the *qibla*. We asked the Prophet (God's peace and blessings be upon him) about it and he said, 'Your prayer was valid.' It was then that revelation came down with the verse, 'Unto Allāh belongeth the East and the West, and withersoever ye turn, there is Allāh's countenance'".[101] Thus, the implication of the verse stays confirmed, and it is concerned with the person who observes prayer and later discovers that he prayed in a direction other than the *qibla*. The majority of the jurists, however, maintain that it has been abrogated by the verse, "And whencesoever thou comest forth [for prayer, O Muḥammad] turn thy face toward the Inviolable Place of Worship".[102] Those for whom this tradition did not prove to be authentic constructed the analogy of the limits of direction upon the limits of timings. And those who accepted the tradition held that prayer was valid.

Within this topic is a widely known issue, namely the *ḥukm* of prayer inside the Kaʿba. The jurists disagreed about this. Some of them prohibited it absolutely, while others permitted it without qualification. There were others who made a distinction between supererogatory and obligatory prayers within it. The reason for their disagreement is based on the conflict of traditions related to the issue, and the question of whether a person facing one of its sides from within may be called "one facing the Kaʿba", as in the case of a person facing it from outside.

There are two conflicting traditions about the issue, and both are authentic. First is Ibn ʿAbbās's tradition, who said, "When the Messenger of Allāh (God's peace and blessings be upon him) entered the Kaʿba, he offered supplication at each side, but he did not pray till he had come out. On coming out he offered two *rakʿa*s besides the Kaʿba and said, 'This is the *qibla*'". The second tradition is that of ʿAbd Allāh Ibn ʿUmar "that the Messenger of Allāh (God's peace and blessings be upon him) entered the Kaʿba, along with Usāma ibn Zayd, ʿUthmān ibn Ṭalḥa, and Bilāl ibn Rabāḥ. The door was closed behind him and he stayed inside for some time. When he had come out, I asked Bilāl, 'What did the Messenger of Allāh (God's peace and blessings be upon him) do?' He said, 'He stood between two pillars, one on his left and one on his right, while three other pillars were behind him, and then prayed'".

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[101] Qurʾān 2 : 115.

[102] Qurʾān 2 : 149.

Those who adopted the method of preference, or of abrogation, either maintained the absolute prohibition of prayer inside the Kaʿba, preferring Ibn ʿAbbās's tradition, or upheld its absolute permission, preferring Ibn ʿUmar's tradition. Those who adopted the method of reconciliation construed Ibn ʿAbbās's tradition to be concerned with obligatory prayers, and Ibn ʿUmar's tradition to mean supererogatory prayers. Reconciliation, however, between these two traditions is difficult, as the Prophet (God's peace and blessings be upon him) described the two *rakʿa*s prayed by him outside the Kaʿba as supererogatory. Those who adopted the method of suspension of the conflicting traditions did not permit prayer inside the Kaʿba at all, when they extend the accompanying *ḥukm* of consensus and of agreement. Those who did not uphold the extension of the *ḥukm* of consensus, and reconsidered the application of the expression "one facing the Kaʿba" to the person praying inside it as well, they permitted such prayer, but when they did not permit such application of the expression, which is better, they did not permit prayer inside the House.

The jurists agreed upon the recommendation of having a curtain between the person praying and the *qibla*, when he is praying alone or as an *imam*. This is based on the words of the Prophet (God's peace and blessings be upon him), "If you were to place in front of you something like that on the back of a man, then, you may pray". They disagreed about the obligation to draw a line, in case a person not finding a curtain. The majority maintained that he is under no obligation to draw a line, while Aḥmad ibn Ḥanbal said that he is to draw a line in front of him.

The reason for their disagreement derives from their dispute over the authenticity of the tradition laid down on the issue. The tradition has been related by Abū Hurayra "that the Prophet said, 'When one of you prays he is to place something in front of his face. If he does not find anything then let him prop a staff in front of him. If he does not find a staff, let him draw a line in front of him. Thus, any one passing in front of him will not harm him'". It is recorded by Abū Dāwūd, and Aḥmad ibn Ḥanbal considered it as authentic, while al-Shāfiʿī did not. It is also related that "the Prophet (God's peace and blessings be upon him) prayed without a curtain". There is another authentic tradition that a staff with a pointed tip of iron used to be affixed for him. These, then, are the principles of this subject, incorporated in four issues.

2.2.4. Chapter 4 Covering of Private Parts and the Dress for Prayer

This chapter is divided into two sections. The first is about covering of the private parts (*satr al-ʿawra*), while the second is about the kinds of dress permitted for prayer.

2.2.4.1. *Section 1: Covering the* ʿawra

The jurists agreed that covering the private parts is an absolute obligation, but they disagreed on whether it is a condition for the validity of prayer? Similarly, they differed about the area of the body, for a woman and a man, that is delineated by the term *ʿawra*.

2.2.4.1.1. Issue 1

The preferred opinion in Mālik's school is that it (covering of the this area) is one of the *sunan* of prayer. Abū Ḥanīfa and al-Shāfiʿī said that it is one of the prerequisites of the validity of prayer. The reason for disagreement over this stems from the conflict of traditions and the differences among the jurists in their understanding of the meaning of the words of the Exalted, "O Children of Adam! Look to [take] your adornment at every place of worship",[103] whether the prescription is to be construed as an obligation or a recommendation.

Those who interpreted it as an obligation said that the implied meaning is the covering of the *ʿawra*. They argued for this on the basis of the context of the revelation of the verse that a woman used to circumambulate the Kaʿba naked, so the verse was revealed and "the Messenger of Allāh issued the command that from then on no polytheist be allowed to perform the pilgrimage, nor was anyone to make the circumambulation naked". Those who interpreted it to convey a recommendation said that the adornment mentioned is the external form of the dress or other clothes that constitute adornment. They argued for this on the basis of what is laid down in a tradition that some men used to join the Prophet in prayer with their wrappers tied to their necks, as is done for children, and the women were, therefore, advised not to raise their heads (from the *sujūd*) till the men straightened up into the sitting posture. They added that it was for this reason that there was no disagreement about whether a person who could not find anything to cover himself should pray, but there was a disagreement about one who could not purify himself, whether he could pray.[104]

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[103] Qurʾān 7 : 31.

2.2.4.1.2. Issue 2

The second issue is about the delineation of the *ʿawra* in the case of men. Mālik and al-Shāfiʿī said that the *ʿawra* in his case extends from the navel to the knees. This was also Abū Ḥanīfa's opinion. A group of jurists maintained that the *ʿawra* comprises the private parts alone (the male sex organ and the rear exit). The reason for their disagreement stems from the conflict of two traditions, and both are authentic. The first is the tradition of Jarhad that the Messenger of Allāh (God's peace and blessings be upon him) said, "The thighs are part of the *ʿawra*". The second is Anas's tradition "that the Messenger of Allāh (once) uncovered his thighs while he was sitting with his Companions". It is recorded by al-Bukhārī. Anas's tradition has a stronger chain, while the Jarhad's tradition is on the safer side. Some of the jurists have said that the *awra* comprises the buttocks, genitals, and the thighs.

2.2.4.1.3. Issue 3

The third issue relates to the limits of the *ʿawra* in the case of a woman. Most of the jurists maintained that her entire body constitutes *ʿawra*, except for the face and the hands. Abū Ḥanīfa maintained that her feet are not a part of the *ʿawra*. Abū Bakr ibn ʿAbd al-Raḥmān and Aḥmad said that her entire body is *ʿawra*.

The reason for their disagreement is based on the possible interpretations of the words of the Exalted, "And to display of their adornment only that which is apparent", that is whether the exemption relates to defined parts or to those parts that she cannot (help but) display? Those who maintained that the intended exemption is only for those parts that she cannot help but display while moving, said that her entire body is *ʿawra*, even her back. They argued for this on the basis of the general implication of the words of the Exalted, "O Prophet! Tell thy wives and thy daughters and the women of the believers to draw their cloaks close round them. That will make them recognizable and they will not be exposed to harm".[105] Those who held that the intended exemption is for what is customarily not covered, that is, the face and the hands, said that these are not included in the *ʿawra*. They (further) argued for this on the grounds that a woman does not cover her face during *ḥajj*.

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[104] This is confusing. A person who cannot purify himself with water has to perform *tayammum* and pray.

[105] Qurʾān 33 : 59. Pickthall's translation changed.

2.2.4.2. *Section 2: The dress permitted for prayer*

The source for this are the words of the Exalted, "O Children of Adam! Take your adornment at every place of worship",[106] along with the prohibition of certain forms of dress in prayer, such as wrapping oneself in clothes (for sleeping on the ground); that is, to use a garment as a support for the head, or to wrap oneself in a single piece of cloth (with its ends crossed) without there being anything covering the shoulders, or to wrap himself in a single garment without anything covering the private parts. All proscriptions laid down about it have as their aim the prevention of the means that lead to the uncovering of the private parts, and I do not know of anyone who said that prayer is not permitted in any of these forms of dress so long as the *ʿawra* is not uncovered. This, however, would be obligatory according to the principles of the Ẓāhirites.

They agreed that a man is permitted to pray in a single dress, because of the saying of the Prophet (God's peace and blessings be upon him) when he was asked: "Can a man pray in a single garment?" He said, "Do all of you have two garments?"

They disagreed about the case of a man praying with his back and the front part above the navel uncovered. The majority uphold the permission of such prayer, as the back and the chest are not part of the *ʿawra* for a man. A group of jurists deviated and said that his prayer is not permitted, because of the proscription from the Prophet (God's peace and blessings be upon him) about the prayer of a man with nothing of his dress on his shoulders. They also relied upon the words of the Exalted, "O Children of Adam! Take your adornment at every place of worship".[107]

The majority agreed that the dress permissible for a woman in prayer is a (long) shirt and a veil, because of what is related from Umm Salama "that she asked the Prophet (God's peace and blessings be upon him), 'In what kind of dress should a woman pray?' He said, 'In a veil and a long and loose-fitting garment that covers the upper part of her feet'". Further, it is related from ʿĀʾisha from the Prophet (God's peace and blessings be upon him) that he said, "Allah does not accept the pubescent woman's prayer, unless she wears a veil". It is also related from ʿĀʾisha, Maymūna, and Umm Salama, and they used to issue verdicts accordingly. All jurists say that if she prays without a covering, she is to repeat her prayer (when she realizes her error) either within its prescribed time or later, except that Mālik used to say that she is to repeat it only in its prescribed time.

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[106] Qurʾān 7 : 31.

[107] Qurʾān 7 : 31.

The majority maintained that a slave-girl may pray with her head and fee uncovered, but al-Ḥasan al-Baṣrī deemed it obligatory for her to use the veil while ʿAṭāʾ deemed it recommended. The reason for disagreement lies in th question of whether a (legal) communication addressed to either category o persons (sex) includes those who are free as well as those in bondage, o whether it includes only the free to the exclusion of slaves?

They disagreed about the case of a man praying while dressed in a silke garment. A group of jurists said that his prayer in it is valid (thoug prohibited), while another group said it is not. A third group recommende repeating the prayer in its prescribed time (without the silk dress). The reaso for disagreement is over the question of whether avoidance of a thin prohibited absolutely is a condition for the validity of prayer? Those wh maintained that it is a condition said that prayer in it is not permitted (no valid), while those who maintained that he commits a sin because of his dress but his prayer is permissible said that it is not a condition for the validity o prayer unlike purification, which is a condition. This issue is of the sam nature as that of prayer in usurped property, dispute over which is widel known.

2.2.5. Chapter 5 Purification from Filth

It is unlikely for those who said that purification from filth is an emphati *sunna* to say that it is an obligation for prayer, that is, a condition for it validity, while those who maintained that it is an absolute obligation would sa that it is an obligation for prayer, but it is possible that they would not say this Two opinions of the school (Mālik's) are related from ʿAbd al-Wahhāb. First that removal of uncleanliness is a condition for the validity of prayer, when i possession of the means for doing so and in a state of remembering. Th second opinion is that it is not a condition. The opinion that it is a conditio does not conform with the better known opinion of the school that it is a emphatic *sunna*. It conforms more with the opinion that it is an obligatio when the capacity to remove (the uncleanliness is available) and when in a stat of remembrance. The issue had already preceded in the Book of Ritua Purification, and the reasons for disagreement were identified there.

The discussion relevant here is whether an absolute obligation that is relate to prayer is necessarily an obligation of prayer also. The truth is that a thin that is an absolute requirement does not necessarily become a condition for th validity of another required thing, [even if it occurs during it, except b another command; similarly, an absolute command for a thing proscribe absolutely does not necessarily become a condition for the validity of another thing],[108] except by another command.

2.2.6. Chapter 6 Places Suitable for Prayer

The places in which prayer is permissible, in the opinion of some jurists, are all those that are free from uncleanliness. Some jurists exempted seven places out of these: the dunghill (garbage area), the slaughterhouse, the graveyard, the roadway, the public bath, the kneelingplace of camels, and the roof of the House of Allāh (Kaʿba). Others made an exemption for the graveyard alone, while some others exempted the graveyard and the public-bath. Some of them deemed praying in these undesirable places as merely abominable, but did not invalidate the prayer; this is one narration from Mālik. The permissibility of such prayer is also related from him, which is Ibn al-Qāsim's narration.

The reason for disagreement arises from the conflict of the apparent meanings of traditions on the issue. There are two traditions on the issue that are agreed upon, while two are disputed. The traditions agreed upon are the sayings of the Prophet (God's peace and blessings be upon him), "I have been granted seven things that were not granted to anyone before me . . . [He mentioned within this]: The earth has been made a mosque for me and a means of purification, so wherever the time of prayer overtakes me, I pray". The other tradition says, "Enliven your homes with your prayers in them occasionally, and do not convert them into graveyards". As to the disputed traditions, one report is "that the Prophet (God's peace and blessings be upon him) proscribed prayers in seven places: the dunghill, the place for slaughtering animals, the graveyard, the roadway, the public bath, the kneeling places of camels, and the roof of the House of Allāh". It has been recorded by al-Tirmidhī. The second is the report that Prophet (God's peace and blessings be upon him) said, "Pray in the resting places of cattle, but do not pray in the kneeling places of camels".

The jurists were divided over these traditions because of the employment of three methods. The first is the method of preference and abrogation. The second is the method of structuring, that is, structuring the particular upon the general. The third is the method of reconciliation. Those who adopted the method of preference and abrogation followed the widely known tradition, the words of the Prophet (God's peace and blessings be upon him), "The earth has been made a mosque for me and a means of purification". They maintained that this tradition abrogates those that conflict with it, as it counts the merits granted to the Prophet (God's peace and blessings be upon him), and this cannot be abrogated, as abrogation belongs to the category of rules (*aḥkām*). Those who adopted the method of structuring the particular upon the general said that the tradition about permissibility is general whereas the proscribing tradition is particular; therefore it is necessary that the particular be structured upon the general. Some of these jurists (who apply this method) excluded the seven places, while some of them excluded only the public bath and the graveyard, saying that this is what is established from the Prophet (God's peace and blessings be upon him), as it is related that he also proscribed them independently. Some excluded only the graveyard due to the preceding tradition. Those who adopted the method of reconciliation, not excluding the particular from the general, said that the proscribing traditions are to be construed for abomination, and the others for permissibility.

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[108] Editors note: The statement between the brackets does not appear in the Egyptian manuscript, but it does in the Fās manuscript.

They disagreed about praying in synagogues and churches. One group considered it as reprehensible, while another permitted it. A third group made a distinction on the basis of the existence of figures, which is Ibn ʿAbbās's opinion because of ʿUmar's statement, "We do not enter their churches because of the images". The underlying cause, however, for the opinion of those who considered it abominable is not the images, but the probability of the existence of uncleanliness (*najāsa*).

They disagreed about prayer on the (bare) ground and on carpets and other things used for sitting on the ground. The majority maintain the permissibility of prostrating on mats and other similar things made of material produced by the land, and deem the rest as abominable, which is Mālik ibn Anas's opinion.

2.2.7. Chapter 7 Conditions Stipulated for the Validity of Prayer

The jurists agreed that things stipulated to be relinquished in prayer include words as well as acts. The acts include all acts permissible outside prayer that are not part of prayer, except the killing of a scorpion or a snake during prayer, about which they disagreed due to the existence of a conflict between a tradition on the issue and analogy. They agreed, I think, about the permissibility of minor movements.

The words include all those that are not part of prayer. In this too, they agreed that they invalidate prayer, if uttered intentionally, because of the words of the Exalted, "And stand up with devotion to Allāh",[109] and also because of the report from the Prophet, "Allāh stipulates any command of His that He likes, and He stipulates that you should not speak during prayers".

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[109] Qur'ān 2 : 238.

This is the tradition of Ibn Masʿūd. The tradition of Zayd ibn Arqam reads, "We used to speak during prayer, till the words, "And stand up with devotion to Allāh", were revealed and we were commanded to maintain silence and prohibited from speaking". Further, there is the tradition of Muʿāwiya ibn al-Ḥakam al-Sulamī, who said, "I heard the Messenger of Allāh (God's peace and blessings be upon him) saying, 'The speech of people is not suitable for our prayer, for prayer is praise (of Allāh), the repetition of the word of *tawḥīd*, thanksgiving, and the recitation of the Qurʾān'". They disagreed, however, about this on two points. First, when a person speaks out due to forgetfulness, and second when he speaks out intentionally for correcting an error in prayer. Al-Awzāʿī deviated from this saying that a person who speaks out in prayer for saving a life or for another serious matter may continue his prayer after that. Mālik's widely known opinion is that intentional speech with a view to rectification does not invalidate prayer. Al-Shāfiʿī said that speech invalidates it, whatever its nature, except in the case of forgetfulness. Abū Ḥanīfa said that prayer is invalidated by speech without exception.

The reason for their disagreement stems from the conflict of the apparent meaning of the traditions. The preceding traditions imply the general prohibition of speech, and appear to conflict with Abū Hurayra's tradition, which says, "The Messenger of Allāh (God's peace and blessings be upon him) once concluded his prayer after two *rakʿa*s. Dhū al-Yadayn [a man so called] asked him, 'Has the prayer been shortened, or did you forget, O Messenger of Allāh?' The Messenger of Allāh (God's peace and blessings be upon him) said, 'Did Dhū al-Yadayn speak the truth?' They said, 'Yes'. The Messenger of Allāh (God's peace and blessings be upon him) stood up and prayed the remaining two *rakʿa*s and then concluded with the salutation'". The apparent meaning here is that the Messenger of Allāh (God's peace and blessings be upon him) spoke and so did the people with him, and they continued the prayer after this speech, which did not cut off their prayer. Those who followed this apparent meaning, and maintained that this speech was specific to the rectification of prayer, exempted it from the general implication (of prohibition). This is Mālik ibn Anas's opinion. Some maintained that there is no evidence in the tradition to indicate that they spoke intentionally during prayer, and said that it appears they spoke thinking that the prayer had been shortened, while the Prophet (God's peace and blessings be upon him) spoke thinking that the prayer had been completed. Further, they added that the report that the people spoke after the statement of the Prophet (God's peace and blessings be upon him), "The prayer has not been shortened nor did I forget", was not proved authentic in their view; therefore the tradition implies the permissibility of speech for a person who is not speaking intentionally. Thus, the reason for the disagreement between Mālik and al-Shāfiʿī about the exemption from the general implication is their dispute over the meaning of this tradition, though al-Shāfiʿī also relied for this upon a general principle, which is the saying of the Prophet (God's peace and blessings be upon him), "Liability for mistake and forgetfulness has been removed from my *umma*". Abū Ḥanīfa, on the other hand, interpreted the proscribing traditions in their general meaning and held them to have abrogated the tradition of Dhū al-Yadayn, and as being preferred over it.

2.2.8. Chapter 8 *Niyya* and its Stipulation in Prayer

The jurists agreed about the stipulation of intention (*niyya*) for the validity of prayer, because prayer is the foremost form among the different kinds of ritual worship that have been ordained in the law without being assigned a rational interest (*maṣlaḥa*), that is, a tangible interest. They disagreed, however, about whether it is a condition that the *niyya* of the follower should conform with the *niyya* of the *imām*? In other words, is it permitted for a follower to pray *ẓuhr* when the *imām* is praying *ʿaṣr*? And, is it permitted for the *imām* to be praying supererogatory *ẓuhr* when the follower prays *farḍ*? Mālik and Abū Ḥanīfa maintained that it is obligatory that the intention of the follower conform with the intention of the *imām*, while al-Shāfiʿī held that it is not obligatory.

The reason for their disagreement is the conflict between the implication of the saying of the Prophet (God's peace and blessings be upon him), "The *imām* has been appointed so that he may be followed", and the tradition of Muʿādh that he used to pray with the Prophet (God's peace and blessings be upon him) and then lead his people in prayer. Those who maintained that this was specific to the case of Muʿādh and that the general implication of the words of Prophet (God's peace and blessings be upon him), "The *imām* has been appointed so that he may be followed", includes intention, stipulated the conformity of the *imām*'s intention with that of the follower. Those who maintained that the permission granted to Muʿādh extends to all the believers, which is the principle, said that there can be two possible interpretations of the other (former) tradition: first, that its general implication does not include intention, for its apparent meaning relates to (external) acts, in which case it would not conflict with Muʿādh's tradition; or it may include intention, in which case Muʿādh's tradition has restricted the generality.

Related to *niyya* are issues that have no concern with matters expressly stated in the law, and we decided to drop them, as our primary purpose is the discussion of issues that are directly related to matters expressly stated in the law.

2.3. Part 3: The Words and Acts of Prayer

This part covers the words and acts that constitute prayer, and these are the *arkān* (the elements). The obligatory prayers differ on the basis of an increase or decrease in these two elements, with respect to:

1. individual and congregational performance;
2. time, like the difference between the *ẓuhr* prayer on a Friday and the *ẓuhr* prayer for other days;
3. residence or travel;
4. security and fear; and
5. health and illness.

If it is desired that the discussion follow this classification and structure, it is necessary first to discuss what is common between these categories and then take what is specific to each. On the other hand, the discussion of each individual category may be taken up, which is easier, though this method of instruction leads to some repetition, but it was a method adopted by the *fuqahā*ʾ, and we will follow them in this.

We shall, therefore, divide this part into six chapters. The first chapter will cover the prayer of the individual who is resident, secure (from fear), and in good health. The second chapter will cover prayer in a congregation, that is, the *aḥkām* concerning the *imām* and the follower in prayer. The third chapter will deal with the *jumuʿa* prayer. Chapter 4 will deal with prayer during travel. Chapter 5 will discuss prayer in (a state of) fear. The sixth chapter will deal with the prayer of the sick.

2.3.1. Chapter 1 The Prayer of an Individual who is Resident, Secure, and in Good Health

There are two sections in this chapter. The first section is about the words of prayer, while the second is about its acts.

2.3.1.1. *Section 1: The words used in prayer*

The fundamental issues in this chapter are nine.

2.3.1.1.1. Issue 1: *Takbīr*

The jurists disagreed about *takbīr* (pronouncing the words: "*Allāhu Akbar*"—Allāh is Supreme) into three opinions. A group of jurists said that all pronouncements of *takbīr* in prayer are obligatory, while another group said that all pronouncements are not obligatory, which is a deviant opinion. The majority hold that the initial *takbīr* alone is obligatory.

The reason for disagreement among those who made all its instances obligatory and those who made only the *takbīr* of *iḥrām* obligatory stems from the conflict of the transmitted words of the Prophet (God's peace and blessings be upon him) with his transmitted acts. The transmitted saying of the Prophet (God's peace and blessings be upon him) is in the widely known tradition of Abū Hurayra that the Prophet (God's peace and blessings be upon him) said to a man, whom he was teaching how to pray, "When you resolve to pray, complete the ablution and face the *qibla*, then, pronounce the *takbīr* followed by recitation". The meaning here is that it is only the first *takbīr* that is obligatory, and had another *takbīr* been obligatory, he would have mentioned it to him, just as he mentioned the other obligations of prayer. The transmitted acts of the Prophet (God's peace and blessings be upon him) include Abū Ḥurayra's tradition "that he prayed pronouncing the *takbīr* each time he bowed or straightened up, and then said, 'I give you in my prayer a semblance of the prayer of the Messenger of Allāh (God's peace and blessings be upon him)'". Included (in the transmitted acts) is also the tradition of Muṭarrif ibn ʿAbd Allāh ibn al-Shikhkhīr, who said, ʿImrān ibn al-Ḥuṣayn and I followed ʿAlī ibn Abī Ṭālib, may Allāh be pleased with him, in prayer, and he pronounced *takbīr* when he prostrated, and when he raised his head after bowing. When he had completed the prayer, we went away and ʿImrān took hold of my hand and said, 'This reminds me of Muḥammad's prayer'".

Those who upheld its obligation, followed these acts transmitted in these traditions, and said that the principle is that all acts of the Prophet that have been described as an explanation of an obligatory act are to be construed as obligatory, as is justified by the words of the Prophet (God's peace and blessings be upon him), "Pray as you see me praying and acquire from me your acts of devotion".

The first group said that what is implicit in these traditions indicates that the acts of the Companions were for an affirmation (of the obligation) *takbīr*. Therefore, Abū Hurayra said, "I provide you with a semblance of the prayer of the Messenger of Allāh", while ʿImrān said, "I am reminded by this of Muḥammad's prayer". With respect to the opinion of those who deemed all instances of the *takbīr* as supererogatory, it is weak. Perhaps, they constructed an analogy for it from all those pronouncements of *dhikr* (remembrance) that are not obligatory, just as they constructed an analogy for the *takbīr* of *iḥrām* upon all other instances of *takbīr*.

Abū ʿUmar ibn ʿAbd al-Barr said that what supports the majority opinion is the report by Shuʿba ibn al-Ḥajjāj from al-Ḥasan ibn ʿImrān from ʿAbd

Allāh ibn ʿAbd al-Raḥmān ibn Abzī from his father, who said, "I prayed with the Prophet (God's peace and blessings be upon him) and he did not pronounce the *takbīr*, and I prayed with ʿUmar ibn ʿAbd al-ʿAzīz and he did not pronounce the *takbīr*". Further, the report by by Aḥmad ibn Ḥanbal from ʿUmar (God be pleased with him) that he did not pronounce the *takbīr* when he prayed alone. It appears that these jurists maintained that *takbīr* is meant to be an indication by the *imām* to the followers about his movements, and it also appears that those who considered it all supererogatory also held on to this reason.

2.3.1.1.2. Issue 2: The words of *takbīr*

Mālik said that it is not allowed to pronounce *takbīr*, except with the words *Allāhu Akbar*, while al-Shāfiʿī said that the forms *Allāhu Akbar* and *Allāhu al-Akbar* are both permitted. Abū Ḥanīfa said that *takbīr* is permitted with all those words that convey the same meaning, like Allāh is the Greatest (*al-Aʿẓam*) and Allāh is Greater (*al-Ajall*).

The reason for their disagreement is whether it is the words or their meaning that are prescribed for the opening. The Mālikites and the Shāfiʿites argued on the basis of the words of the Prophet (God's peace and blessings be upon him), "The key to prayer is purification, its sanctity starts with *al-takbīr*, and it is discharged with the salutation". They said that the definite article "*al*" is exhaustive and indicates that the *ḥukm* is confined to the thing expressed, and that it is not permissible without anything else. Abū Ḥanīfa does not agree with them about this principle, for such a meaning, in his view, arises from the literal category of *dalīl al-khiṭāb* (the indirect implication of the text), which requires the assigning of a meaning opposite that of the expressed subject to the unexpressed categories.[110] The *dalīl al-khiṭāb* is a method not used by Abū Ḥanīfa.

2.3.1.1.3. Issue 3: The post-*takbīr* words

A group of jurists said that *tawjīh* is obligatory in prayer. It is either the statement after *takbīr*, "I (have) turn(ed) (my face) to One Who created the heavens and the earth", which is al-Shāfiʿī's opinion, or it is the glorification of Allāh, which is Abū Ḥanīfa's opinion, or it is a combination of both, which is Abū Yūsuf's opinion, who was the disciple of Abū Ḥanīfa. Mālik said that *tawjīh* is not obligatory in prayer, nor is it a *sunna*.

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[110] That is, maintaining it is not permitted with other words, which is something left unsaid by the tradition.

The reason for disagreement is the conflict of traditions about *tawjīh* with practice (of the people of Medina), in Mālik's view, or is based upon the dispute over the authenticity of the relevant traditions. The Qāḍī (Ibn Rushd) said that it is established in the *Saḥīḥayn* from Abū Hurayra "that the Messenger of Allah (God's peace and blessings be upon him) used to remain silent between *takbīr* and (later) recitation. So I said, 'O Messenger of Allāh, for you I would offer as ransom my father and mother. In this silence of yours between *takbīr* and recitation, what do you say?' He said, and I quote, 'O Allāh, distance me from my errors, as You have distanced the east from the west, O Allāh, cleanse me of errors like a white dress cleansed of filth, O Allāh, wash away my errors with water, snow, and the morning dew'".

A group of jurists preferred some occasions for silence during prayer, including the moment following the initial *takbīr*, after the recitation of the *umm al-Qurʾān*, and after the completion of recitation just before bowing. Some of those who upheld this are al-Shāfiʿī, Abū Thawr, and al-Awzāʿī. These were denied by Mālik, his disciples, and by Abū Ḥanīfa, and his disciples.

The reason for their disagreement arises from their dispute over the authenticity of Abū Hurayra's tradition, who said, "The Prophet (God's peace and blessings be upon him) observed three occasions for silence in his prayer: between his pronouncing the initial *takbīr* while beginning the prayer, before beginning the recitation of the *fātiḥat al-Kitāb*, and after he had finished reciting before bowing".

2.3.1.1.4. Issue 4: Prounouncing the *tasmiya*

The jurists disagreed about reciting the *basmala*, the words meaning, "In the name of Allāh, the Beneficent, the Merciful", before beginning recitation in prayer. Mālik prohibited this in the prescribed prayer, whether loudly or inaudibly, at the beginning of the *umm al-Qurʾān* or any other *sūra*, but he permitted it with supererogatory prayers. Abū Ḥanīfa, al-Thawrī, and Aḥmad said that it is to be pronounced inaudibly in each *rakʿa* with the *umm al-Qurʾān*. Al-Shāfiʿī said that it is to be pronounced aloud in case of audible recitation and in a whisper in case of the inaudible. In his view it is a verse of the *fātiḥat al-Kitāb*, which was also the opinion of Aḥmad, Abū Thawr, and Abū ʿUbayd. Al-Shāfiʿī, however, differed about whether it was a verse of every *sūra* or a verse of *sūrat al-Naml* and *fātiḥat al-Kitāb* alone? Both opinions are related from him.

The reason for disagreement in this refers to two factors. First is the conflict of traditions on the topic, while the second relates to the dispute whether *basmala* is a verse of *fātiḥat al-Kitāb*. The traditions relied upon by those who drop it include that of Ibn Mughaffal, who said, "My father heard me when I was reciting the *basmala*, and said, 'O my son, beware of innovation, for I have prayed with the Messenger of Allāh (God's peace and blessings be upon him), Abū Bakr, and ʿUmar, but I did not hear any of them reciting it'". Abū ʿUmar ibn ʿAbd al-Barr said that Ibn Mughaffal is an unknown narrator. They also include what is related by Mālik about the tradition of Anas, who said, "I prayed behind by Abū Bakr, ʿUmar, and ʿUthmān (God be pleased with them) and none of them recited the *tasmiya* at the beginning of the prayer". Abū ʿUmar said that in some versions he states: "Following the Prophet (God's peace and blessings be upon him) and he did not recite it". Abū ʿUmar said that the traditionists are of the view that the narrations of this tradition are confused, and it cannot be adduced as a persuasive evidence. The reason is that in one instance it has been related through a chain that can be traced back to the Prophet (God's peace and blessings be upon him) (*marfūʿ*), and on another occasion the chain did not extend to him, while some versions mention ʿUthmān and others do not. Some of its versions say that they used to recite it, while others say they did not. Some other versions say that they did not pronounce the *basmala* loudly.

The traditions opposing these include the tradition of Nuʿaym ibn ʿAbd Allāh al-Mujammir, who said, "I observed prayer led by Abū Hurayra and he recited the *basmala* before the *umm al-Qurʾān* and before the *sūra*, and he pronounced *takbīr* while bowing and while straightening up. He then said, 'I provide you with a semblance of the prayer of the Messenger of Allāh (God's peace and blessings be upon him)'". Included in these is the tradition of Ibn ʿAbbās "that the Prophet (God's peace and blessings be upon him) used to pronounce the *basmala* aloud". Another tradition is from Umm Salama, who said, "The Messenger of Allāh (God's peace and blessings be upon him) used to recite the *basmala* and the verse meaning, 'Praise be to Allāh, Lord of the Worlds'".

The conflict of these traditions is one factor giving rise to disagreement about the recitation of the *basmala* in prayer. The second reason, as we have said, is whether it is a verse only of the *umm al-Kitāb* or also of each *sūra*, or whether it is not a verse at all?

Those who deemed it a verse of the *umm al-Kitāb* made its recitation obligatory because of the obligation to recite the *umm al-Kitāb* in their view, while those who deemed it a verse at the beginning of each *sūra* made its recitation obligatory along with the *sūra* as well. There has been extensive disagreement over this issue, and the issue is subject to interpretation. The strangest thing that occurred in this issue is when they asked: What is the basis of their disagreement, is it that the *basmala* is a verse of the Qurʾān, even in cases other than the *sūrat al-Naml*, or is it a verse of the Qurʾān in *sūrat al-Naml* alone? They relate, as a rebuttal of al-Shāfiʿī's argument, that had it been a part of the Qurʾān in places other than *sūrat al-Naml*, the Prophet

(God's peace and blessings be upon him) would have explained it, as the Qur'ān has been transmitted through *tawātur*. This is what the Qāḍī[111] said and thought it was irrefutable. Abū Ḥāmid (al-Ghazālī) defended al-Shāfiʿī's position by saying that, had it been something other than the Qur'ān, it would have been obligatory upon the Prophet (God's peace and blessings be upon him) to explain it. All this is confused and meaningless for how is it possible to say about a single verse that it is a part of the Qur'ān on one occasion and that it is not a part of it on another? In fact, it may be said that it has been established to be a part of the Qur'ān wherever it is mentioned, and that it is a also a verse of *sūrat al-Naml*. Whether it is a verse of the *umm al-Qur'ān* and of each *sūra* used as a beginning, is disputed. The issue is subject to interpretation, as it is the opening for all the chapters, and is a part of *sūrat al-Naml*. Think over this for it is self-evident. Allāh knows best.

2.3.1.1.5. Issue 5: Prayer without recitation

The jurists agreed that prayer without recitation is not valid, whether the omission is intentional or out of forgetfulness, except what is related from ʿUmar (God be pleased with him) that he prayed and forgot to recite. He was told about this, and he asked how the bowing and prostrations go? When he was told that they were normal, he said, "Then there is no harm". But this is a solitary (*gharīb*) tradition in their view, although it is included by Mālik in his *al-Muwaṭṭa'*, in some versions of it. Further, there is the report from Ibn ʿAbbās that he did not recite in prayer not requiring audible recitation, and said, "The Messenger of Allāh (God's peace and blessings be upon him) recited in some prayers, but kept silent in others, so we recite where he recited and maintain silence where he kept silent". He was asked whether there was recitation in *ẓuhr* and *ʿaṣr* prayers, and he replied, "No!"

The majority followed the tradition of Khabbāb "that the Prophet (God's peace and blessings be upon him) used to recite in the *ẓuhr* and *ʿaṣr* prayers. He was asked: 'How did you come to know this?' He replied, 'By the movement of his beard'". The Kūfīs relied on Ibn ʿAbbās's tradition for relinquishing the obligation of recitation in the last two *rakʿa*s of prayer, because of the equivalence of audible and inaudible prayer with respect to the silence of the Prophet (God's peace and blessings be upon him) in these two *rakʿa*s.

Those who held that recitation is obligatory in prayer, disagreed as to what is to be recited. Some of them maintained that the obligation here is to recited the *umm al-Qurʾān* for one who has memorized it, and that there is no limitation about additional recitation. Some of them made it obligatory in each *rakʿa*, some for the major part of prayer, some for half the prayer, and others for one *rakʿa* in each prayer. The first opinion was held by al-Shāfiʿī, and it is also the widely known view of Mālik, but it is also related from him that if he recites it in two of a four-*rakʿa* prayer it would be valid. Al-Ḥasan al-Baṣrī and many jurists of Baṣra held that recitation in *rakʿa* is sufficient. The obligation according to Abū Ḥanīfa is for reciting any verse that the person may choose, while his disciples held that the minimum is three short verses or a lengthy verse, like that about *dayn* (debt). This was the case for the first two *rakʿas* and for the remaining two he deemed as recommended (*mustaḥabb*) to recite *tasbīḥ*, "words glorifying the name of Allāh", and not recitation. This was upheld by the Kūfīs. The majority consider recitation as recommended (*mustaḥabb*) in all the *rakʿas*.

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[111] The identity of this person is not clear, unless the title has been applied to the author's grandfather. On other occasions, the title is used for the author himself. He does however mention in the Book of Oaths a jurist by the name of Ismāʿīl al-Qāḍī, who was a disciple of Mālik.

The reason for this (disagreement) stems from the conflict of traditions on the topic, and the conflict of the apparent meaning of the Book with a tradition. One of the conflicting traditions is the authentic tradition of Abū Hurayra, "A man entered the mosque and prayed. He then came up to the Prophet (God's peace and blessings be upon him) and greeted him and the Prophet (God's peace and blessings be upon him) responded to the salutation and said, 'Go back and pray, for you have not prayed'. He prayed again and returned, but the Prophet ordered him to pray again. He did so three times, till the man said, 'By the One Who has sent you in truth, I cannot do better than this'. The Prophet (God's peace and blessings be upon him) said to him, 'When you arise for prayer, complete the ablution and face the *qibla*, then pronounce *takbīr*. After that recite what is convenient for you from the Qurʾān, and then bow and remain in that position for a while, then raise yourself till you are firmly erect, then prostrate for a while, then sit up for a while, then prostrate again for a while, then rise till you are erect and stable. Then, do this in your entire prayer"'. Conflicting with this are two confirmed traditions, which are recorded by al-Bukhārī and Muslim. First is the tradition of ʿUbāda ibn al-Ṣāmit that the Prophet (God's peace and blessings be upon him) said, "He has not prayed, the one who has not recited the *fātiḥat al-Kitāb*". The second is the tradition of Abū Hurayra that the Messenger of Allāh (God's peace and blessings be upon him) said, "When a person prays without reciting the *umm al-Qurʾān*, it is lost, lost, lost".

Abū Hurayra's former tradition apparently indicates that it is sufficient in a prayer for a worshipper to recite whatever is convenient for him from the Qurʾān, while the tradition of ʿUbāda ibn al-Ṣāmit and the latter tradition of Abū Hurayra imply that the *umm al-Qurʾān* is a condition for (the validity of) prayer. The apparent meaning of the words of the Exalted, "So recite of it whatever is easy (for you)",[112] also support Abū Hurayra's former tradition. The jurists disagreeing over this issue either decided to adopt the method of reconciliation for these traditions or they adopted the method of preference, and the same meaning emerges from both opinions. The reason is that those who maintained the obligation of reciting whatever is easy from the Qur'ān said that this is preferable, for the apparent meaning of the Book conforms with it, and they may also hold by way of reconciliation that the purpose of ʿUbāda's tradition is to deny perfection (of such prayer), not its validity, while the purpose of Abū Hurayra's (latter) tradition is to indicate its validity, as it imparts instruction about the obligations in prayer.

These jurists may also adopt these two methods (for the second opinion) by saying that the traditions (requiring any recitation) are greater in number and a widely known tradition from Abū Hurayra supports this view, and this is the tradition in which Allāh, the Exalted, says, "I have divided prayer in half between Myself and My servant, one-half is for Me and one-half for My servant, and My servant gets what he asks for. The servant says, 'Praise be to Allāh, the Lord of the worlds', and Allāh says, 'My servant has praised Me . . '". (till the end of the tradition). These jurists may also argue that the words of the Prophet, "recite whatever you can from the Qur'ān", are ambivalent, while the other traditions are explicit, and the explicit govern the ambivalent. There is a difficulty that arises from the meaning of the word "*mā*" (what) which signifies "whatever is easy". The other interpretation can be valid here if "what" indicates, in accordance with the usage of the Arabs, what is implied by the *lām al-ʿahd* (i.e., the "*al*" if it alludes to an already known thing), so that the text will be assumed to mean "recite what is easy for you from the Qur'ān", and its implication will be (recite) the *umm al-Qur'ān*, as the definite article "*al*" indicates the previously mentioned object. It is necessary to take this into consideration in the usage of the Arabs, and if you find that the Arabs do this, that is, make a concession in the implication of *mā* to indicate a determined object, then such an interpretation is to be adopted, otherwise there is no cause for it. The issue, as you can see, is ambiguous, and this ambiguity would be removed if abrogation is established.

The disagreement among those who deemed obligatory the recitation of *umm al-Kitāb* as to whether it is so in every *rakʿa* or in part of the prayer, is caused by the differences over the reference of the pronoun in the words of the Prophet (God's peace and blessings be upon him), "the one who has not recited the *fātiḥat al-Kitāb* in it *fīhā*", whether it is the whole prayer or every part of the prayer. Because, the person who has recited it as a whole (not in every *rakʿa*), or in some, that is in one *rakʿa* or more, cannot be included in the ambit of the words of the Prophet (God's peace and blessings be upon him) about one who has not recited it (in every part). It was, in fact, this likelihood that led Abū Ḥanīfa to decide in favour of relinquishing recitation itself in part of the prayer, that is in the last two *rakʿa*s. Mālik preferred the recitation of *al-ḥamd* and a *sūra* in the first two *rakʿa*s of a four-*rakʿa* prayer, and *al-ḥamd* alone in the last two. Al-Shāfiʿī preferred that *al-ḥamd* and a *sūra* be recited in all four *rakʿa*s of the *ẓuhr* prayer, except that the *sūra* to be recited in the first two is to be longer. Mālik followed the authentic tradition of Abū Qatāda "that the Prophet (God's peace and blessings be upon him) used to recite the *fātiḥat al-Kitāb* and a *sūra* in the first two *rakʿa*s of *ẓuhr* and *ʿaṣr*, and the *fātiḥat al-Kitāb* only in the last two *rakʿa*s". Al-Shāfiʿī followed the apparent meaning of the authentic tradition of Abū Saʿīd "that he (the Prophet) used to recite in the first two *rakʿa*s of *ẓuhr* the length of about thirty verses, and in the last about fifteen verses". They did not disagree about *ʿaṣr* due to the agreement of the two traditions about it. The same tradition of Abū Saʿīd says "that in the first two *rakʿa*s of *ʿaṣr* he used to recite up to fifteen verses, and in the last two *rakʿa*s about half of that".

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[112] Qur'ān 73 : 20. Pickthall's translation changed.

2.3.1.1.6. Issue 6: Recitation of the *Qurʾān* while bowing and prostrating

The majority agreed about the prohibition of the recitation of the Qurʾān while bowing and prostrating, because of the tradition of ʿAlī about it. According to this tradition, he (the Prophet) said, "Jibrīl prohibited me from reciting the Qurʾān while bowing and prostrating". Al-Ṭabarī said that it is an authentic tradition, and it was followed by the jurists of the various regions. Some of the Tābiʿūn decided to allow this, and it is also the opinion of al-Bukhārī, because the tradition did not prove to be authentic for him, Allāh knows best.

They disagreed on whether bowing and prostrating require determined words from the worshipper. Mālik said that there is nothing determined for them. Al-Shāfiʿī, Abū Ḥanīfa, Aḥmad, and a group of jurists said that the worshipper repeats the words, "Praise the name of thy Lord, the Tremendous",[113] three times while bowing, and the words "Praise the name of thy Lord, the Most High",[114] three times while prostrating, in accordance with the tradition of ʿUqba ibn ʿĀmir. Al-Thawrī maintained that it was preferable if the *imām* were to repeat these words five times, so that the follower would have time to repeat them thrice.

The reason for disagreement here stems from the conflict of Ibn ʿAbbās's tradition with the tradition of ʿUqba ibn ʿĀmir. In Ibn ʿAbbās" tradition the

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[113] Qurʾān 56 : 74, 96.

[114] Qurʾān 87 : 1.

Prophet (God's peace and blessings be upon him) is reported to have said, "I have been prohibited from reciting the Qur'ān while bowing and prostrating. You should glorify the Lord while bowing and strive in making supplications while prostrating, for it is a deserving form for their being answered". In the tradition of ʿUqba ibn ʿĀmir, it is stated that when the verse "Praise the name of thy Lord, the Tremendous",[115] was revealed, the Prophet (God's peace and blessings be upon him) is reported to have said, "Recite this while bowing", and when the verse "Praise the name of they Lord, the Most High",[116] was revealed he said, "Recite this while prostrating".

Similarly, they disagreed about supplication when bowing, after they had agreed about glorification of Allāh. Mālik deemed this reprehensible because the Prophet (God's peace and blessings be upon him) said, "You should glorify the Lord while bowing and strive in making supplications while prostrating". A group of jurists said that supplication is permitted while bowing. They relied for this on traditions that state, "The Prophet (God's peace and blessings be upon him) used to make supplications while bowing". This is al-Bukhārī's opinion, who relied upon ʿĀ'isha's tradition. She said, "The Prophet (God's peace and blessings be upon him) used to say while bowing and prostrating, 'Glory to You O Allāh, our Lord, and all grateful praise for You. O Allāh, forgive me'".

Abū Ḥanīfa does not permit supplication in prayer, using words other than the words of the Qur'ān, but Mālik and al-Shāfiʿī allow it. The reason for disagreement is based upon the dispute over whether it is (mundane) speech.

2.3.1.1.7. Issue 7: The obligation to recite the *tasshahhud*

They disagreed about *tashahhud* and its preferred text. Mālik, Abū Ḥanīfa, and a group of jurists held that *tashahhud* is not obligatory, while another group upheld its obligation, which was adopted by al-Shāfiʿī, Aḥmad, and Dāwūd. The reason for their disagreement arises from the conflict of analogy with the apparent meaning of traditions. Analogy requires its association with all other *arkān* (elements) that are not obligatory in prayer, because of their agreement over the obligation of (reciting) the Qur'ān (alone) in prayer, and that *tashahhud* is not a part of the Qur'ān so that it may be obligatory. In a tradition from Ibn ʿAbbās, he says, "The Messenger of Allāh (God's peace and blessings be upon him) used to teach us the *tashahhud* as he would teach us a *sūra* of the Qur'ān". This implies an obligation, along with the principle that the words and the acts of the Prophet (God's peace and blessings be upon him) must be construed to imply obligation till an evidence to the contrary is adduced. The principle followed by the others is contrary to this, which states that it is not obligatory to associate with matters whose obligation has been established by agreement or whose obligation has been expressly mentioned, unless their obligation has been expressly and explicitly mentioned (by the Prophet). These, as you can see, are two separate approaches.

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[115] Qur'ān 56 : 74, 96.

[116] Qur'ān 87 : 1.

In preferring the words of *tashahhud*, Mālik (God bless him) followed the words used by ʿUmar (God be pleased with him) for instructing people from the pulpit. The words are: "(All) greetings are for Allāh, righteous acts are for Allāh, good words and prayers are for Allāh. Peace on you O Prophet, and the mercy of Allāh and His blessings. Peace on us and on the righteous servants of Allāh. I testify that there is no god, but Allāh alone, without associates. I testify that Muḥammad is His servant and Messenger". The jurists of Kūfa, Abū Ḥanīfa and others, preferred the *tashahhud* used by ʿAbd Allāh ibn Masʿūd. Abū ʿUmar said that this was also preferred by Aḥmad and most of the traditionists, because of the authenticity of its transmission from the Messenger of Allāh (God's peace and blessings be upon him). The words are: "All salutations are for Allāh, as well as prayers and good words. Peace on you O Prophet, and the mercy of Allāh and His blessings. Peace on us, and on the righteous servants of Allāh. I testify that there is no god, but Allāh, and I testify that Muḥammad is His servant and Messenger". Al-Shāfiʿī and his disciples preferred the *tashahhud* used by Ibn ʿAbbās, which he related from the Prophet (God's peace and blessings be upon him), saying, "The Messenger of Allāh (God's peace and blessings be upon him) used to instruct us in *tashahhud* as he would in a *sūra* of the Qurʾān. He used to say, 'Salutations, blessed acts, prayers, and good words are (all) for Allāh. Peace on you O Prophet, the mercy of Allāh and His blessings. Peace on us and upon the righteous servants of Allāh. I testify that there is no god but Allāh and that Muḥammad is His Messenger' ".

The reason for disagreement stems from their conviction about the preferred words. Those who were convinced about the preference of one of the three traditions followed it. Many jurists maintained that all this is a matter of choice, like words of *adhān* and *takbīr* in the case of funerals, the two *ʿĪds*, and some other matters that have been attributed to the Prophet through *tawātur*. This appears to be the truth, Allāh knows best.

Al-Shāfiʿī stipulated blessings upon the Prophet (God's peace and blessings be upon him) as a condition of *tashahhud*, saying that it is an obligation because of the words of the Exalted, "Lo! Allah and His angels shower blessings on the Prophet. O ye who believe! Ask blessings on him and salute him with a worthy salutation".[117] He maintained that this salutation is the salutation in prayer.[118] The majority maintained that this is the salutation that is made after prayer.

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[117] Qurʾān 33 : 56.

A group of the Ẓāhirites said that it is obligatory for the worshipper reciting *tashahhud* to seek the refuge of Allāh from four things described in a tradition: the torment of the grave, the torment of Hell, the trial (*fitna*) of the Antichrist, and the trial of life and death. Because, it is established in the tradition "that the Messenger of Allāh (God's peace and blessings be upon him) used to seek refuge from them at the end of his *tashahhud*. Some versions of this tradition state: "When one of you completes the last *tashahhud*, he should seek refuge of Allāh from four things". The tradition has been recorded by Muslim.

2.3.1.1.8. Issue 8: Salutation concluding prayer

They disagreed about salutation after prayer. The majority upheld its obligation, while Abū Ḥanīfa and his disciples said that it is not obligatory. Some of those who maintained that it is obligatory said that it is obligatory upon the individual, and the *imām*, to make a single salutation, when others said that they make two (one to the right and one to the left).

The majority (who held that it is obligatory) followed the apparent meaning of ʿAlī's tradition, in which the Prophet (God's peace and blessings be upon him) said, "Its termination is the salutation". Those among them who said that the obligation is for making two salutations followed the established tradition that "the Prophet (God's peace and blessings be upon him) offered two salutations", and this is the case for those who construe his (God's peace and blessings be upon him) acts to imply obligation. Mālik preferred two salutations for the follower and a single salutation for the *imām*, though it is related from him that the follower offers three salutations, the first for termination, the second for (to greet) the *imām*, and the third for (to greet) the person on his left. Abū Ḥanīfa followed what was related by ʿAbd al-Raḥmān ibn Ziyād al-Ifrīqī that both ʿAbd al-Raḥmān ibn Rāfiʿ and Bakr ibn Sawādah related from ʿAbd Allāh ibn ʿAmr ibn al-ʿĀṣ who said, "If a man has taken the sitting posture at the end of his prayer and he passes wind before offering the salutation his prayer is complete". Abū ʿUmar ibn ʿAbd al-Barr said that the preceding tradition of ʿAlī is more authentic according to the traditionists, as the tradition of ʿAbd Allāh ibn ʿAmr ibn al-ʿĀṣ has been narrated only by al-Ifrīqī, a case that is considered weak by the traditionists.

The Qāḍī (Ibn Rushd) said: "If it is authentic by way of transmission, its text is subject to interpretation, because it does not indicate that completion of prayer is not possible without a salutation, except by way of the (indirect) implication of the text (*dalīl al-Khiṭāb*), which is a construction that is considered weak by most. The majority, on the other hand, may say that the definite article, '*al*', which signifies inclusion is stronger than the (indirect) implication of the text in indicating the *ḥukm* of the unexpressed category, which is the opposite of the expressed *ḥukm*".

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[118] The editor of the original text says: Attributing this to al-Shāfiʿī is subject to investigation. It appears, however, that the statement in the text is correct.

2.3.1.1.9. Issue 9: Supplication (*qunūt*)

They disagreed about the recitation of *qunūt*.[119] During the *iʿtidāl* in the last *rakʿa* Mālik maintained that *qunūt* is recommended for the dawn prayer, while al-Shāfiʿī said that it is a *sunna*. Abū Ḥanīfa held that reciting *qunūt* is not permitted in the dawn prayer, and its place is in the *witr* prayer. A group of jurists said that, in fact, *qunūt* is to be recited in every prayer. Some said that *qunūt* is recited only in the month of Ramaḍān, some said that it is recited in its second half, and others said that it is recited in the first half.

The reason for this disagreement is the conflict of traditions transmitted from the Prophet (God's peace and blessings be upon him) with analogy constructed upon other prayers, that is, analogy based upon those prayers in which *qunūt* is recited for those in which it is not. Abū ʿUmar ibn ʿAbd al-Barr said that recitation of *qunūt* was a prevailing practice among the first generation during the month of Ramaḍān, in which the disbelievers were cursed following the *sunna* of the Messenger of Allāh (God's peace and blessings be upon him), who made a supplication for cursing Waʿl and Dhakwān, and the group who killed the residents of Biʾr Maʿūna. Al-Layth ibn Saʿd said that for a period of forty-five years he had not offered *qunūt*, except behind an *imām* making such a supplication. He said that for this he had followed the tradition that was related from the Prophet (God's peace and blessings be upon him) that "he made supplications for a month or forty (days) pleading on behalf of one group and cursing others till Allāh, the Glorious and Exalted, censured him in the verse: 'It is no concern at all of thee (Muhammad) whether He relent toward them or punish them; for they are transgressors'".[120] The Messenger of Allāh (God's peace and blessings be upon him) gave up the supplication and did not repeat it till he met Allāh. Al-Layth said that since the time he bore this tradition with him, he did not make a supplication. This was also the opinion of Yaḥyāʾ ibn Yaḥyāʾ. The Qāḍī (Ibn Rushd) said: "The elderly scholars mentioned to me that this practice also prevailed among us at his mosque in Cordova, and it continued till our time or close to our time".

Muslim has recorded a report from Abū Hurayra "that the Prophet (God's peace and blessings be upon him) used to recite the *qunūt* in the dawn prayer, then information reached us that he relinquished this when the verse, 'It is no concern at all of thee (Muhammad) whether He relent toward them or punish them; for they are transgressors',[121] was revealed. He also recorded from Abū Hurayra that the Prophet (God's peace and blessings be upon him) used to supplicate during *ẓuhr*, *ʿishāʾ*, and the dawn prayers. In addition, he has recorded a tradition from the Prophet (God's peace and blessings be upon him) that 'he continued to recite *qunūt* for one month during the dawn prayer invoking a curse upon Banū Uṣayya'".

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[119] It means the recitation of *duʿāʾ*.

[120] Qurʾān 3 : 128. Pickthall's translation changed.

They disagreed about the text of the *qunūt*. Mālik preferred that it be with the words: "O Allāh, we seek Your help, we seek Your forgiveness, we seek Your guidance, we believe in You, we bow and humble ourselves before You, we devote ourselves to You, and we shun him who denies You. O Allāh, You it is we worship, and for You we pray and prostrate ourselves, toward You we strive and hasten, seeking Your mercy, and fearing Your torment, for Your torment is about to chase the disbelievers". The jurists of ʿIrāq call these the two *sūrahs*, and it is reported that they are to be found in the *muṣḥaf* of Ubayy ibn Kaʿb. Al-Shāfiʿī and Isḥāq said that the text of the *qunūt* is: "O Allāh, guide us with those You have guided, and deliver us with those You have delivered, guard us from the consequences of what You have decreed, You are the One Who decrees and there is no decree for You, You are the Glorious, our Lord, and the Exalted". This was related by al-Ḥasan ibn ʿAlī through authentic channels that the Prophet (God's peace and blessings be upon him) had taught him this prayer to be used as a supplication in prayer. ʿAbd Allāh ibn Dāwūd said: "Do not follow in prayer the person who does not supplicate using the two *sūrahs*". A group of jurists said that there is no special text prescribed for the *qunūt*.

2.3.1.2. *Section 2: The acts that constitute the elements* (arkān)

In this section there are eight fundamental issues:

2.3.1.2.1. Issue 1: Raising the hands (*rafʿ al-yadayn*)

The jurists disagreed about raising of the hands in prayer on three points: first, about its *ḥukm*; second, about the occasions when the hands are raised; and third, about the extent to which they are to be raised.

Regarding the *ḥukm* the majority maintained that raising of the hands is a *sunna* of prayer, while Dāwūd and a group of his disciples maintained that it is an obligation. These jurists are further divided into sub-groups. Some of them made it obligatory in the *takbīr* of *iḥrām* alone, some made it obligatory at the beginning of the prayer, while reciting the first words of *takbīr*, and at the time of bowing, that is, while lowering the body for *rukūʿ* and while raising it, some made it obligatory on these two occasions and at the time of prostration, and this in accordance with their disagreement about the occasions on which they are to be raised.

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[121] Qurʾān 3 : 128.

The reason for their disagreement is the conflict of the apparent meaning of Abū Hurayra's tradition, which contains instructions about the obligations of prayer, with the (reported) acts of the Prophet (God's peace and blessings be upon him). Abū Hurayra's contains the statement that the Prophet (God's peace and blessings be upon him) instructed him about *takbīr*, but he did not order him to raise his hands, while it is established from the Prophet (God's peace and blessings be upon him) through traditions reported by Ibn ʿUmar and others that "he used to raise his hands at the beginning of prayer".

About their disagreement over the occasions for raising the hands, the jurists of Kūfa, Abū Ḥanīfa, Sufyān al-Thawrī, and all their other jurists, said that the worshipper is not to raise his hands, except at the time of the first *takbīr*. This is also a narration of Ibn al-Qāsim from Mālik. Al-Shāfiʿī, Aḥmad, Abū ʿUbayd, Abū Thawr, the majority of the Ahl al-Ḥadīth, and the Ẓāhirites upheld the *ḥukm* of raising of the hands at the time of the first *takbīr*, and at the time of bowing, and while rising up from bowing. This is also related from Mālik, except that it is an obligation according to some of these jurists, while it is a *sunna* in Mālik's view. Some of the Ahl al-Ḥadīth upheld the raising of the hands at the time of prostration and on rising from it.

The reason for all this disagreement is related to the conflict of the traditions relevant to the issue, and the conflict of some of these with the practice at Medina. One of these traditions is that of ʿAbd Allāh ibn Masʿūd and al-Barāʾ ibn ʿĀzib "that the Prophet (God's peace and blessings be upon him) raised his hands once for the first *takbīr* and did not do so again". The second tradition is reported by Ibn ʿUmar from his father "that the Messenger of Allāh (God's peace and blessings be upon him) used to raise his hands up to the level of his shoulders at the beginning of prayer, and he also raised them when he straightened up after bowing and said, 'Allāh listens to one who praises Him, our Lord, all praise is for You', but he did not do this while prostrating". This is a tradition that is agreed upon for its authenticity (by al-Bukhārī and Muslim) and they believed that it was reported from the Prophet (God's peace and blessings be upon him) by about thirteen individuals from among his Companions. The third tradition is reported by Wāʾil ibn Ḥujr, which contains an addition over the tradition of Ibn ʿUmar "that he used to raise his hands while prostrating".

Among those who interpreted raising of the hands here to imply recommendation or obligation, there are some who restricted it to apply to the first *takbīr* by preferring the tradition of ʿAbd Allāh ibn Masʿūd and the tradition of al-Barāʾ ibn ʿĀzib, which is Mālik's opinion in conformity with practice (at Medina). Some of these jurists preferred the tradition of ʿAbd Allāh ibn ʿUmar and thus upheld raising of the hands on two occasions, that is while bowing and at the beginning because of its being widely known and because all of them agreed about it. Those among them who considered it to be an obligation interpreted it to be so, while those who deemed it to be a recommendation interpreted them to imply a recommendation. Those who adopted the method of reconciliation said that it is necessary to combine the additions with each other in accordance with what is contained in the tradition of Wāʾil ibn Ḥujr. Thus, the jurists adopted two methods with respect to these traditions: the method of preference or the method of reconciliation.

The reason for their disagreement over whether interpreting the raising of hands implies recommendation or obligation is the same reason that we have stated earlier that some of the jurists maintain that the principle about the acts of the Prophet (God's peace and blessings be upon him) is that they be construed as an obligation till an evidence is adduced to show the contrary, while others maintain that the principle is not to add to what has been established as an obligation of prayer through an authentic saying or through consensus, except on the basis of an explicit evidence. This explanation has already preceded in our description and there is no reason to repeat one single point many times.

The level to which the hands are to be raised has been determined by some to be up to the shoulders. This was the opinion of Mālik, al-Shāfiʿī, and a group of jurists. Some of them held it to be the level of the ears, which was upheld by Abū Ḥanīfa. Some jurists held that they be raised to the level of the chest. All this is related from the Prophet (God's peace and blessings be upon him), except that the most authentic of these reports is that they be raised up to the shoulders, and that is upheld by the majority. Raising them up to the ears is more authentic than raising them up to the chest, and is more widely known.

2.3.1.2.2. Issue 2: Rising straight from bowing

Abū Ḥanīfa maintained that *iʿtidāl* on rising from the *rukūʿ* and during it is not an obligation. Al-Shāfiʿī said it is obligatory. Mālik's disciples differed about whether the foremost opinion in the school implies that it is a recommendation or an obligation, as no explicit opinion is narrated from him on this.

The reason for disagreement here is whether the obligation is met by conforming with a part of that to which the term applies or by complying with the whole of it. Those for whom the obligation is met by complying with a part of that to which the term is applied, did not stipulate the maintenance of *iʿtidāl* while bowing. Those for whom the obligation is met by conformity with the whole stipulated rising to an erect position after *rukūʿ*, as this is established from the Prophet (God's peace and blessings be upon him). In a preceding tradition he said to a man whom he was instructing in the obligations of prayer, "Bow, resting a little in bowing, and raise yourself resting a while"; therefore, it is necessary to construe this as an obligation.

Those who maintain that the principle is not to construe the acts of the Prophet (God's peace and blessings be upon him) relating to his acts in prayer as obligatory unless an evidence indicates this, had recourse to this tradition; for this reason also they did not consider raising of the hands as obligatory nor even the other acts and pronouncements besides the first *takbīr* and recitation. Think over it for it is a principle that opposes the first principle (of interpreting the acts as obligatory), and is the cause of disagreement in most of these issues.

2.3.1.2.3. Issue 3: The sitting posture

The jurists disagreed about the sitting posture (in prayer). Mālik and his disciples said that the person is to lower himself on his buttocks toward the ground, with his right foot raised resting on the inside of its toes and his left leg bent under him and bend the left foot. In his view, the sitting posture for a woman is the same as that of a man. Abū Ḥanīfa and his disciples said that a man is to plant his right foot on the ground and seat himself on his left foot. Al-Shāfiʿī distinguished between the posture in the middle of the prayer and the posture at the end; for the posture during the middle he followed the same opinion as that of Abū Ḥanīfa, and for the last posture the same opinion as Mālik's.

The reason for their disagreement is the conflict of traditions. There are three traditions on the issue. The first, which is established by the agreement of all, is the tradition of Abū Ḥumayd al-Sāʿidī describing the prayer of the Prophet (God's peace and blessings be upon him). It contains the words, "When he sat down after two *rakʿas*, he did so on his left leg and raised his right foot, but when he sat down at the end he bent his left leg and raised the right one sitting on his hips [on the left side]". The second is the tradition of Wāʾil ibn Ḥujr, which says, "When he sat down in prayer, he raised his right foot and sat on the left". The third tradition is related by Mālik from ʿAbd Allāh ibn ʿUmar, who said, "The *sunna* in prayer is that you raise your right foot and bend your left leg". It is a primary authority, because of his saying, "The *sunna* in prayer". In a report from al-Qāsim ibn Muḥammad he showed them the sitting posture during *tashahhud*, and raised his right foot and turned in the left, but he sat on his left hip not on his foot, saying "This is what ʿAbd Allāh ibn ʿAbd Allāh ibn ʿUmar showed me, and said that his father used to adopt this posture".

Mālik followed the method of preference on the basis of this tradition, while Abū Ḥanīfa favoured preference on the basis of Wāʾil's tradition. Al-Shāfiʿī adopted the method of reconciliation based on the tradition of Abū Ḥumayd. Al-Ṭabarī left it to the choice of the individual and said, "All these postures are permissible, and their adoption is commendable because they have been established through authentic reports from the Messenger of Allāh". This is a commendable opinion, as it is better to base the varying acts on selection rather than on conflict. This kind of conflict may often occur between acts as opposed to words, or in words opposed to words.

2.3.1.2.4. Issue 4: The *ḥukm* of the sitting postures

The jurists disagreed about the sitting postures in the middle of the prayer (that is, on rising from the second prostration of the second *rakʿa* and before standing up for the third) and at the end. Most of the jurists held that the posture in the middle of the prayer is *sunna* and is not an obligation. One group deviated from this and said that it is an obligation (*farḍ*). Likewise, the majority held that the sitting posture at the end of the prayer is obligatory, but some deviated and held that it is a *sunna*. The reason for their disagreement is the conflict of the implication of the text with analogy constructed upon one sitting posture over the other. This is so as in the preceding tradition of Abū Hurayra; the words are: "Then sit up and rest a little, while seated". According to the apparent meaning of this tradition the sitting posture is obligatory in the entire prayer. Those who adopted it said that all sitting postures are obligatory. It is however laid down in the confirmed tradition of Ibn Buhayna that "the messenger of Allah (God's peace and blessings be upon him) dropped the middle sitting posture and did not repeat it, and then prostrated on account of it". It is also established from him that he dropped two *rakʿas* but performed them again, as he did for one *rakʿa*. From this the jurists understood the difference between the *ḥukm* of the middle sitting posture and the *ḥukm* of a *rakʿa*. As a *rakʿa* was obligatory for them by consensus, it followed that the middle sitting posture was not obligatory. It is on this basis that the jurists differentiated between the two sitting postures and maintained the prostrations of forgetfulness are performed for *sunan* and not for obligations (*furūḍ*). Those who considered it to be an obligation maintained that the prostrations of forgetfulness are specific to the middle posture (if left out) as distinguished from the other obligations, and that cannot be counted as evidence that it (the middle posture) is not obligatory.

Those who maintained that both sitting postures are a *sunna* considered that the last sitting posture is to be so on the analogy of the middle sitting posture after having considered the middle sitting posture to be so on the basis of the evidence relied upon by the majority for considering it as *sunna*. Thus, the reason for their disagreement, in actual fact, refers to the conflict between reasoning and the implication of words or with the implication of acts. Some jurists, those who considered that the sitting postures are both obligatory, did so because for them the acts of the Prophet (God's peace and blessings be upon him) are the basis for declaring the acts of prayer as obligatory, unless there is an evidence indicating the contrary. Both bases taken together imply here that the last sitting posture is obligatory, for which reason the majority adopt this opinion. As there is only analogy opposing these two bases, that is, of words and acts, the weakest of the opinions is that which holds both sitting postures to be a *sunna*, Allāh knows best.

It is established from the Prophet (God's peace and blessings be upon him) that "he used to place his right hand on his right thigh and his left hand on his left thigh, and that he used to point with his finger [an indication of Divine Unity]". The jurists agree that this form of the sitting posture is to be preferred to others in prayer, but they differed about the movement of the finger because of the conflict of traditions in this, the established act being that he merely used to point it (not to shake it).

2.3.1.2.5. Issue 5: Placing one hand over the other in prayer (in the standing posture)

The jurists differed about placing one hand over the other in prayer. Mālik disapproved this in obligatory prayers, but permitted it in supererogatory prayers. A group of jurists, and these are the majority, maintained that this act is among the *sunan* of prayer. The reason for their disagreement is that confirmed traditions have been reported in which the description of the Prophet's prayer have been transmitted, but it has not been transmitted that he used to place his right hand over his left during prayer, while it has also been related that the people were commanded to do this. This has been related in the description of the prayer of the Prophet (God's peace and blessings be upon him) in the tradition of Abū Ḥumayd. A group of jurists, therefore, held that the traditions in which this is established imply an addition over those in which this addition has not been transmitted, and an addition has to be accepted. Another group said that it is necessary to adopt the traditions in which this addition has not been transmitted as these are more in number, and also because it (this practice) is not compatible with the acts of prayer for it belongs to the category of seeking support; therefore, Mālik permitted it in supererogatory and not in obligatory prayers. It appears that it depicts a posture of humility, which is appropriate for it.

2.3.1.2.6. Issue 6: Rising from prostrations after the odd *rakʿa* and leaning on the hands before prostrating

A group of jurists preferred that when a person is in the odd *rakʿa* of his prayer he should not stand up (after the second prostration) till he has straightened up in the sitting posture (for resting), while another group preferred that he rise up straight from the prostrations. The first was the opinion of al-Shāfiʿī and a group of jurists and the second was the opinion of Mālik and a group of jurists.

The reason for the disagreement is that there are two conflicting traditions in this. The first is the confirmed tradition of Mālik ibn al-Ḥuwayrith "that he saw the Messenger of Allāh (God's peace and blessings be upon him) pray, and when he was in the odd *rakʿa* of his prayer he did not stand up after the prostration till he had straightened up in the sitting posture". In the tradition of Abū Ḥumayd about the description of the prayer of the Prophet (God's peace and blessings be upon him) it is said "that when he raised up his head after the second prostration in the first *rakʿa*, he stood up and did not seat himself". Al-Shāfiʿī adopted the first tradition, while Mālik adopted the second.

They also differed about whether a person prostrating should place his hands on the ground before kneeling, or whether he should kneel before placing his hands. Mālik's view favours kneeling before the placing of hands. The reason for their disagreement is that in the tradition of Ibn Ḥujr, he said: "I saw that the Messenger of Allāh (God's peace and blessings be upon him) would kneel while prostrating before reaching for the floor with his hands, and would withdraw his hands before his knees while rising up". It is related from Abū Hurayra "that the Prophet (God's peace and blessings be upon him) said, 'When one of you is about to prostrate he should not kneel down like a camel, but should place his hands before kneeling'". ʿAbd Allāh ibn ʿUmar used to place his hands before his knees. Some of the traditionists have said that the tradition of Waʾil ibn Ḥujr is more authentic than that of Abū Hurayra.

2.3.1.2.7. Issue 7: Prostration is on seven limbs

The jurists agreed that prostration is on seven limbs, the forehead, the (two) hands, the (two) knees, and the inside of the toes, because of the words of the Prophet (God's peace and blessings be upon him), "I have been commanded to prostrate on seven limbs". They differed about the person who prostrates and fails to employ one of these limbs: is his prayer invalidated? A group of jurists said that his prayer is not invalidated as the term "prostration" applies only to the face. Another group said that it is invalidated if he does not prostrate on the seven limbs stated in the tradition.

They did not differ, however, on the point that one who prostrates on his forehead and nose is considered to have prostrated on his face, but they disagreed on whether prostration on one or the other was permissible. Mālik said that if he prostrates on his forehead and not the nose it is permitted, but if he prostrates on his nose and not on his forehead it is not permitted. Abū Ḥanīfa said that this is allowed. Al-Shāfiʿī said that the prostration is not valid unless he prostrates on both.

The reason for their disagreement arised from the question of whether the obligation is to comply with part of that to which the term is applicable or to comply with the whole. This is so as the term face has been used in the tradition of Ibn ʿAbbās which says, "I have been commanded to prostrate on seven limbs". Those who maintained that the obligation is to comply with part of that to which the term is applicable said that it is sufficient if he prostrates on either the forehead or the nose. Those who maintained that the term prostration applies to the person who prostrates on his forehead only, but does not apply to one who prostrates on his nose only, permitted prostration on the forehead and not on the nose alone. This amounts to delineation of the part that achieves compliance with the obligation when such part is implied by the term, and it is based upon the opinion of those who distinguish between parts of a thing. They maintain that compliance with (the important) part of it fulfils the obligation, while compliance with another part (that is not important) does not. Think over this as it is one of the principles of this topic. (Had prostration on the nose alone been permitted) it would have been possible for one to say that even if the nose barely touches the ground prostration is valid. Those who maintain that the obligation is to comply with all that is included in the term make it obligatory for a person to prostrate on his forehead as well as his nose. Al-Shāfiʿī says that the ambiguity that is found in the words has been removed by the acts of the Prophet (God's peace and blessings be upon him) and has been explained, for he used to prostrate on his forehead and his nose as has been stated in a tradition that when he completed one of his prayers there were marks of dust and water on his forehead and nose, thus, his act has elaborated the unelaborated tradition.

Abū ʿUmar ibn ʿAbd al-Barr said that one of the *ḥadīth* authorities related the tradition of Ibn ʿAbbās and mentioned the face and the nose in it. The Qāḍī Abū al-Walīd (Ibn Rushd) said that some of them have mentioned only the forehead, and both narrations are in the compilation by Muslim, the latter being an evidence for Mālik.

They also disagreed on whether it is a condition for the prostrations that the hands be conspicuously placed on the prayer-mat on which the face rests? Mālik said that this is a condition of prostration, and I believe it is a condition of perfection. A group of jurists said that this is not a condition for prostration.

Within this topic is also their disagreement about prostrating on the bands of the turbans. The jurists are divided into three opinions about it. One opinion prohibits it, while another allows it. A third makes a distinction between prostrating on a small fraction of the band or on the major part of it, and whether or not a part of the forehead touches the ground. This disagreement is found all over the school and among the jurists of the regions. In al-Bukhārī there is a tradition to the effect that they used to prostrate on caps and turbans.

Those who did not uphold as obligatory to let the hands rest on the floor in prostration argued on the basis of Ibn ʿAbbās's opinion that "The Prophet (God's peace and blessings be upon him) ordered that we prostrate on seven limbs without folding back the clothes or hair", and also on analogy upon the knees in prayer and upon prayer in boots. It is possible to argue on the basis of the general implication here for prostrating on the band of the turban.

2.3.1.2.8. Issue 8: Prohibition of *iqʿāʾ* (sitting on the buttocks and folding up the knees) during prayer

The jurists agreed on the disapproval of *iqʿāʾ* during prayers on the basis of the prohibition (specified) in the tradition (which refers to) "a man sitting during prayer in the posture of a dog". They differed, however, about the implications of the term. Some of them maintained that the prohibited *iqʿāʾ* is the sitting posture of a man when he seats himself on his buttocks and folds up his thighs like posture of a dog or a lion. There is no disagreement among them that this is not one of the postures of prayer. Another group maintained that the *iqʿāʾ* that has been frowned upon is the resting of the buttocks on the ankles between the two prostrations while the feet are resting on the toes. This is Mālik's opinion as it is related that Ibn ʿUmar used to do this because his feet used to ache. Ibn ʿAbbās used to say that "sitting on the feet in this way is the *sunna* of your Prophet". It is recorded by Muslim.

The reason for their disagreement is the vacillation of the term *iqʿāʾ*, (frowned upon in prayers) between the literal meaning and the legal meaning, that is, the meaning to which this term has been restricted by the law. Those who said that it conveys a literal meaning identified it with the posture of a dog. Those who said that it conveys the legal meaning said that it indicates one of the postures prohibited during prayer, and as it is established from Ibn ʿUmar that the posture of a person sitting on his ankles letting his feet rest on their toes is not a *sunna* of prayer they were led to believe that it is this posture that has been prohibited. But this is a weak (argument) as terms for which no legal meaning has been established must be understood in their literal sense till such time that a legal meaning is established for them. This is unlike those terms for which legal meanings have been established, that is, these must be understood in their legal meaning till an evidence indicates their interpretation in the literal sense. Further, the tradition of Ibn ʿUmar has been contradicted by the tradition of Ibn ʿAbbās.

2.3.2. Chapter 2 Congregational Prayers and the Conditions of *Imāma*

The discussion of the rules in this chapter is covered in seven sections. The first is about the identification of the *aḥkām* of congregational prayers. The second is about the identification of the conditions of *imāma* and about the person who has precedence for *imāma* and the conditions specific to him. The third is about the position of the followers with respect to the *imām* and the *aḥkām* specific to the followers. The fourth is about the things in which a person follows the *imām* and those in which he does not follow him. The fifth is about the manner of following (the *imām*). The sixth is about the acts that the *imām* bears on behalf of the followers. The seventh is about the question of how far can the invalidation of the *imām*'s prayer be extended to the followers.

2.3.2.1. *Section 1: The* ḥukm *of congregational prayers*

In this section there are two issues. The first is whether prayer with the congregation is obligatory on the person who hears the call. The second issue relates to the following question: if a person enters the mosque and prays (separately before the congregational prayer is held), is it obligatory upon him to repeat the same prayers with the congregation?

2.3.2.1.1. Issue 1

The jurist disagreed about (the issue), with the majority maintaining that it is either a *sunna* or a communal obligation (*farḍ kifāya*). The Ẓāhirites maintained that prayer with the congregation is obligatory for each *mukallaf* (individual with legal capacity).

The reason for their disagreement arises from the conflict of the interpretations of the traditions on this issue. Thus, the apparent meaning of the words of the Prophet (God's peace and blessings be upon him), "Prayer with the congregation is superior to praying alone by twenty-five degrees or by twenty-seven degrees" conveys that congregational prayers belong to the category of recommended *aḥkām*. This means that it is a perfection over and above the obligatory prayer, as if the Prophet (God's peace and blessings be upon him) had said that prayer with the congregation is more perfect than the prayer of the (solitary) individual. Perfection is something additional to sufficiency. There is the well-known tradition about the blind man, who sought permission to stay away from congregational prayers as there was no one to lead him to it (the congregation). The Prophet (God's peace and blessings be upon him) granted him the exemption (at first), but then said to him, "Can you hear the call?" He said, "Yes". He said, "In that case I do not find any exemption for you". This is explicit about its obligation in the absence of a valid excuse. This is recorded by Muslim. Among those that strengthen this tradition is that related by Abū Hurayra, the authenticity of which is agreed upon and it states that the Messenger of Allāh (God's peace and blessings be upon him) said, "By Him in whose hands is my life, I had almost resolved to order the collection of firewood in bundles, order the call for prayer, then order a person to lead the people in prayers (on my behalf), and then chase reluctant men (in their houses) and to burn down their houses over them. By Him in whose hands is my life, if any of them had known that he would find a meaty bone or two good meat legs, he would be present at *ishā'*". There is also the tradition of Ibn Mas'ūd, in which he said, "The Messenger of Allāh (God's peace and blessings be upon him) taught us the paths of right guidance, and among these guided paths is prayer in a mosque where the call has been issued". In some of its versions it is said, "If you were to give up the practice of your Prophet you would be led astray".

Each group (of these jurists) followed the method of reconciliation by interpreting (in his own way) the tradition adopted by the contender and turning it toward the apparent meaning of the tradition adopted by them. Thus, the Ẓāhirites said that it is probable that grading can be found in things all of which are obligatory. Consequently, the obligatory congregational prayer has precedence, by the stated degrees, over the prayer of the solitary individual who has a valid excuse. They said that because of this there is no contradiction between the traditions. They also argued that this is similar to the case conveyed by the words of the Prophet (God's peace and blessings be upon him) that "the prayer of one sitting is half that of one standing (that is, though one is superior both are obligatory)".

The others construed the tradition about the blind man to apply to the call for the Friday prayer as that is the call which it is obligatory by agreement to answer by one who hears it. This, however, is far-fetched, Allāh knows best. The text of the tradition states that Abū Hurayra said, "A blind man came up to the Prophet (God's peace and blessings be upon him) and said, 'O Messenger of Allāh, I have no one who can lead me to the mosque'. He then asked the Messenger of Allāh (God's peace and blessings be upon him) to exempt him so that he may pray in his house. The Prophet granted him the exemption. When the man turned around to go, he called him saying, 'Do you hear the call for prayer?' The man said, 'Yes'. He said, 'Then answer it' ". It is unlikely that this can be understood to mean the call for the Friday prayer. Moreover, going to the Friday prayer is obligatory upon everyone resident in the town even if he does not hear the call, and I am not aware of any disagreement over this. Further, this tradition is opposed by the tradition of ʿUtbān ibn Mālik mentioned in *al-Muwaṭṭaʾ*, which says that ʿUtbān ibn Mālik, a blind man who used to lead people in prayers, said to the Messenger of Allāh (God's peace and blessings be upon him), "It is (sometimes) dark and raining with flooding all around, and I am a man who has lost his sight. So come, O Messenger of Allāh, to pray in my house in a corner that I have set aside to be the place of prayer". The Messenger of Allāh (God's peace and blessings be upon him) came to him and said, "Where would you prefer that I pray?" He pointed out a spot in the house and the Messenger of Allāh (God's peace and blessings be upon him) prayed there.

2.3.2.1.2. Issue 2

The person who entered the mosque and prayed may have done it in one of two ways: he may have prayed alone, or he may have prayed with the congregation. If he has prayed alone, a group of jurists maintain that he is to repeat the prayer with the congregation, except in the case of the sunset prayer (*maghrib*) only. Those who upheld this opinion are Mālik and his disciples. Abū Ḥanīfa said that he is to repeat the prayer, except the sunset and the middle prayer (*ʿaṣr*), while al-Awzāʿī exempted the sunset and the morning prayers, and Abū Thawr exempted the middle and the morning prayers. Al-Shāfiʿī said that he is to repeat all the prayers.

They agreed generally about the repetition of the prayers (with the congregation) because of the tradition of Bishr ibn Muḥammad from his father "that the Messenger of Allāh (God's peace and blessings be upon him) said to him when he entered the mosque and did not pray with him, 'Why is it that you did not pray with the people, are you not a Muslim?' He said, 'Of course I am, O Messenger of Allāh, but I had prayed with my family.' The Prophet (God's peace and blessings be upon him) said to him, 'When you come you must pray with the people, even if you have already prayed'". The jurists disagreed due to the likelihood of the restriction of this general implication by means of analogy or an evidence. Those who interpreted it in its (unrestricted) general meaning made the repetition of all prayers obligatory, and this is the opinion of al-Shāfiʿī. Those who exempted from this only the sunset prayer, restricted the general meaning through *qiyās al-shabah*. This was done by Mālik (God bless him). He argued that repeating the sunset prayer, which is an odd number (of *rakʿas*), would make it an even number and it would no longer remain odd as the total would come to six *rakʿas*. Thus, it would be moved from its own category to the category of another prayer, which would invalidate it. There is weakness, however, in this analogy as the salutation has caused a separation between the two odd prayers, and adopting the general meaning is better than effecting a restriction by means of such analogy. Stronger than this argument is what is maintained by the Kūfīs, who argued that if he repeats the sunset prayer he has performed two odd prayers, and there is a tradition that "two odd numbered prayers cannot be performed in one night". Abū Ḥanīfa, on the other hand, said that the second prayer would be like supererogatory prayers. Thus, if a person repeats the middle prayer (*ʿaṣr*) he would be observing a supererogatory prayer after the *ʿaṣr* prayer, which is prohibited. He therefore exempted the middle prayer on the basis of this analogy and the sunset prayer because it is odd-numbered, and odd-numbered prayers are not to be repeated. This analogy is good if al-Shāfiʿī concedes to them that the repeated prayer is supererogatory. Those who made a distinction between the morning prayer and the middle prayer for this purpose did so because the traditions do not conflict about the prohibition of praying after the morning prayer, while they do conflict about prayer after the middle prayer, as has already been mentioned. This is al-Awzāʿī's opinion.

If a person has prayed in a congregation, is he to repeat the prayer with another congregation? Most of the jurists, including Mālik and Abū Ḥanīfa, maintain that he does not have to repeat such a prayer. Some of them said that he is to repeat it. Those who held this opinion are Aḥmad, Dāwūd, and the Ẓāhirites.

The reason for their disagreement stems from the conflict of the implications of the traditions on this issue. It is related from the Prophet (God's peace and blessings be upon him) that he said, "A prayer is not to be performed twice in a day". It is also related from him "that he ordered those persons, who had said their prayer in a congregation, to say it with another congregation about to start". Further, the apparent meaning of the tradition of Bishr requires repetition from each worshipper who comes into the mosque (when the congregational prayer is about to start), and the strength of this tradition is that of a general rule. Most of the jurists believe that if a general rule is based upon a particular cause, such rule is not to be restricted to its cause. In addition, there is the case of the prayer of Muʿādh with the Prophet (God's peace and blessings be upon him), who would then lead his own people for the same prayer, a fact which bears evidence for the permissibility of repeating a prayer (performed with a congregation) with another congregation.

The jurists adopted either the method of reconciliation or that of preference in these traditions. Those who adopted the method of preference accepted the general implication of the words of the Prophet (God's peace and blessings be upon him), "A prayer is not to be performed twice in a day", and they exempted from this the person who had prayed alone because of the agreement over his case. Those who adopted the method of reconciliation said that the meaning of the words of the Prophet (God's peace and blessings be upon him), "A prayer is not to be performed twice in a day", is that a person should not repeat the same prayer believing that each one of them is obligatory (*farḍ*); on the contrary, he should believe that the second is an addition over the first, but it is commanded nevertheless. Another group said that the implication of this tradition is for the individual praying alone, that is, an individual should not say the same prayers twice (alone).

2.3.2.2. *Section 2: The conditions for* imāma *and issues of precedence*

This section is about the identification of the conditions for *imāma*, identification of the person who has precedence, and about the *aḥkām* specific to the *imām*. In this section there are four issues.

2.3.2.2.1. Issue 1

They disagreed about the person who has precedence for *imāma*. Mālik said that he is the one most learned (about the rules of prayer), and not one who is the best reciter (of the Qurʾān). This was also al-Shāfiʿī's opinion. Abū Ḥanīfa, al-Thawrī, and Aḥmad said that the best reciter is to lead them.

The reason for their disagreement comes from the dispute over the meaning of the words of the Prophet (God's peace and blessings be upon him), "The person who recites the Book of Allāh best is to lead his people, and if two are equal in recitation then one who has greater knowledge of the *sunna*. If they are equal with respect to the *sunna* then the one who emigrated [to Medina] first. If they are equal with respect to emigration then the one who embraced Islam first. A man is not to lead another person who is under his authority, nor is he to take advantage of another person's hospitality without his permission". This is a tradition that is agreed upon for its authenticity, but the jurists differed about its meaning.

Among those who interpreted it through its apparent meaning is Abū Ḥanīfa. Some of them understood the words "best reciter" to mean the most learned in the law, as they believed that the need for *fiqh* in *imāma* is greater than that for recitation. Further, the best reciter among the Companions was necessarily the best in legal knowledge contrary to the situation that prevails today.

2.3.2.2.2. Issue 2

The jurists disagreed about the *imāma* of a minor who had not attained puberty but he could recite. A group of jurists permitted this due to the generality of this tradition[122] and due to the tradition of ʿAmr ibn Salama that he used to lead his people in prayer when he was a minor. A group of jurists prohibited this absolutely, while another permitted it for supererogatory prayers, but not for obligatory prayers, which is a narration from Mālik.

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[122] According to the editor of the original, the words "this tradition" is an addition found in the Egyptian manuscript, though the word *athar* was not there.

The reason for the disagreement stems from the question of whether a person can lead another in prayer when such prayer is not obligatory for him, but is obligatory for the person being led. This is due to the difference in the *niyya* of the person leading and that of the follower.

2.3.2.2.3. Issue 3

They disagreed about the *imāma* of the disobedient (*fāsiq*). A group of jurists rejected it outright, while another permitted it without qualification. A third group made a distinction on the basis of the degree of certainty of his disobedience, and said that if his (the *imām*'s) disobedience is certain the worshipper is (obliged) to repeat his prayer always, but if it is probable, it is recommended that the worshipper repeat the prayer. This opinion was preferred by al-Abharī from among the opinions in the school. There were those who made a distinction according to whether there was a basis for his disobedience, like one who drinks *nabīdh* (a beverage of dates considered prohibited by some) and relies on the opinion of the jurists of Iraq for doing so; thus they permitted prayer behind a person (leader) who relies on some basis, but not behind one who does not have such a basis. The reason for their disagreement stems from the fact that it is something that is not expressly stated by the law, and the analogies are in conflict.

Those who maintained that as *fisq* (disobedience) does not invalidate prayer, and that the follower does not need more than the validity of the *imām*'s prayer—that is, according to the opinion of those who hold that the *imām* performs the prayer on behalf of the follower—permitted the *imāma* of the *fāsiq*. Those who compared *imāma* to the rendering of testimony and suspected the *fāsiq* of performing an invalid prayer, just as the (*fāsiq*) witness is suspected of rendering false testimony, did not permit his *imāma*. It is for this reason that some of the jurists made a distinction on the basis of whether his *fisq* is based on some legal justification. The distinction based on whether his disobedience is definitive or probable is almost similar to this, for when his *fisq* is certain it is as if he does not have a legal justification for it.

The Ẓāhirites preferred to permit the *imāma* of the disobedient on the basis of the general implication of the words of the Prophet (God's peace and blessings be upon him), "The best reciter is to lead them". They said that the disobedient has not been exempted from this. Arguing on the basis of a general implication, however, is deemed weak when the issue is not directly addressed by the text.

Some jurists made a distinction between the case where a person's disobedience is related to one of the conditions of the validity of prayer and where it is related to matters outside the ambit of prayer; this is so because it is a condition for the *imām* that his prayer be valid.

2.3.2.2.4. Issue 4

They disagreed about the *imāma* of a woman. The majority maintained that she cannot lead men, but they disagreed about her leading women (in prayer). Al-Shāfiʿī permitted this while Mālik prohibited it. Abū Thawr and al-Ṭabarī deviated (from the majority opinion) and permitted her *imāma* in absolute terms.

The majority agreed to prohibit her from leading men, because had this been permitted such permission would have been transmitted from the first generation (of Islam). Further, a known practice in prayer is that women should stand behind men; therefore it is obvious that their being at the front is not permitted. The Prophet (God's peace and blessings be upon him) said, "Keep them behind insofar as Allāh has kept them behind". It is for this reason that some jurists permitted them to lead women, as they have equal precedence for purposes of prayer. This has also been narrated from some members of the first generation.

Those who permitted her *imāma* argued on the basis of the tradition of Umm Waraqa recorded by Abū Dāwūd "that the Messenger of Allāh (God's peace and blessings be upon him) used to visit her at her house and appointed a *muʾadhdhin* for her to recite the *adhān* for her. He ordered her to lead the members of her household in prayer".

There are many issues under this topic of *imāma*, including their disagreement about the qualifications stipulated for the *imām*. We have left out their discussion as they are not expressly mentioned in the law.

The Qāḍī (Ibn Rushd) said: "What we have aimed for in this book is the discussion of issues that have been transmitted and of those that are closely related to the transmitted issues".

2.3.2.2.5. Issue 5: The *aḥkām* specific to the *imām*

There are four issues in this that are related to those expressly transmitted. The first is whether it is the *imām* who pronounces *āmīn* (amen) after he has completed the recitation of the *umm al-Qurʾān*, or is it the follower who does that. The second is when does he pronounce the *takbīr* of commencement. The third is whether he is to be led on if he waivers in the recitation. The fourth is whether his place of prayer is to be higher than that of the followers.

About the issue whether the *imām* is to pronounce *āmīn* (amen) once he has completed the recitation of the *umm al-Kitāb*, Mālik held, in the narrations of Ibn al-Qāsim and the Egyptians from him, that he is not to pronounce *āmīn*.

The majority maintained that he is to say *āmīn* just like the follower. This is also one narration from Mālik through the Medinites.

The reason for the disagreement are two traditions that have conflicting apparent meanings. First is the tradition of Abū Hurayra, which is agreed upon for its authenticity. He said, "The Messenger of Allāh (God's peace and blessings be upon him) said, 'When the *imām* pronounces *āmīn*, you should pronounce it too'". The second tradition is what is recorded by Mālik, also from Abū Hurayra, that the Prophet (God's peace and blessings be upon him) said, "When the *imām* says '*ghayr al-maghḍūbi ʿalayhim wa laʾḍḍālīn*', then you should say '*āmīn*'".

The first tradition is explicit about the pronouncing of *āmīn* by the *imām*. The second tradition indicates that the *imām* does not pronounce *āmīn*, for had he been required to pronounce *āmīn* why would the follower be asked to pronounce it after the completion of the recitation of the *umm al-Kitāb* and before the *imām*'s uttering of *āmīn*. The *imām* as the Prophet (God's peace and blessings be upon him) said, "has been appointed so that he be followed". (This holds true) unless the act in issue has been excluded from the words of the *imām*, that is, the follower may either say *āmīn* at the same time as the *imām* or before him. Thus there is no evidence in this tradition about *imām*'s pronouncing of *āmīn* and it only includes the *ḥukm* of the follower. It appears that Mālik adopted the method of preference for the tradition that he narrated because it is the listener who says *āmīn* and not the reciter. The majority preferred the first tradition because it was explicit and because there is nothing in it about the *ḥukm* of the *āmīn* of the *imām*. The difference between this tradition and the other is on the issue of the *āmīn* of the follower and not whether the *imām* is to say *āmīn*, so think over this.

It is possible that the first tradition be interpreted so as to say that the meaning of the words "When the *imām* pronounces *āmīn*, you should pronounce it too" is that (you should say it) when the *imām* reaches the point of *āmīn*. It is said that pronouncing *āmīn* is a form of prayer but this amounts to swerving from an apparent meaning to something that is not implied by the tradition, unless this is done through analogy, that is, the words of the Prophet should be read as saying, "When the *imām* says '*ghayr al-maghḍūbi ʿalayhim wa laʾḍḍālīn*", then you should say "*āmīn*" for the *imām* does not say "*āmin*".

About the point at which the *imām* is to pronounce *takbīr*, a group of jurists said that he is not to pronounce it except after the completion of the *iqāma* and the formation of the rows. This is the opinion of Mālik, al-Shāfiʿī, and a group of jurists. Another group said that the occasion for *takbīr* is prior to the completion of the *iqāma*, and they preferred that he should pronounce it when the *muʾadhdhin* says "*qad qāmati'ṣ-ṣalāh*". This is the opinion of Abū Ḥanīfa, al-Thawrī, and Zufar.

The reason for disagreement over this stems from the conflict of the apparent meaning of the tradition of Anas with the tradition of Bilāl. In the tradition of Anas, he said that "the Messenger of Allāh (God's peace and blessings be upon him) turned toward us before pronouncing *takbīr* for the prayer and said, 'Form the rows and close up, for I can see you behind me'". The apparent meaning of this is that these words were said after the completion of the *iqāma*. The same thing is related of ʿUmar, that after the completion of the *iqāma* he used to straighten up the rows and then pronounce *takbīr*. In Bilāl's tradition, he relates that "I used to pronounce the *iqāma* for the Prophet (God's peace and blessings be upon him) and used to say to him, 'O Messenger of Allāh, do not pre-empt me with *āmīn*'". It is related by al-Ṭaḥāwī. They said that this indicates that the Messenger of Allāh (God's peace and blessings be upon him) used to pronounce the *takbīr* before the completion of the *iqāma*.

In the case of their disagreement about the admissibility of the *imām* to lead when he hesitates (in the recitation), Mālik, al-Shāfiʿī, and the majority of the jurists permitted that the *imām* be led on, but the Kūfīs prohibited this. The reason for their disagreement is based on the conflict of traditions. It is related "that the Messenger of Allāh (God's peace and blessings be upon him) hesitated while reciting a verse, and when he had finished said, 'Where is ʿUbayy (ibn Kaʿb)? Was he not among the people (worshipers)'". Thus, he wanted to be led on. It is also related from the Prophet (God's peace and blessings be upon him) that he said, "The *imām* is not to be led on". The dispute over this exists from the first period, and it is well-known of ʿAlī that he prohibited it, while its permissibility is equally well known from Ibn ʿUmar.

A group of jurists permitted that the position of the *imām* be at a raised level with respect to the position of the followers, while another group prohibited this. Another group preferred that it be slightly higher, which was Mālik's opinion. The reason for disagreement is based on two conflicting traditions. First is the confirmed tradition that "the Prophet (God's peace and blessings be upon him) led the people (in prayer) from the pulpit so that he may teach them how to pray, but when he was about to prostrate he stepped down from the pulpit". The second is the tradition recorded by Abū Dāwūd that Hudhayfa led the people in prayer standing on (the raised platform of) a shop (or on a bench). Ibn Masʿūd took hold of his shirt and pulled him down. When he had finished praying he said, "Do you not know that they used to prohibit this or were prohibited from this?"

They disagreed about whether the *imām* should make a *niyya* for the *imāma*. A group of jurists said that this is not obligatory for him because of the tradition of Ibn ʿAbbās that he took up his position on one side of the

Messenger of Allāh (God's peace and blessings be upon him) after he had begun his prayer. A group of jurists said that this is probable; however, the *niyya* of *imāma* is necessary if the follower leaves out some of the acts of prayer, on the assumption that the *imām* bears it on behalf of the followers. This is so according to the opinion of those who maintained that the omissions by the follower are compensated by the *imām's* performance of the obligatory or supererogatory acts (of prayer).

2.3.2.3. *Section 3: The position of the follower with respect to the* imām, *and* aḥkām *specific to the followers*

In this section there are five issues as follows:

2.3.2.3.1. Issue 1

The majority of the jurists agreed that the practice for one person (male) is to stand on the right side of the *imām*, because of its being established through the traditions of Ibn ʿAbbās and others. If there are three persons besides the *imām* they are to stand behind the *imām*. They differed when there are two persons besides the *imām*. Mālik and al-Shāfiʿī said that they are to stand behind the *imām*, while Abū Ḥanīfa, his disciples, and the Kūfīs said that the *imām* is to stand between them.

Their disagreement is due to two conflicting traditions on this. The first is the tradition of Jābir ibn ʿAbd Allāh, who said, "I stood on the left of the Messenger of Allāh (God's peace and blessings be upon him), so he took hold of my hand and brought me around till I stood on his right side. Jābir ibn Ṣakhr then came, performed the ablution, and stood to the left of the Messenger of Allāh (God's peace and blessings be upon him). He took hold of our hands at the same time and pushed us till we stood behind him". The second tradition is Ibn Masʿūd's, that he prayed with ʿAlqama and al-Aswad while standing between them. He related this from the Prophet (God's peace and blessings be upon him). Abū ʿUmar said that the narrators of this tradition differed. Some of them stopped at Ibn Masʿūd, while others linked it up to the Prophet. The correct view is that it is *mawqūf* (stops at the Companion).

The practice for a woman is that she stands behind a male follower, when there is one man besides the *imām*, or she stands behind the *imām* if she is alone. I am not aware of a disagreement over this, because it is established from the tradition of Anas that has been recorded by al-Bukhārī "that the Prophet (God's peace and blessings be upon him) prayed with him and his mother or his aunt. He said, 'He made me stand on his right and made the woman stand behind us' ". In that which is also related from him by Mālik, he says, "We formed a row, the orphan and I, behind the Prophet (God's peace and blessings be upon him) and the old woman stood behind us".

The practice for one single person is that he stands to the right of the *imām*, because of the tradition of Ibn ʿAbbās when he spent the night at Maymūna's place. A group of jurists said that he should stand on his left. There is no disagreement about a single woman standing behind the *imām*, and if she is praying together with another man, the man is to stand by the side of the *imām*, while the woman is to stand behind him.

2.3.2.3.2. Issue 2

The jurists agreed that the first row is to be desired; similarly standing close together and the straightening the rows, because of the confirmation of the command from the Messenger of Allāh (God's peace and blessings be upon him). They disagreed in ths case of a person standing alone behind a row. The majority of the jurists say that his prayer is valid, while Aḥmad, Abū Thawr, and a group of jurists said that his prayer is invalid.

The reason for their disagreement arises from the dispute over the authenticity of the tradition of Wābiṣa and its conflict with practice. The tradition of Wābiṣa is that the Prophet (God's peace and blessings be upon him) said, "No prayer (is counted) for the person standing alone behind a row". Al-Shāfiʿī said that this is contrary to the case of the old woman standing behind a row in the tradition of Anas. Aḥmad said that there is no legal force in this (argument) as it is the practice for women to stand behind men, and Aḥmad, as we have said, considered the tradition of Wābiṣa authentic. Others have said that it has wavering *isnād* and such a tradition cannot serve as a legal evidence. The majority argued on the basis of the tradition of Abū Bakra that he prayed alone, separately from the row, and the Messenger of Allāh (God's peace and blessings be upon him) did not order him to repeat the prayer. He said to him, "May Allāh increase your eagerness, but do not repeat that". If this (remark) is interpreted as recommendation (for praying alongside others in a line), there is no conflict between the traditions of Wābiṣa and Abū Bakra.

2.3.2.3.3. Issue 3

There was a dispute among the early jurists as to whether a person who hears the *iqāma* should increase his pace to reach the mosque for fear of missing part of the prayer. It is related from ʿUmar and Ibn Masʿūd that they used to walk rapidly upon hearing the *iqāma*. It is related from Zayd ibn Thābit, Abū Dharr, and other Companions that they did not deem it proper to rush to the mosque, rather they held that one should approach it with composure and tranquility. This is the opinion upheld by the jurists of the provinces, because of the confirmed tradition of Abū Hurayra, "If the *iqāma* has been pronounced do not approach it in a rush, but come to it in a tranquil state". It appears that the reason for disagreement over this arose either because this tradition had not reached them or because the Book contradicts it in the words of the Exalted, "So vie (*fa'stabiqū*: compete) with one another in good works",[123] "And the foremost in the race, the foremost in the race: Those are they who will be brought nigh",[124] "And vie (*sāriʿū*: rush forward) with one another for forgiveness from your Lord".[125] On the whole, the principles of the law bear testimony of competition in good works, but if the tradition is authentic it is necessary to make an exception for prayer from among other good works.

2.3.2.3.4. Issue 4

When is it considered recommended to stand up for prayer? Some prefer the time at the beginning of the *iqāma* on the principle that eagerness is desirable. Some prefer it when the words "*qad qāmati'ṣ-ṣalāh*" are being pronounced, while others prefer it on the pronouncement of the words "*ḥayya ʿalaʾl-falāḥ*". Some say that when people see the *imām* (it is time to get up), while others, like Mālik (God be pleased with him), have not fixed any (specific) time, for this depends on the capacity of the individual, and there is no transmitted evidence for it, except the tradition of Abū Qatāda that the Prophet (God's peace and blessings be upon him) said, "When the prayer is about to commence, do not get up till you see me". If this is proved authentic, it is necessary to act in accordance with it, but the issue remains indeterminate, I mean, there is no law for it, and whenever someone gets up then it is proper.

2.3.2.3.5. Issue 5

Mālik and the majority of the jurists maintain that a person who arrives when the *imām* is in the *rukūʿ* position, and fears that he will lose a *rakʿa*[126] if he hesitates or tries to reach the first row, he may bow behind the first row and then move forward while bowing. Al-Shāfiʿī considered this abominable, while Abū Ḥanīfa made a distinction between a group and an individual, considering it abominable for an individual, but permissible for a group. The position taken by Mālik is related from Zayd ibn Thābit and Ibn Masʿūd. The reason for their disagreement stems from their dispute over the authenticity of the tradition of Aū Bakr, which says that "he entered the mosque when the

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[123] Qurʾān 2 : 148.

[124] Qurʾān 56 : 10,11.

[125] Qurʾān 3 : 133.

[126] The background is that if the follower joins while *imām* is bowing, or before this, a *rakʿa* is counted for him, but not if he joins after the *rukūʿ*.

Messenger of Allāh (God's peace and blessings be upon him) was leading the people in prayer and they were bowing. He bowed too and then moved towards the row. When the Messenger of Allāh had finished praying, he said, "Who moved?" Abū Bakr said, "It was I". He said, "May Allāh advance your eagerness, but do not repeat it".

2.3.2.4. *Section 4: Identification of things in which it is necessary for the follower to follow the* imām

The jurists agreed that it is obligatory on the follower to follow the *imām* in all his utterances and acts, except in reciting the words "*samiʿa Allāhu liman ḥamidah*" and when the *imām* is seated because of illness, according to those who permit *imāma* while sitting.

2.3.2.4.1. Issue 1

About their disagreement over the exception in reciting the words "*samiʿa Allāhu liman ḥamidah*", a group of jurists said that the *imām* pronounces only these words when he raises his head after bowing, and the follower, then, pronounces only the words "*rabbanā wa lakʾal-ḥamd*". Among in those who held this opinion are Mālik, Abū Ḥanīfa, and others. Another group of jurists maintained that the *imām* and the follower both say "*samiʿa Allāhu liman ḥamidah rabbanā wa lakʾal-ḥamd*", and that the follower follows the *imām* repeating with him as in the case of *takbīr*. It is related from Abū Ḥanīfa that when one person is praying with an *imām*, both should pronounce it together. There is no dispute about one single person and the *imām* reciting the whole (both parts of the statement) together.

The reason for disagreement over this (the former case) is based on two conflicting traditions. The first is the tradition of Anas that the Prophet (God's peace and blessings be upon him) said, "The *imām* has been appointed so that he may be followed. When he bows you must bow, and when he straightens up you must straighten up. When he says '*samiʿa Allāhu liman ḥamidah*,' you must say '*rabbanā wa lakʾal-ḥamd*' ". The second is the tradition of Ibn ʿUmar "that the Prophet (God's peace and blessings be upon him), when he began praying, would raise his hands to the level of the shoulders, and when he straightened up from bowing would say '*samiʿa Allāhu liman ḥamidah rabbanā wa lakʾal-ḥamd*' ".

Those who preferred the meaning of the tradition of Anas maintained that the follower is not to say "*samiʿa Allāhu liman ḥamidah*", and the *imām* is not to say "*rabbanā wa lakʾal-ḥamd*". This belongs to the category of the implication of the text (*dalīl al-khiṭāb*) for it assigns to the unexpressed case a *ḥukm* opposite that of the expressed case. Those who preferred the tradition of Ibn ʿUmar maintained that the *imām* does say "*rabbanā wa lakʾal-ḥamd*", and it is obligatory on the follower to follow the *imām* in saying "*samiʿa Allāhu liman ḥamidah*", because of the general application of the words of the prophet, "The *imām* has been appointed so that he may be followed". Those who reconciled the two traditions made a distinction between the *imām* and the follower, and the truth in this is that the tradition of Anas requires—through the implication of its text—that the *imām* does not say "*rabbanā wa lakʾal-ḥamd*", and that the follower does not say "*samiʿa Allāhu liman ḥamidah*", while the tradition of Ibn ʿUmar requires explicitly that the *imām* says "*rabbanā wa lakʾal-ḥamd*". It is not proper that an explicit text be given up because of an implication of the text, as the explicit text is stronger than its implication. The tradition of Anas requires, through its general application, that the follower is to say "*samiʿa Allāhu liman ḥamidah*", in conformity with the general implication of the words, "The *imām* has been appointed so that he may be followed", while it implies that he should not say these words. Thus it becomes necessary to make a choice between the general meaning and the implication of the text, and there is no dispute that the general meaning is stronger than the implication of the text, though the general meaning can also vary with respect to strength and weakness, and it is not unlikely that some implications can be stronger than the general meanings. The issue, then, upon my life, is one that is subject to interpretation, that is, with respect to the follower.

2.3.2.4.2. Issue 2

This relates to the prayer of one standing behind one who is seated. The gist of the opinions is that the healthy person is not to pray an obligatory prayer while seated when praying alone or as an *imām*, because of the words of the Exalted, "And stand up with devotion to Allāh".[127] There were three opinions about the case of the follower who was in sound health and prayed behind an *imām* who was not well and prayed while seated. The first opinion is that the follower is to pray behind him in the sitting posture. Included among those who upheld this opinion are Aḥmad and Isḥāq. The second opinion is that he should pray standing behind (the *imām*). Abū ʿUmar ibn ʿAbd al-Barr has said that this is the opinion of most of a body of jurists of the provinces: al-Shāfiʿī, his disciples, Abū Ḥanīfa, his disciples, the Ẓāhirites, Abū Thawr, and others. These jurists made an addition saying that the followers are to pray behind him while standing even if he is unable to bow and prostrate and merely makes a gesture (with his head). Ibn al-Qāsim has related that the

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[127] Qurʾān 2 : 238.

imāma of a person seated is not permitted, and that if they pray behind him seated or standing, their prayer is void. It is related from Mālik that they are to repeat their prayers before the expiry of the time, but this has been based on the idea of disapproval not prohibition, though the first opinion is well-known from him.

The reason for their disagreement springs from the conflict of traditions over this (issue), and also the conflict of *ʿamal* with traditions, that is, the practice of the people of Medina according to Mālik. There are two conflicting traditions in this. The first is the tradition of Anas that the Prophet (God's peace and blessings be upon him) said, "If he prays while sitting then you should pray while seated". A tradition from ʿĀʾisha conveys the same meaning. Her tradition says that the Prophet (God's peace and blessings be upon him) prayed seated while complaining (he was not well). The people wanted to pray behind him while standing, but he gestured to them that they should be seated. When he had finished, he said, "The *imām* has been appointed so that he may be followed. If he bows, you must bow, and when he straightens up, you must straighten up too. If he is seated, then you must pray while seated". The second tradition is from ʿĀʾisha "that the Messenger of Allāh (God's peace and blessings be upon him) went out to the people when he was ill, an illness from which he [later] died. He reached the mosque and found Abū Bakr leading the people in prayer. Abū Bakr began to retreat, but the Messenger of Allāh (God's peace and blessings be upon him) gestured to him that he should stay where he was. The Messenger of Allāh (God's peace and blessings be upon him) sat down beside Abū Bakr, who then followed the Messenger of Allāh's in prayer and the people followed Abū Bakr in the prayer".

The jurists adopted two methods for interpreting these traditions: the method of abrogation (*naskh*) and the method of preference. Those who adopted the method of abrogation maintained that the apparent meaning of ʿĀʾisha's tradition is that the Prophet (God's peace and blessings be upon him) led the people in prayer and Abū Bakr was the transmitter, for it is not possible that there be two *imāms* for the same prayer. Further, the people were standing and the Prophet (God's peace and blessings be upon him) was sitting. Thus, this is necessarily an act of the Prophet (God's peace and blessings be upon him), and since it was later (shortly before the end of his life) it abrogates his prior acts (related to the same issue). Those who adopted the method of preference, preferred the tradition of Anas, for they said that the tradition of ʿĀʾisha has varying narrations over the question of who was the *imām*, the Messenger of Allāh (God's peace and blessings be upon him) or Abū Bakr. Mālik, however, has no basis for reliance in transmission, as both traditions agree on the permissibility of *imāma* while sitting, and they only differ about the standing or sitting of the follower. This led Abū Muḥammad ibn Ḥazm to say that in the tradition of ʿĀʾisha there is nothing to show whether the people prayed while standing or sitting, and it is not proper to relinquish the expressed rule in favour of a rule that has not been expressly stated.

Abū ʿUmar said that Abū al-Muṣʿab has recorded in his *Mukhtaṣar* from Mālik that he said, "The people are not to follow (in prayer) anyone who is sitting. If he leads them while sitting, their prayer and his prayer is invalid, because the Prophet (God's peace and blessings be upon him) has said, 'No one after me is ever to lead others while sitting'". Abū ʿUmar states that this tradition is not deemed authentic by the traditionists, for it has been narrated by Jābir al-Juʿafī as a *mursal* (the Companion supposed to have related the tradition is dropped). His tradition that he relates with a complete chain is not considered as sufficient proof, so how can his *mursal* tradition be accepted? It is related by Ibn al-Qāsim of Mālik that he used to argue on the basis of what was related by Rabīʿa ibn Abī ʿAbd al-Raḥmān "that the Messenger of Allāh (God's peace and blessings be upon him) went out to the people when he was ill, and Abū Bakr was praying as the *imām*. The Prophet prayed following the prayer of Abū Bakr and then said, 'No Prophet has died until he has prayed behind a man from his *umma*'". There is no evidence in this unless it is believed that he followed Abū Bakr in prayer as the prayer of an *imām* who takes up a sitting posture is not permitted. This is mere conjecture for which an explicit text cannot be relinquished; besides, the tradition is weak.

2.3.2.5. *Section 5: Description of the following*

This comprises two issues. First is the time of the initial *takbīr*, while the second is the *ḥukm* of the person who raises his head before the *imām* does so.

In their dispute over the initial *takbīr*, Mālik preferred that the follower should pronounce it after the *imām* has finished pronouncing it; if he pronounces it with the *imām* he (Mālik) still holds it to be valid, while some said that it is not so. But if he pronounces it before the *imām* it is not acceptable. Abū Ḥanīfa and others have said that he may pronounce the *takbīr* with the *imām*, but if he finishes the pronouncement before the *imām* it becomes invalid. There are two narrations from al-Shāfiʿī on this. First is like the opinion of Mālik and this is the better known opinion, and the second is that if the follower pronounces *takbīr* before the *imām* it becomes invalid.

The reason for disagreement is that there are two conflicting traditions on this issue. The first includes the words of the Prophet (God's peace and blessings be upon him), "If he pronounces *takbīr*, you should pronounce it too". The second is the narration "that the Prophet (God's peace and blessings be upon him) pronounced the initial *takbīr* in one of his prayers and then gestured to the people that they should wait. He went away and then returned with remnants of moisture on his head". The apparent meaning of this is that his *takbīr* was pronounced (again) after theirs, for his *takbīr* before this was not counted because of the absence of purification. This too is based upon his (al-Shāfiʿī's) principle that the prayer of the follower is not dependent upon the prayer of the *imām*. There is no indication in the tradition whether they renewed their *takbīr*. Thus, it is not proper to interpret it either way without evidence. The principle, however, is to follow (the *imām*), which can only be after the *imām's* pronouncement of *takbīr*.

About the person who raises his head (from the *rukūʿ* or bowing or *sujūd* or prostrating) before the *imām*, the majority are of the view that he has made an error, but his prayer is valid and it is obligatory on him to revert and follow the *imām*. Yet, a small group of jurists held that his prayer is nullified because of the proclaimed warning related to it, namely, the words of the Prophet (God's peace and blessings be upon him), "Is the person, who raises his head before the *imām*, not afraid that Allāh may turn his head into the head of donkey".

2.3.2.6. *Section 6: What the* imām *performs on behalf of the follower*

They agreed that that no exemption is granted to the follower from the obligations of prayer, except for the recitation. They disagreed about this (the recitation by the follower) holding three opinions. First, some held that the follower should undertake his recitation behind the *imām* in prayers with inaudible recitation, but he should not recite behind him when the recitation is audible to him. Second, that he should not recite behind the *imām* at all. Third, that he should recite the *umm al-Kitāb* and the rest in the case of prayers with inaudible recitation, and only the *umm al-Kitāb* in the case of prayers with audible recitation. Some made a distinction between the case of prayers with audible recitation when the follower can hear the *imām's* recitation and when he cannot hear him. Thus, they made recitation obligatory for him when he cannot hear the *imām*, but they prohibited him from doing so when he can hear him. The first view was held by Mālik, except that he preferred recitation in the case of inaudible recitation. The second opinion was held by Abū Ḥanīfa and the third by al-Shāfiʿī. Aḥmad ibn Ḥanbal made the distinction between the situation where the follower is able to hear the *imām's* recitation and the situation where he is not.

The *reason for their disagreement stems from the conflict of traditions on* this topic and the interpretation of some on the basis of others. There are four traditions on the topic. The first is the saying of the Prophet (God's peace and blessings be upon him), "There is no prayer, except with the *fātiḥat al-Kitāb*".

This is in addition to the traditions conveying the same meaning, which we have discussed under the issue of the obligation of recitation. The second is a tradition recorded by Mālik from Abū Hurayra that the Messenger of Allāh (God's peace and blessings be upon him) finished his prayer reciting in an audible voice, and said, "Did one of you recite with me just now". A man said, "Yes, I did O Messenger of Allāh". He said, "I say: How am I being challenged in the (recitation of the) Qurʾān". The people stopped reciting while praying behind the Messenger of Allāh (God's peace and blessings be upon him) when the recitation was made in an audible voice. The third is the tradition of ʿUbāda ibn al-Ṣāmit, who said that "the Messenger of Allāh (God's peace and blessings be upon him) led us in the morning prayer and the recitation became difficult for him. When he had finished he said, 'I see that you recite behind the *imām*'. We said, 'Yes.' He said, 'Do not do it, except for the *umm al-Qurʾān*' ". Abū ʿUmar said that the tradition of ʿUbāda here is a narration from Makḥūl and other narrations have continuous chains and are authentic. The fourth tradition is that of Jābir from the Prophet (God's peace and blessings be upon him), who said, "The recitation of a person who has an *imām* leading him is undertaken by the *imām*". There is also a fifth tradition that has been declared authentic by Aḥmad ibn Ḥanbal. It is the narration that reports the Prophet (God's peace and blessings be upon him) as saying, "When the *imām* recites listen silently".

The jurists disagreed about the manner of reconciling these traditions. There were some who exempted the recitation of the *umm al-Qurʾān* alone from the proscription of recitation during audible recitation of the *imām*, on the basis of the tradition of ʿUbāda ibn al-Ṣāmit. There were those who exempted from the general implication of the words of the Prophet, "There is no prayer without the (recitation of) the *fātiḥat al-Kitāb*", only the case of the follower in a prayer with audible recitation, because of the prohibition of recitation in a prayer with audible recitation occurring in the tradition of Abū Hurayra. They supported this with the words of the Exalted, "And when the Qurʾān is recited, give ear to it and pay heed, that ye may obtain mercy".[128] They said that this was related to prayer. Some of them exempted (from the proscription) the obligatory recitation of the follower in group prayers, whether the prayer was with inaudible or audible recitation, and they confined the obligation of recitation to the cases of an *imām* and the single worshiper taking, into account the tradition of Jābir. This is the opinion of Abū Ḥanīfa. Thus, the tradition of Jābir became for him an evidence restricting the words of the Prophet (God's peace and blessings be upon him), "Recite whatever you can", for he does not specify the recitation of the *umm al-Qurʾān* in prayer, but he does prescribe the recitation of any Qur'ānic passage, as explained earlier. The tradition of Jābir, however, was related as *marfūʿ* (reaching the Prophet) only through the *isnād* of Jābir al-Juʿafī, and there is no force in a tradition related as *marfūʿ* through him alone. Abū ʿUmar said that it is a tradition that is not deemed authentic, except the *marfūʿ* narration of Jābir.

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[128] Qurʾān 7 : 204.

2.3.2.7. *Section 7: Things invalidating the prayer of the* imām *and extending the invalidity to the prayer of the follower*

They agreed that if he (the *imām*) is suddenly overcome by *ḥadath* (like releasing wind) during prayer and stops, the prayer of the followers is not invalidated (they continue individually or one of them steps forward and leads them). They disagreed over the case where the *imām* leads them in prayer in a state of ritual impurity, and they come to know of this after the prayer. A group of jurists said that their prayer is valid, while another group said that their prayer is invalid. A third group made a distinction on the basis of whether the *imām* was aware of his sexual defilement or was ignorant of it. They said that if he was aware of it their prayer is invalidated, but if he was unaware of it their prayer is not invalidated. The first opinion was held by al-Shāfiʿī and the second by Abū Ḥanīfa, while the third was held by Mālik.

The reason for their disagreement derives from their dispute over whether the validity of the follower's prayer is dependent upon the validity of the *imām's* prayer. Those who did not consider it to be dependent said that the prayer is valid, while those who considered it to be dependent said that their prayer is invalidated.

Those who made a distinction between forgetfulness and intentional silence took into account the apparent meaning of the preceding tradition, which says "that the Prophet (God's peace and blessings be upon him) pronounced the *takbīr* in one of his prayers and then (interrupting his prayer) gestured to the people that they should wait. He went away and on his return there were remnants of moisture on his body". The apparent meaning of this is that they continued their prayer (building upon the part they prayed before the Prophet interrupted his prayer). Al-Shāfiʿī (supporting this ruling) argued that had their prayer been dependent upon his prayer they would certainly have recommenced the prayer (with a fresh *takbīr*).

2.3.3. Chapter 3 The Friday Congregational Prayer (*Jumuʿa*)

The comprehensive discussion of the principles of this chapter is covered in four sections. The first section is about the obligation of *jumuʿa* prayer and about the person on whom it is obligatory. The second is about the conditions for *jumuʿa*. the third is about the elements (*arkān*) of *jumuʿa*. The fourth is about the *aḥkām* of *jumuʿa*.

2.3.3.1. *Section 1: The obligation of* jumuʿa *and the person on whom it is obligatory*

The majority of the jurists uphold the universal obligation of the *jumuʿa* (Friday) prayer, as a substitute for another obligation, which is the *ẓuhr* prayer, and also because of the apparent meaning of the words of the Exalted, "O ye who believe! When the call is heard for the prayer of the day of the congregation, haste unto remembrance of Allāh and leave your trading. That is better for you if ye did but know".[129] The command here necessitates an obligation. Further, because of the words of the Prophet (God's peace and blessings be upon him), "Let people desist from neglecting the Friday prayers, or Allāh will stamp their hearts". A group of jurists maintained that it is a communal obligation (*farḍ kifāyā*), and from Mālik there is an isolated opinion that it is a *sunna*.

The reason for this disagreement stems from its similarity to the *ʿĪd* prayer, because of the words of the words of the Prophet (God's peace and blessings be upon him), "This day has been determined to be an *ʿid* by Allāh".

The person on whom it is obligatory is one who fulfils the conditions for the obligation of prayer, the discussion of which has preceded, and who meets four additional conditions, two of them are agreed upon and two are disputed. The two that are agreed upon are being a male, and being in sound health. Thus, it is not binding upon a woman, nor upon a sick person, but if they attend, their *jumuʿa* prayer would be valid. The disputed conditions are (not) being a traveller and (not) being a slave. The majority maintain that *jumuʿa* is not obligatory on them, while Dāwūd and his disciples maintained that it is obligatory.

The reason for disagreement arises from their dispute over the authenticity of the tradition related to this issue, which is the saying of the the Prophet (God's peace and blessings be upon him), "*Jumuʿa* is a duty that is obligatory upon each Muslim living among a group, except for four persons: an owned slave, a woman, a minor, and one who is sick". In another version the words are "except for five", and the words "a traveller" are added. The tradition has not been deemed authentic by most of the (*ḥadīth*) scholars.

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[129] Qurʾān 62 : 9.

2.3.3.2. *Section 2: The conditions for* jumuʿa

They agreed that the conditions of the Friday prayer are the very conditions determined for obligatory prayers, that is, the eight preceding conditions, except for the time and the call for prayer, for they disagreed about these. Similarly, they disagreed about the conditions specific to the Friday prayer.

With respect to the time (of the *jumuʿa* prayer), the majority of the jurists maintained that it is the time for *ẓuhr* itself, that is, the time of the declining of the sun, and that it is not permitted before the declining of the sun. A group of jurists, including Aḥmad ibn Ḥanbal, maintained that it is permitted to observe it before the declining of the sun.

The reason for this disagreement stems from the dispute over the meaning of the traditions urging the early observance of the Friday prayer, like the one recorded by al-Bukhārī from Sahl ibn Saʿd, who said, "We did not take lunch or a midday nap, during the time of the Prophet (God's peace and blessings be upon him), until after the Friday prayer"; likewise another report says, "that they used to pray and return before the walls had cast their shade". Those who understood from these traditions that the prayer was observed before the declining of the sun permitted it, while those who only interpreted them to mean (just starting with the) *takbīr* did not permit it, so that the sources may not conflict with each other on this topic. The reason (for upholding this interpretation) is that it is established through the tradition of Anas ibn Mālik "that the Prophet (God's peace and blessings be upon him) used to pray when the sun had declined". Further, as the Friday prayer is a substitute for the (regular) *ẓuhr* prayer, it is necessary that its time be the time for *ẓuhr*. It therefore becomes necessary by way of reconciliation to construe those traditions so that they apply to *takbīr*, for they do not indicate explicitly that the time (for the Friday prayer) starts before the declining of the sun, and that is what the majority uphold.

The majority of the jurists agree that the time of *adhān* (for the Friday prayer) starts when the *imām* seats himself at the pulpit. They disagreed, however, on whether a single *muʾadhdhin* or more should make the call for prayer in front of the *imām*. Some of them maintained that only one *muʾadhdhin* is to make the call while facing the *imām*, and this is the call with which buying and selling are declared prohibited. Some other jurists said that there should be two *muʾadhdhins*, and not more, who are to make the call, while others have said that in fact three of them should make the call. The reason for the disagreement derives from the conflict of traditions about this. It is recorded by al-Bukhārī from al-Sāʾib ibn Yazīd that he said, "The call on Friday, during the time of the Prophet (God's peace and blessings be upon him) and also during the time of Abū Bakr and ʿUmar, was made when the *imām* had seated himself at the pulpit. When at the time of ʿUthmān the population had increased, a third call was instituted to be delivered from al-Zawrā". It is also related from al-Sāʾib ibn Yazīd that he said, "In the time of the Messenger of Allāh (God's peace and blessings be upon him) there was only one *muʾadhdhin* for the Friday prayer". It is related from Saʿīd ibn al-Musayyab that he said, "The call for the Friday prayer during the periods of the Messenger of Allāh (God's peace and blessings be upon him) and Abū Bakr and ʿUmar used to be a single call when the *imām* came out, but when it was the time of ʿUthmān and the population increased he added to the one initial call in order to induce the people to get ready for the Friday prayer". Ibn Ḥabīb has related "that the *muʾadhdhins* during the time of the Messenger of Allāh (God's peace and blessings be upon him) used to be three".

A group of jurists followed the apparent meaning of the report by al-Bukhārī and maintained that on Friday two *muʾadhdhins* are to make the call. Some other jurists maintained that there should be a single *muʾadhdhin*. They said that the meaning of the words "When it was the time of ʿUthmān and the population increased, a third call was instituted", is that the second call was the *iqāma*. Others adopted what is reported by Ibn Ḥabīb, although the traditions of Ibn Ḥabīb are weak according to the traditionists, especially those that only he has related.

It is agreed upon by all, in the conditions of obligation and validity of the Friday prayer, that a condition for it is the congregation (*jamāʿa*), but they differed about the (minimum) number in the congregation. Some of them said that one person with the *imām* is sufficient. This is the opinion of al-Ṭabarī. Some said that there should be two persons besides the *imām*. Some said that there should be three persons besides the *imām*; this is the opinion of Abū Ḥanīfa. Some of them stipulated the presence of forty persons, which is the opinion of al-Shāfiʿī and Aḥmad, while some said there should be thirty. Some did not fix a number, but said that it should be a number sufficient to establish a settlement. Thus, according to this opinion, which was held by Mālik, it (Friday prayer) is not permissible with three or four persons.

The reason for their disagreement stems from their dispute over the minimum number that can be referred to in the plural whether this is three or four or two, and whether the *imām* is included in this number. Further, whether the plural for purposes of this prayer is the minimum that is applied in most cases, which is more than four or three. Those who maintained that the condition here is designation with the minimum to which the plural is applied—and for them the minimum for the plural was two—said that the *jumuʿa* is valid with two persons, the *imām* and another; this was the view of those who included the *imām* in the count, but if they were among those who did not include the *imām* in the count, they held that it is valid with two persons besides the *imām*. Those for whom the minimum for plurality was three, and they were not including the *imām* in the count, said that *jumuʿa* is valid with three persons besides the *imām*, but if they were among those who included the *imām* in the count, their opinion conformed with the opinion of those who said that the minimum for plurality was two while not counting the *imām* in the congregation. Those who took into account what is usually applied to a congregation by custom, said that it is not valid with two or with four, and they did not fix a minimum limit for this. As the condition for the (validity of) Friday congregation was that it be held in a permanent settlement, they fixed for this a number of people who are able to establish a permanent settlement by themselves. This is Mālik's opinion (God bless him). Those who fixed the number at forty did so relying on the report that this was the number of the group who held the Friday prayers for the first time (in Medina, just before the Hijra of the Prophet). This, then, is one of the conditions of the Friday prayer, that is, conditions of obligation and conditions of validity, as in the conditions for the Friday prayer, some are the conditions of obligation alone, while there are others that combine the two factors, I mean, they are the conditions of obligation as well as those of validity.

The second condition (of obligation and validity) is that it should be held in a (permanent) settlement (and the believer must be a resident there, not a traveller). The jurists agreed about this because of their agreement that the Friday prayer is not obligatory for a traveller. This is opposed by the Ẓāhirites who hold that the *jumuʿa* is obligatory for a traveller as well. Abū Ḥanīfa stipulated that there should be a permanent settlement and a (governing) authority along with it, but he did not stipulate a number.

The reason for disagreement in this matter arises from whether or not the circumstances prevailing at the time the Prophet (God's peace and blessings be upon him) held this prayer are to be considered as conditions for the validity or for the obligation of this prayer. It happened that the Prophet (God's peace and blessings be upon him) always observed this prayer in a congregation in a permanent settlement (village or town) and in a central mosque. Those who maintained that the linking of these surroundings with his prayer renders them conditions for the Friday prayer stipulated their existence as a condition. Those who linked (only) some of these (elements) with his Friday prayer stipulated (only) these as conditions to the exclusion of others. This is like the stipulation by Mālik of observing it in a mosque, and dropping the condition that it should take place in a permanent settlement and that there should be (a ruling) authority. In relation to this topic, we may add that the jurists disputed other points, like their disagreement over whether two or more Friday congregations could take place in one town.

The reason for their disagreement in stipulating some of these related circumstances and acts is that some of these circumstances are more suited to the acts of prayer than others. It is for this reason that they agreed upon the stipulation of performing it in a congregation as congregating is a legal feature of the Muslim prayer. For this reason also Mālik did not stipulate that the observance of the Friday prayer in a congregation should be conditional on the existence of a settlement and a supervising authority, because he did not consider these as either representative features of prayer or circumstances closely related to prayer. Yet he stipulated that the Friday congregation be held in a mosque as the mosque is closely related to prayer. His disciples, however, differed to the extent of whether the mosque should have a roof, and whether it is a condition that Friday prayers are regularly held in this mosque. Perhaps this amounts to too much probing, and the *Dīn* of Allāh requires ease. Someone may raise the objection that if all these were the conditions for the validity of prayer, the Prophet (God's peace and blessings be upon him) would not have remained silent about them and he would not have failed to give the explanation because of the words of the Exalted, "We have revealed unto thee the Remembrance that thou mayst explain to mankind that which hath been revealed for them",[130] and His words, "And We have revealed the Scripture unto thee only that thou mayst explain unto them that wherein they differ".[131] Allāh guides to what is right.

2.3.3.3. *Section 3: The elements* (arkān) *of* jumuʿa

The Muslim jurists agreed that the elements (major parts of the Friday prayer) are the *khuṭba* (sermon) and the two *rakʿas* after the *khuṭba*. Within this they agreed about five issues that are the principles of this topic.

2.3.3.3.1. Issue 1

Whether the *khuṭba* is a condition for the validity of this prayer and whether it is one of its elements (*arkān*). The majority maintained that it is a condition as well as an element. A group of jurists said that it is not obligatory, while the majority of the disciples of Mālik maintained that it is obligatory, except for Ibn al-Mājishūn.

The reason for their disagreement stems from the principle that has already been discussed, whether all things and circumstances existing at the time the Prophet used to hold the Friday prayer should necessarily constitute the conditions for its validity. Those who maintained that the *khuṭba* is one of the circumstances specific to this prayer, especially when it is taken into account that it is a substitute for the two *rak*ʿ*as* that have been reduced from the (*ẓuhr*) prayer, said that it is an element of this prayer and one of the conditions of its validity. Those who maintained that its purpose is the usual exhortation that is the aim of all sermons, held that it is not a condition for this prayer. One group of jurists argued on the basis of the words of the Exalted, "haste unto remembrance of Allāh",[132] saying that this means the sermon.

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[130] Qurʾān 16 : 44.
[131] Qurʾān 16 : 64.

2.3.3.3.2. Issue 2

Those who upheld that the sermon is an obligation differed about the minimum length of the sermon. Ibn al-Qāsim said that it is the minimum length that can be called a sermon in the usage of the Arabs, including a word of praise for Allāh (*al-Ḥamd*) at the beginning. Al-Shāfiʿī said that the permitted minimum requirement of a sermon is that it should be in two parts during which the speaker (*imām*) should be standing and that they should be separated by a short interval for sitting, and that at the beginning of each part he should pronounce words praising Allāh (*al-Ḥamd*), pray for the Prophet and preach piety. He should also recite a passage from the Qurʾān in the first part of the sermon and pray for the believers in the second part.

The reason for their disagreement over this issue is their dispute over the meaning of the minimum permissible length whether it is the literal or the technical meaning? Those who maintained that the permitted length is the literal minimum did not stipulate in it anything of the words that have been traced to the Prophet (God's peace and blessings be upon him) in his sermons. Those who maintained that the permitted length is the minimum to which the technical meaning applies stipulated that it should include words that were regularly included in the sermons of the Prophet (God's peace and blessings be upon him), that is, not just occasional words.

The reason for this disagreement is that the sermons that have been transmitted from him contained words regularly used and also occasional remarks. Those who took into account the occasional remarks and preferred the *ḥukm* emanating from them said that a sufficient length is the minimum to which the literal term applies, that is, the meaning of the term *khuṭba* in the usage of the Arabs. Those who took into account the regularly delivered speeches and gave predominance to their *ḥukm* said that the permitted length is the minimum to which the term *khuṭba* is applied in legal usage and practice.

Sitting down (between the two parts of the sermon) is not a condition for the *khuṭba* in Mālik's view, and it is a condition, as we have said, in al-

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[132] Qurʾān 62 : 9.

Shāfiʿī's view. The reason is that those who attributed to it the ordinary meaning of being a rest for the *khaṭīb* (speaker) did not consider it to be a condition, while those who considered it to be a ritual deemed it a condition.

2.3.3.3.3. Issue 3

There are three different opinions about maintaining silence while the *imām* is delivering the sermon. Some of the jurists held that silence is obligatory under all circumstances and then it is a binding *ḥukm* of the sermon. These were the majority: Mālik, al-Shāfiʿī, Abū Ḥanīfa, Aḥmad ibn Ḥanbal, and all the jurists of the provinces. They are, however, divided into three groups. Some permitted the utterance of a blessing for a person who has sneezed, and also permitted responding to salutations; others distinguished between exclamation of a blessing and salutations, saying that one may respond to salutations, but not bless. The second view is the opposite of the first, that is, speech during any stage of the sermon is permitted, except when the Qurʾān is being recited during it. This is related from al-Shaʿbī, Saʿīd ibn Jubayr, and Ibrāhīm al-Nakhaʿī. The third opinion makes a distinction between the worshippers who can hear the sermon and those who cannot. The worshippers who can hear the sermon should maintain silence, but those who cannot hear it are permitted to occupy themselves in the remembrance of Allāh or to discuss religious issues. This was the opinion of Aḥmad, ʿAṭāʾ, and a group of jurists.

The majority maintain that if a person talks (during the sermon) his prayer is not invalidated; but it is related from Ibn Wahb that if a person indulges in idle talk he is obliged to pray the four *rakʿas* of *ẓuhr* (i.e. his Friday prayer is invalidated).

The majority upheld the obligation of maintaining silence because of the tradition of Abū Hurayra that the Prophet (God's peace and blessings be upon him) said, "If you say to your companion 'Be silent', during Friday prayer while the *imām* is delivering the sermon, then, you have indulged in idle talk'". Those who did not deem this obligatory, for them I do not recall an analogy, unless they were of the view that this matter is in conflict with the implication of the text in the words of the Exalted, "And when the Qurʾān is recited, give ear to it and pay heed, that ye may obtain mercy",[133] that is, there is no obligation to maintain silence for what is besides the Qurʾān, but this is weak, Allāh knows best. It is more probable that this tradition did not reach them.

In the case of their disagreement about responding to the salutation and about blessing the person sneezing, the reason for disagreement stems from the conflict between the general command to do so and the general command to maintain silence; the likelihood is that each is an exemption from the other. Thus, those who exempted from the general command to maintain silence during the *jumuʿa* sermon the command to respond to the salutation and to bless the person sneezing permitted them, while those who exempted from the general command to respond to the salutation, and to bless the person sneezing, the proscription of speaking during the Friday sermon, did not permit either. Among those who made a distinction between the two utterances, some exempted the response to a salutation from the proscription of speaking during the Friday sermon, and some exempted the expression of blessings for one who has sneezed. Each one of these two groups adopted one of these exemptions, about which it was convinced because of the strength in one general application and a weakness in the other. The reason is that the command for maintaining silence is general with respect to speech and particular with respect to time, while the command to respond to salutation and to utter blessings is general with respect to time and particular with respect to speech. Those who exempted the particular time from general speech did not permit, during the sermon, the response to salutation or blessing one who has sneezed, while those who exempted particular speech from the proscription of general speech permitted it.

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[133] Qurʾān 7 : 204.

The correct method is not to adopt an exemption of one of the general implications from one of the particular implications, except on the basis of an evidence. If this becomes difficult then a preference among the general and particular implications is to be investigated, and preference is to emphasize the commands. The discussion of all this is lengthy, but it should be known in brief that if the commands have equal strength and the general and particular implications are also equal in strength, and there is no evidence as to which is to be exempted from the other a dead end is inevitably reached, though this rarely happens. If this is not the case, then, the preference between general and particular meanings occurring in such cases involves an investigation of all kinds of relationships that exist between the particular and general meanings. These are four. Two general meanings possessing the same strength and two particular meanings having the same strength, are not to be exempted, one from the other, except on the basis of another evidence. The second case is the opposite of this, and this may be a particular meaning of extreme strength or a general meaning of extreme weakness. In such a case it is to be adopted, in fact it is necessary, that is, exempting the particular from the general. The third is the case of two particular meanings of the same category and a general meaning that is weaker than the other (general meaning). In this case it is necessary to restrict the weaker general meaning. The fourth case is that of two general meanings of the same category along with one particular meaning that is stronger than the other. In such a case it is necessary that the *ḥukm* be assigned to the stronger particular meaning. All this takes place when the commands are equal in emphasis. If that is different, the orders are all changed and the measures are applied equally to the implications of the words as well as to the commands. Because of the difficulty of ordering such matters, it is said that each *mujtahid* is correct or, at least, he is not at fault.[134]

2.3.3.3.4. Issue 4

They disagreed about whether a person who arrives in the mosque for Friday prayers when the *imām* is already at the pulpit, is to begin offering the (two required) *rakʿas*. Some of the jurists maintain that he is not to pray, and this is Mālik's opinion, while others maintained that he is to offer the *rakʿas*.

The reason for their disagreement arises from the conflict of analogy with the general implication of the tradition. The general implication of the words of the Prophet (God's peace and blessings be upon him), "When one of you arrives in a mosque, he is to offer two *rakʿas*", conveys that anyone entering a mosque on a Friday is to offer two *rakʿas* even if the *imām* is delivering the sermon. The evidence of the command of paying attention to the speaker in silence requires that the entrant is not to occupy himself with anything that distracts him from silent attention, even if such an activity is worship. The general meaning of this tradition is supported by the authentic tradition of the Prophet (God's peace and blessings be upon him), "When one of you enters the mosque when the imām is delivering the sermon, he should offer two short *rakʿas*". It is recorded by Muslim in some of its versions. Most versions of this tradition say, "The Prophet (God's peace and blessings be upon him) ordered a man who had entered the mosque that he should pray". He did not say, "When one of you enters the mosque . . ". This leads to a disagreement on whether an addition by a single narrator, when he is opposed by the other narrators narrating through a common *shaykh*, is to be accepted. If the addition is proved authentic, it is necessary to act according to it, for it is explicit on a point of dispute, and an explicit text is not to be opposed by analogy. It appears that what Mālik has taken into account on this issue is *ʿamal* (practice of the jurists of Medina).

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[134] The problem described by the author requires some understanding of the subject of *uṣūl al-fiqh*. A brief explanation might help. The *aḥkām* of Allāh are discovered or derived by the *mujtahid* from the commands occurring in the texts of the Qurʾān and *sunna*. These commands have two attributes. The first is that the commands may or may not be expressed in decisive terms. If the command is expressed decisively, the resulting *ḥukm* conveys an obligation (*wujūb*). If a command is not expressed decisively, the resulting *ḥukm* may convey a recommendation (*nadb*). Now the same command may be expressed in general terms – and this is the second attribute – in which case it will apply to all cases falling under it, or it may be expressed in specific terms and will apply to a particular case. This however is not the end of the matter. A command may be expressed decisively in general terms, but it may be opposed to or conflict with another command also expressed decisively and in general terms. Is one to restrict the other? If so, then on what grounds? In the discussion above the issue is highly complex. There are four commands, two general and two particular, that conflict with each other. The author is trying to explain how many combinations can arise, when some commands are to restrict the others, or when some are to be considered to be exemptions from the general rule contained in the others. He divides them into four cases, but assumes that all have the same attribute of decisiveness, that is all are conveying an obligation. He points out that if the assumption is changed, and we assume that some were expressed in decisive terms while others were not, then the order and relationships change and new priorities will have to be determined.

2.3.3.3.5. Issue 5

The majority of the jurists maintain that the recitation of the *sūra* of *Jumuʿa*[135] in the first *rakʿa* of the Friday prayer is an established practice (*sunna*), for its repetition is observed in the acts of the Prophet (God's peace and blessings be upon him). Muslim has recorded from Abū Ḥurayra "that the Messenger of Allāh (God's peace and blessings be upon him) used to recite it in the first *rakʿa* during Friday prayers, and in the second (*rakʿa*) he used to recite *sūrat al-Munāfiqūn*".[136] Mālik has related that al-Ḍahhāk ibn Qays asked al-Nuʿmān ibn Bashīr what the Messenger of Allāh (God's peace and blessings be upon him) usually recited on a Friday after the *sūrat al-Jumuʿa*. He said, "He used to recite (the *sūra* beginning with the words), 'Hath there come unto thee the tidings of the Overwhelming?' "[137] Mālik preferred that the practice conform with this tradition, though it would be good, in his view, if (the *sūra* beginning with the words), "Praise the name of thy Lord the Most High"[138] was recited, for it is related from ʿUmar ibn ʿAbd al-ʿAzīz. Abū Ḥanīfa, on the other hand, did not specify anything in this respect.

The reason for their disagreement arises from the conflict between the reported practice and analogy. Analogy dictates that there should not be any *sūra* appointed for this purpose as is the case with the rest of the prayers, while the indication of practice requires that there an appointed *sūra*s.

The Qāḍī said that Muslim has recorded from al-Nuʿmān ibn Bashīr "that the Messenger of Allāh (God's peace and blessings be upon him) used to recite on the occasion of the two *ʿĪds* and *Jumuʿa* (the *sūra* beginning with the words), 'Praise the name of thy Lord the Most High'[139] and also (the *sūra* beginning with the words), 'Hath there come unto thee the tidings of the Overwhelming?' "[140] He said that if the *ʿĪd* and *Jumuʿa* fell on the same day, they were recited in both prayers. This indicates that there is no appointed *sūra* for this and they were not always recited in the *Jumuʿa*.

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[135] Qurʾān, chapter 62.
[136] Qurʾān, chapter 63.
[137] Qurʾān 88 : 1.
[138] Qurʿān 87 : 1.
[139] Qurʾān 87 : 1.
[140] Qurʾān 88 : 1.

2.3.3.4. *Section 4*: *The* aḥkām *of* jumuʿa

This topic covers four issues. First, the *ḥukm* of purification for Friday prayers. Second, on whom it is obligatory from among those living outside the town. Third, the desired time for moving toward the Friday congregation. Fourth, the permissibility of trading on Friday after the call has been made.

2.3.3.4.1. Issue 1

They disagreed about purification (bathing) for Friday prayers. The majority maintained that it is a *sunna*, while the Ẓāhirites held that it is an obligation. There is no dispute, as far as I know, that it is not a condition for the validity of this prayer.

The reason for their disagreement stems from the conflict of traditions. On this subject, there is the tradition of Abū Saʿīd al-Khudrī, being the words of the Prophet (God's peace and blessings be upon him), "Bathing for the *jumuʿa* is obligatory on each adult, like bathing after sexual defilement". There is also the tradition from ʿĀʾisha, who said, "The people, who were mostly workers, used to come for Friday prayers in the condition that they were, and it was said to them, 'If only you had washed yourselves'". The first tradition is authentic by agreement, while the second has been recorded by Abū Dāwūd and Muslim. The apparent meaning of the tradition of Abū Saʿīd implies the obligation of bathing, while the apparent meaning of ʿĀʾisha's tradition conveys that it is only for purposes of cleanliness and is not a required ritual. It has been reported that "It is sufficient to perform ablution on a Friday, but if one takes a bath it is better". This is explicit in eliminating the obligation. It is, however, a weak tradition.

2.3.3.4.2. Issue 2

About the obligation of Friday prayers on one living outside a permanent settlement, a group of jurists have said that it is not obligatory on such a person, while another group has said that it is obligatory. These jurists differed extensively. Some said that if the distance between his place and the place of the congregation involves a journey of one day, it is obligatory on him to come to it. This is a deviant opinion. Some said that it is obligatory on him to come if the distance is within three miles. Others were of the view that it is obligatory on him to come to it from a distance up to which the call can normally be heard, and this is determined to be three miles from the place of the issuance of the call. The latter two opinions are related from Mālik. This issue is related to the conditions of obligation.

The reason for their disagreement on this topic arises from the conflict of traditions. It is reported that the people used to come for Friday prayers from the suburbs during the time of the Prophet (God's peace and blessings be upon him), which were up to three miles from Medina. Abū Dāwūd has reported that the Prophet (God's peace and blessings be upon him) said, "The Friday prayer is obligatory on one who hears the call". It is also reported that "Friday prayer is obligatory on one who can return to his family by nightfall", but this is a weak tradition.

2.3.3.4.3. Issue 3

Their disagreement about the preferred timings for setting off for the Friday prayer is based on the words of the Prophet (God's peace and blessings be upon him), "If one sets off in the first hour, it is as if he has made an offering of a camel. If one sets off in the second hour, it is as if he has made an offering of a cow. If one sets off in the third hour, it is as if he has made an offering of a horned ram. If one sets off in the fourth hour, it is as if he has made an offering of a chicken. If one sets off in the fifth hour, it is as if he has made an offering of an egg". Al-Shāfiʿī and a group of jurists believed that these hours are the hours of the day, and they recommended moving in the first hour of the day. Mālik maintained that these are the parts of the single hour prior to the declining of the sun and after it. A group of jurists said that these are the parts of the hour before the declining of the sun. This appears to be the prominent opinion, because there is an obligation of making haste after the declining of the sun, except for those who maintain that greater merit can also be attached to obligatory acts.

2.3.3.4.4. Issue 4

In their disagreement over buying and selling at the time of the call (and thereafter before the prayer), a group of jurists have said that the sale is rescinded if the call has been made, while another group said that it is not rescinded. The reason for their disagreement stems from their dispute on whether the proscription of a thing, which is essentially permissible, when associated with another attribute, renders void the thing proscribed?

The etiquette of Friday prayer covers three things: perfume, brushing the teeth (was done with a tooth-stick), and decent attire. There is no dispute about this because of the traditions related to the topic.

2.3.4. Chapter 4 Prayers during a Journey

In this chapter there are two sections. The first section is about curtailing the prayer and the second is about combining prayers.

2.3.4.1. *Section 1: Curtailing prayers (while travelling)*

Travelling is effective in curtailing (quadruple)[141] prayers, by agreement, and is effective in combining prayers, with disagreement.

The jurists agreed about the curtailment of prayers, except for a deviant opinion, which is the opinion of ʿĀʾisha, who maintained that curtailing prayers is not permitted, except for one in a state of fear, because of the words of the Exalted, "And when ye go forth in the land, it is no sin for you to curtail [your] worship if ye fear that those who disbelieve may attack you. In truth the disbelievers are an open enemy to you".[142] They said that the Prophet (God's peace and blessings be upon him) shortened his prayers for he was in a state of fear.

They (the majority) differed over this on five points. First, about the *ḥukm* of curtailing prayers. Second, about the length of the journey to which curtailment applies. Third, the kind of journey that justifies curtailment. Fourth, the point from which the traveller may commence shortened prayers. Fifth, the duration in time for which it is permissible for the traveller to continue curtailing prayers, if he has stayed on at one place.

With respect to the *ḥukm* of curtailing prayers, they held four different opinions. Some of them held that curtailing prayers is an obligation for the traveller and is determined for him. Some held that curtailing and completion are both obligatory for him by way of an option, like the option in case of expiation (*kaffāra*). Some held that curtailing of prayers is a *sunna*, while others were of the view that it is an exemption and offering complete prayers has greater merit. The first opinion was held by Abū Ḥanīfa, his disciples, and the Kūfīs as a whole, that is, it is a fixed obligation. The second opinion was held by some of the disciples of al-Shāfiʿī. The third, that it is *sunna*, was held by Mālik in the best known narration from him. The fourth, that it is an exemption, was held by al-Shāfiʿī in the best known narration from him and it is supported by his disciples.

The reason for their disagreement derives from the conflict between rational argument and the form of the command in the transmitted evidence, and also the conflict of the evidence from the acts with the rational argument and the form of the words used in the transmitted evidence. The (rational) meaning arising from the curtailing of prayers for a traveller is an exemption because of the existence of hardship, just as he has been exempted in the case of fasting and other things. This also is supported by the tradition of Yaʿlā ibn Umayya, who said, "I said to ʿUmar that Allāh has said 'if ye fear that those who disbelieve may attack you', intending thereby the curtailing of prayers during a journey. He said, 'I was also struck by what has struck you, so I asked the Messenger of Allāh (God's peace and blessings be upon him), and he replied, 'It is a charity that Allāh has granted to you, so accept the charity'". This indicates an exemption. Further, there is the tradition of Abū Qalāba from a man from Banū ʿĀmir, who came to the Prophet (God's peace and blessings be upon him) and the Prophet (God's peace and blessings be upon him) said to him, "Allāh has lifted from the traveller the obligation for fasting and a part of prayer". These two traditions are found in the *Ṣaḥīḥ* compilations. All this indicates leniency, exemption, and the removal of hardship, and not that curtailing of prayer is obligatory or a *sunna*.

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[141] That is, to pray two *rakʿas* instead of four, in the case of *ẓuhr*, *ʿaṣr*, and the *ʿishāʾ* prayers. Thus, the curtailment does not apply in the case of the morning and the *maghrib* prayers.

[142] Qurʾān 4 : 101.

The tradition that contradicts, through the form of its words, the rational meaning and these traditions is the tradition of ʿĀʾisha, declared authentic by agreement, in which she said, "Prayer has been made obligatory two *rakʿas* at a time. The prayer during journey is this basic (unit), while the prayer within a settlement was increased". The evidence arising from the acts (of the Prophet) that conflicts with the rational meaning and with the meaning of the above transmitted traditions is what has been reported about the Prophet (God's peace and blessings be upon him) that he shortened his prayer in all his journeys, and it has never been proved authentically that the Prophet had ever offered the complete prayer during a journey. Those who maintained that it is a *sunna* or an obligation with an option (*wājib mukhayyar*), interpreted it to be so, for it did not prove to be authentic for them "that the Prophet (God's peace and blessings be upon him) completed his prayer, or did what was similar". It therefore follows that it is one of several types, that is, either it is an obligation with an option or it is a *sunna* or it is a determined obligation for the traveller. Its being a fixed obligation, however, conflicts with the rational meaning, while its being an exemption conflicts with the transmitted words. Thus, it is necessary that it be (either) an obligation with an option, or a *sunna*. This is a kind of reconciliation (of the evidences). They objected to the tradition of ʿĀʾisha for it is well-known of her that she used to offer the complete prayer. ʿAṭāʾ has related from her that she said, "The Prophet (God's peace and blessings be upon him) used to complete the prayer during a journey and he used to shorten it, he used to fast and give up fasting, he used to delay the *ẓuhr* prayer and hasten the middle prayer, and he used to delay *maghrib* and hasten *ʿishāʾ*". It is also opposed by the tradition of Anas and of Abū Najīḥ al-Makkī, who said "that the Companions of Muḥammad (God's peace and blessings be upon him) used to travel together, with some of them offering the full prayer and others curtailing it, with some of them fasting when others were not. They did not find fault with each other nor did they disagree about the offering of full prayer by ʿUthmān and ʿĀʾisha". This, then, is their disagreement on the first point.

In their disagreement on the second point, which concerns the length of the journey permitting curtailment of prayers, the jurists disagreed widely. Mālik, al-Shāfiʿī, Aḥmad, and a large group of jurists held that prayer is to be shortened during (a journey of) four *barīds*, which is a distance covered in one day moving at a medium pace. Abū Ḥanīfa, his disciples, and the Kūfīs said that the minimum for which prayer is to be shortened is a journey of three days, and curtailing is for a person who travels from one region to another. The Ẓāhirites said that curtailing prayers is permitted for each journey, whether to a near or distant place.

The reason for their disagreement stems from the conflict of the rational meaning with the words. Rationally speaking, the reason why travelling may occasion the curtailment of prayer is based on the hardship that exists, as in the case of fasting during travel. If this is the case, then, then curtailing is permissible whenever hardship is found. Those who take into account only the letter of the law maintain that the Prophet (God's peace and blessings be upon him) said, "Allāh has removed from the (liability of) traveller fasting and a part of prayer". Thus, anyone to whom the term traveller can be applied is permitted to curtail or to forgo (delay) fasting. They supported this with what has been recorded by Muslim from ʿUmar ibn al-Khaṭṭāb "that the Prophet (God's peace and blessings be upon him) used to curtail prayers during a journey of about seventeen miles".

A group of jurists, as we have said, adopted the fifth opinion maintaining that curtailing of prayers is not permitted, except to the person in a state of fear, because of the words of the Exalted, "And when ye go forth in the land, it is no sin for you to curtail (your) worship if ye fear that those who disbelieve may attack you. In truth the disbelievers are an open enemy to you".[143] It is said that this was ʿĀʾisha's opinion. They also maintained that the Prophet (God's peace and blessings be upon him) used to curtail his prayers as he was in a state of fear.

The basis for the disagreement of those who took into consideration the element of hardship stems from the disagreement of the Companions over this. Thus, the opinion about four *barīds* is related from Ibn ʿUmar and Ibn ʿAbbās, and has been reported by Mālik. The opinion about three days is related from Ibn Masʿūd, ʿUthmān, and others.

With respect to the third point that relates to the kind of journey for which curtailment is permissible, some of the jurists said that it is permitted in a journey undertaken to seek nearness to Allāh, like *ḥajj*, *ʿumra*, and *jihād*. Those who upheld this opinion include Aḥmad. Some of them permitted it in all permissible (*mubāḥ*) journeys, thus, excluding journeys undertaken for evil design. This was the opinion of Mālik and al-Shāfiʿī. Some of them allowed it in any kind of journey whether for seeking nearness, permissible, or for evil design. This was the opinion of Abū Ḥanīfa, his disciples, al-Thawrī, and Abū Thawr.

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[143] Qurʾān 4 : 101.

The reason for their disagreement springs from the conflict of the rational meaning, or the apparent meaning, with the evidence arising from the acts (of the Prophet). Those who took into account the element of hardship or the apparent meaning of the term "journey" did not differentiate between one kind of journey or another. Those who took into account the evidence arising from the acts said that it is not permitted, except in a journey undertaken to seek nearness to Allāh, as the Prophet (God's peace and blessings be upon him) did not ever curtail prayers, except during a journey undertaken to seek nearness to Allāh. Those who distinguished between a permissible journey and one undertaken with unlawful design in mind did so through an enhanced application of the rule. The rule pertains to whether exemptions are permitted in the pursuit of unlawful things. In this issue the rational meaning is in conflict with the apparent meaning, therefore the jurists differed over it.

On the fourth point that relates to the question of from which spot may the traveller commence to curtail prayers, Mālik stated in *al-Muwaṭṭa*ʾ that prayers are not to be curtailed until the person has left the dwellings area on the outskirts of the village and he does not begin to offer full prayers till he reaches the first of such dwellings. It is also related from him that the person is not to curtail prayers in case of the well-populated village until he is at a distance of three miles from it and this, according to him in one narration, is the boundary for the area in which Friday prayers are obligatory on the persons living outside the centre of the town. The first opinion was adopted by the majority.

The reason for this disagreement stems from the conflict between the meaning of the term and the evidence arising from the acts. This is so as the word "traveller" is applied to a person the moment he commences his journey. Those who took into account the connotation of the term said that as soon as he goes beyond the houses of the village he is to curtail prayers. Those who took into account the evidence of acts, that is, the acts of the Prophet (God's peace and blessings be upon him), said that he is not to begin curtailing prayers, until he is at a distance of three miles from the houses of the village as this is established from the tradition of Anas, who said, "The Messenger of Allāh (God's peace and blessings be upon him) used to pray two *rakʿas* when he had travelled a distance of three miles or three *farāsikh*—Shuʿba doubted (which)".

In their disagreement over the time period for which a traveller may stop in a town (during his journey) and yet curtail his prayers there are many disputes;

Abū ʿUmar has related about eleven opinions, but the well-known ones are those that are held by the jurists of the provinces, and they have three different opinions. First is the opinion of Mālik and al-Shāfiʿī that if the traveller decides to stay for four days he is to offer complete prayers. The second is the opinion of Abū Ḥanīfa and Sufyān al-Thawrī that if he decides to stay for a period of fifteen days he is to offer complete prayers. The third is the opinion of Aḥmad and Dāwūd that if he decides to stay for more than four days he is to offer complete prayers.

The reason for disagreement arises from the fact that the matter is not expressly stated in the law, and using analogy for such prescription is deemed weak by all. All of them therefore strived to argue for their opinion on the basis of the reported circumstances in which the Prophet (God's peace and blessings be upon him) continued to curtail prayers while he stopped on the way or he continued to treat prayers with the *ḥukm* of a traveller.

The first group argued for their opinion on the basis of the report "that the Prophet (God's peace and blessings be upon him) stayed at Makka for three days and curtailed his prayer during his *ʿumra*". There is no evidence in this that this is the limit for curtailing prayers, in fact, it does furnish an evidence that the traveller is to curtail prayers when the stay is for three days or less. The second group argued for their opinion on the basis of the report that he (the Prophet) stayed at Makka and curtailed his prayers. This he did for about fifteen days in some versions, while it is also narrated (variously) as seventeen days, eighteen days, or nineteen days. This is recorded by al-Bukhārī. Each version was adopted by some group. The third group argued on the basis of the stay of the Prophet (God's peace and blessings be upon him) at Makka for his *ḥajj* during which he offered curtailed prayers for four days. The Mālikites supported their opinion with the report "that the Messenger of Allāh (God's peace and blessings be upon him) determined three days for the traveller at Makka after he had completed the rituals". This indicates in their view that a stay of three days does not stop the term "traveller" from being applicable to the person staying, and this is the point that was made by all. They strove to derive this from the acts of the Prophet (God's peace and blessings be upon him), that is, (the answer to the question of) when the term "traveller" is not applicable to the person who intends to stay. For this reason they agreed that if the term "traveller" is not lifted from him up to a certain period, on the basis of the opinion of one of them, the person will continue to curtail prayers if some impediment is preventing him (from resuming his journey) even if the stay is prolonged indefinitely (with the will of Allāh). Those who took into account the minimum period of his stay interpreted the maximum period of his stay, invoked by the rival, on the basis of this reasoning. Thus, the Mālikites, for example, said that the fifteen days for which the Prophet (God's peace and blessings be upon him) stayed after the conquest of Makka, he did so while constantly intending that he would not stay more than four days. The same argument can be valid against the time that they determined.

It is better for the *mujtahid* in such cases to follow one of two methods. He should assign the *ḥukm* to the maximum period of stay that has been reported during which the Prophet (God's peace and blessings be upon him) curtailed his prayers. He should fix this as the limit since not curtailing is the original principle and it is therefore necessary that this period not be increased except on the basis of an evidence. The alternative is to uphold that the original principle is based on the minimum period on which a consensus has taken place and the reports about the Prophet (God's peace and blessings be upon him) that he stayed for periods in excess of this minimum during which his prayers were curtailed; this is because it is likely that it is permitted to the traveller. Further, it is also likely that he stayed with the intention of staying for the (minimum) period permitted to the traveller, but that it occurred to him that he should stay longer. When there is an ambiguity, it is necessary to uphold the principle. The minimum that has been asserted on the issue is one day and night, and this is the opinion of Rabīʿa ibn Abī ʿAbd al-Raḥmān. It is related from al-Ḥasan al-Baṣrī that the traveller is always to curtail prayers, except when he stays at one of the cities. This is based on the assumption that the term "travelling" is applicable to him till he approaches one of the cities. These, then, are the governing issues related to curtailment of prayers.

2.3.4.2. *Section 2: Combining prayers* (jamʿ)

Three issues are related to the topic of combining prayers. First is its permissibility. Second, the manner of combining prayers. Third, things permissible in combining.

2.3.4.2.1. Issue 1: The permissibility of combining prayers

About the permissibility of combining prayers, the jurists agreed that combining *ẓuhr* and *ʿaṣr* at the time of *ẓuhr* at ʿArafa (by a pilgrim) is a *sunna*, and combining *maghrib* and *ʿishāʾ* at Muzdalifa at the time of *ʿishāʾ* is also a *sunna*. They disagreed about combining prayers on occasions other than these. The majority permitted it, but disagreed as to the occasions on which this is permitted and those on which it is not. Abū Ḥanīfa and his disciples prohibited this absolutely.

The reason for their disagreement arises from their dispute about the interpretation of the traditions that are cited in support of combining prayers and their employment as legal evidence for the permissibility of *jamʿ*. All of them comprise acts and not words, and acts are subject to wider interpretation, more than are words. Second, there is a dispute about the authenticity of the traditions. Third, there is a disagreement about the permissibility of employing analogy in this. Thus, there are three reasons for disagreement, as you can see.

The traditions about whose interpretation they disagreed, include the tradition of Anas, which is authentic by agreement and is recorded by al-Bukhārī and Muslim. He said, "When the Messenger of Allāh (God's peace and blessings be upon him) used to travel before the declining of the sun, he delayed *ẓuhr* till the time of *ʿaṣr*, when he used to descend (from his mount) and combine the two. If, however, the sun had declined before the commencement of the journey, he used to pray *ẓuhr* and then ride". They also include the tradition of Ibn ʿUmar, which too is recorded by the two Shaykhs (al-Bukhārī and Muslim). He said, "I have seen the Messenger of Allāh (God's peace and blessings be upon him), when he was hastening his journey (for some reason), delaying *maghrib* so that he would combine it with *ʿishāʾ*". The third is the tradition of Ibn ʿAbbās, recorded by Mālik and Muslim. He said, "The Messenger of Allāh (God's peace and blessings be upon him) prayed *ẓuhr* and ʿaṣr combined and *maghrib* and *ʿishāʾ* combined, in the absence of (a cause for) fear or journey". Those who uphold the permissibility of combining prayers interpreted this tradition to mean that he delayed praying *ẓuhr* till the time fixed for *ʿaṣr* and then combined the two. The Kūfīs maintained that he prayed *ẓuhr* in its last timing and *ʿaṣr* in its first timing in accordance with what is related about the *imāma* of Jibrīl. They said that it is proper that the tradition of Ibn ʿAbbās be interpreted this way as there is consensus on the point that without a valid excuse, two prayers are not to be offered in the time fixed for one of them. They also argued for their interpretation on the basis of the tradition of Ibn Masʿūd, who said, "By Him, besides Whom there is no god, the Messenger of Allāh (God's peace and blessings be upon him) did not offer a prayer, ever, other than in its appointed timing, except the two prayers that he combined: *ẓuhr* and *ʿaṣr* at ʿArafa, and *maghrib* and *ʿishāʾ* at Muzdalifa [*jamʿ*]". They also said, "It is possible to interpret these traditions to mean what we have said or to mean what you have said. The fixed timings of prayers and their performance within the timings, however, has been established, and it is not permitted to move away from an established principle to a matter that is subject to interpretation".

The tradition whose authenticity they differed about is related by Mālik from Muʿādh ibn Jabal: "They went out with the Messenger of Allāh (God's peace and blessings be upon him) on the day of (the expedition of) Tabūk, and the Messenger of Allāh (God's peace and blessings be upon him) used to combine *ẓuhr* and *ʿaṣr* and *maghrib* and *ʿishāʾ*. One day he delayed praying and then came out to pray *ẓuhr* and *ʿaṣr* combined, he went back (to his place of rest) and then came out to pray *maghrib* and *ʿishāʾ* combined". This tradition, if proved authentic, is clearer in meaning than those traditions that permit combining, as the apparent meaning here is that he advanced *ʿishāʾ* to the time of *maghrib*, though they would say that he prayed *maghrib* in its last timing and *ʿishāʾ* in its first appointed timing, as there is no definitive indication in the tradition about this; in fact, the words of the narrator are subject to interpretation.

Their disagreement about employing analogy in this relates to the association of all prayers during a journey with the prayers at ʿArafa and Muzdalifa, that combining is to be permitted on the analogy of these prayers. Thus, for example, it may be said: "These are prayers whose obligation has arisen during a journey, therefore, it is permitted to combine them, and the basis is the gathering of the people at ʿArafa and Muzdalifa". This is the opinion of Sālim ibn ʿAbd Allāh, I mean, the permissibility of this analogy, but the use of analogy in matters of worship is deemed weak.

These, then, are the causes of disagreement arising over the permissibility of combining prayers.

2.3.4.2.2. Issue 2: The method of combining prayers

Those who upheld the combining of prayer during a journey differed about its manner. Some of them said that it is preferable to delay the first prayer and offer it with the second prayer, however, if they are combined within the timing of the first this is also permitted. This is one narration from Mālik. Some of them deemed the two equal, that is, the second may be advanced to the timing of the first or it may be the other way round. This is al-Shāfiʿī's opinion and is a narration from Mālik through the jurists of Medina, while the first has been related by Ibn al-Qāsim from him. This kind of combination (delaying the first to the time of the second) is preferable according to Mālik, as it has been established through the tradition of Anas. Those who considered the two methods as equal relied on the principle that preference is not undertaken on the basis of *ʿadāla*, that is, one *ʿadāla* is not be preferred over another *ʿadāla* for determining the obligation of acting upon the tradition. This means that if the tradition of Muʿādh is proved authentic it is obligatory to act upon it, just as it is obligatory to act upon the tradition of Anas, if the *ʿadāla* of the transmitters of both traditions is established, and even if the *ʿadāla* of the transmitters of one tradition is stronger than that of the other.

2.3.4.2.3. Issue 3: The causes permitting the combining of prayers

Those who upheld the permissibility of combining prayers agreed that travel is one of the causes permitting the combining of prayers. They disagreed about combining prayers within a settlement and also about the conditions of travel that permits it, as some of them considered any kind of journey, whatever its nature, to be a valid cause for combining prayers, while others stipulated a particular form and a particular kind of prayer. Mālik is one of those who stipulate a particular form of journey, according to the narration of Ibn al-Qāsim from him. He said that the traveller is not to combine prayers unless the journey becomes cumbersome for him. Al-Shāfiʿī is among those who did not stipulate this, and this is also one narration from Mālik. Those who adopted this opinion (Mālik's) relied on the saying of Ibn ʿUmar "I have seen the Messenger of Allāh (God's peace and blessings be upon him), when he was hastening his journey (for some reason), delaying *maghrib* so that he would combine it with *ʿishā*ʾ". Those who did not hold this opinion adopted the apparent meaning of the traditions of Anas and others.

Similarly, they disagreed, as we have said, about the kind of journey in which combining (of the prayers) is permitted. Some said that it is a journey motivated by piety, like *ḥajj* or war (*jihād*), and this is the apparent meaning of the narration of Ibn al-Qāsim. Some said that it is a journey that is permissible (motivated by piety or undertaken for any legitimate purpose), as against a journey undertaken for unlawful ends. This is al-Shāfiʿī's opinion and the apparent meaning of the narration of the Medinites from Mālik. The reason for their disagreement over this is the same as the reason for their disagreement over a journey during which prayer is curtailed, although in that case the meaning is general, as curtailment has been reported both through words and acts (of the Prophet), while combining has been reported through acts alone. Those who confined it to the kinds of journey in which the Messenger of Allāh (God's peace and blessings be upon him) combined his prayers did not permit it in other kinds of journeys, while those who considered it a kind of exemption (*rukhṣa*) for the traveller deemed it valid in other journeys as well.

Mālik and the majority of the jurists do not permit the combining of prayers within a settlement without an excuse, while a group of the Ẓāhirites and Ashhab, from among the disciples of Mālik, permitted it. The reason for their disagreement is based upon their dispute over the meaning of the tradition of Ibn ʿAbbās. Some of them interpreted it to apply to the case of rain, as did Mālik, while others adopted its absolute meaning. Muslim has recorded an addition in his report, namely, the words of the Prophet (God's peace and blessings be upon him) "in the absence of [a cause of] fear or journey or rain", and this was adopted by the Ẓāhirites.

Al-Shāfiʿī permitted the combining of prayers within a settlement when it rains, whether during the day or the night, while Mālik prohibited it during the day (because of rain) and permitted it during the night. He also permitted it during the night when there is slush (sludge) during the night in the absence of rain. Al-Shāfiʿī criticized Mālik for making a distinction between prayers during the day and prayers during the night, as he related the tradition and then diverted it (through interpretation), that is, restricted its general meaning on the basis of analogy. He commented on the words of Ibn ʿAbbās, "The Messenger of Allāh (God's peace and blessings be upon him) prayed *ẓuhr* and *ʿaṣr* combined and *maghrib* and *ʿishāʾ* combined, in the absence of [a cause of] fear or journey", saying that he considered this to have been at the time of rain. Al-Shāfiʿī said that he did not adopt the general meaning or its interpretation, that is, the restricted meaning, but he rejected part of it and interpreted (restricted) the rest. This is something that is not permitted by consensus, for he did not accept the words "prayed *ẓuhr* and *ʿaṣr* combined", but accepted the words "prayed *maghrib* and *ʿishāʾ* combined", and then interpreted them. I believe, however, that Mālik (God bless him) rejected part of the tradition as it was opposed by practice (*ʿamal*). He therefore adopted the part that was not opposed by practice, which is the combining of *maghrib* and *ʿishāʾ* within a settlement, for it is related that when those in authority used to combine *maghrib* and *ʿishāʾ*, Ibn ʿUmar used to combine these with them.

The investigation of this principle is based on the examination of the issue as to how practice (*ʿamal*) can be a legal evidence. The earlier Mālikites used to say that it is a category of the principle of consensus. There is, however, no basis for this as the consensus of a few is not to be relied upon. The later Mālikites used to say that it is a kind of communal transmission (*mutawātir*), and they argue for this on the basis of (the prevalent use of) a measure (*ṣāʿ*) and similar things that have been transmitted by the jurists of Medina from the predecessors. Practice is an act and acts do not convey *tawātur*, unless they are corroborated by words, for *tawātur* is a method of (oral) reports and not acts. To deem acts as exhibiting *tawātur* is difficult and perhaps not permissible. In my view, it is more likely to be a case of the general need of the people, a principle adopted by Abū Ḥanīfa, as it is not permissible to deem such recurring practices, along with their recurring causes, as unabrogated, when the people of Medina, who acted upon these *sunan* following their predecessors are oblivious of them. It is a stronger (evidence) than the (principle of) general need of the people adopted by Abū Ḥanīfa, for it is appropriate that the jurists of Medina not be oblivious of these as compared to those on whom Abū Ḥanīfa has relied for transmission. On the whole, *ʿamal* is corroborating evidence when it accompanies and conforms with something that is transmitted, in which case it conveys persuasive evidence, and when it is opposed by such transmission, it (still) conveys probable evidence. But the question, whether this corroborating evidence reaches a level with which authentic traditions transmitted through a single *isnād* (*āḥād*) can be rejected, needs investigation. It is possible that in certain cases it does reach such a level, while in others it does not because of the difference in the degree of the need of the people. The reason is that whenever the need for a *sunna* is acute and it is a matter that is constantly recurring for the subjects, the transmission of the *sunna* by way of *āḥād* that does not become widespread in reports and practice (despite the acute need of the people), exhibits weakness because it gives rise to one of two conclusions: that it is either abrogated, or that there is some discrepancy in its transmission. This has been elaborated by Mutakallimūn like Abū al-Maʿālī.

Mālik permitted the combining of prayers within a settlement by a sick person (*marīḍ*) when he was afraid that he would faint at the time of the other prayer, or when the person loses control of the excretion exits, but al-Shāfiʿī prohibited this. The reason for their disagreement stems from their dispute over extending the underlying cause of combining during a journey, that is, hardship. Those who applied the cause uniformly held that it is preferable and more appropriate in this case, as hardship for the *marīḍ* in observing separate prayers is greater than that for the traveller. Those who did not consider this (hardship) as the underlying cause and considered it, as they say, deficient, that is, specific to this *ḥukm* to the exclusion of others, did not permit it.

2.3.5. Chapter 5 Prayers under threat of attack (*Ṣalāt al-Khawf*)

The jurists disagreed about the permissibility and description of *ṣalāt al-khawf* after the time of the Prophet (God's peace and blessings be upon him). Most of the jurists maintain that *ṣalāt al-khawf* is permitted because of the general implication of the words of the Exalted, "And when ye go forth in the land, it is no sin for you to curtail (your) worship if ye fear that those who disbelieve may attack you. In truth the disbelievers are an open enemy unto you".[144] Further, it is also established through the practice of the Prophet (God's peace and blessings be upon him) and that of the Caliphs after him.

Abū Yūsuf, from among the disciples of Abū Ḥanīfa, deviated saying that *ṣalāt al-khawf*, after the time of the Prophet (God's peace and blessings be upon him), is not to be led by a single *imām*, and that after his time two *imāms* are to lead this prayer, with one of them leading a group in praying two *rakʿas* while another group maintains the watch, and then the other is to lead the second group while the first group having prayed maintains a watch.

The reason for their disagreement derives from their dispute of whether the *ṣalāt al-khawf* led by the Prophet (God's peace and blessings be upon him) amounts to worship or whether it is a special merit of the Prophet (God's peace and blessings be upon him). Those who maintained that it is a worship did not consider it to be a case specific to the Prophet (God's peace and blessings be upon him), while those who deemed it to be a special merit of the Prophet (God's peace and blessings be upon him) considered it to be something specific to him, and thus it would be possible for us to divide the people between two *imāms*, as their gathering behind one *imām* was one of the specific merits of the Prophet (God's peace and blessings be upon him). Such an interpretation is supported, in his (Abū Yūsuf's) view by the implication emerging from the words of the Exalted, "And when thou (O Muḥammad) art among them and arrangest (their) worship for them, let only a party of them stand with thee (to worship) and let them take their arms. Then when they have performed their prostrations let them fall to the rear and let another party come that hath not worshipped and let them worship with thee, and let them take their precaution and their arms".[145] The implication here is that if he is not among them the *ḥukm* is to be different.

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[144] Qurʾān 4 : 101.

A group of the jurists of Syria maintained that *ṣalāt al-khawf* is to be delayed from the time of fear to the time of security, just as the Prophet (God's peace and blessings be upon him) did on the day of the Battle of Khandaq. The majority of the jurists maintain that this act on the day of the Battle of Khandaq was prior to the revelation regarding *ṣalāt al-khawf* and was therefore abrogated by it.

The jurists disagreed extensively about the description of *ṣalāt al-khawf* because of the conflict of the traditions on this topic, that is, reports about the acts of the Prophet (God's peace and blessings be upon him) related to *ṣalāt al-khawf*. There are seven well-known descriptions. One of these is what is recorded by Mālik and Muslim about the tradition of Ṣāliḥ ibn Khawwāt from one who had observed the fear prayer with the Messenger of Allāh (God's peace and blessings be upon him) on the day of Dhāt al-Riqā. It says, "A group formed rows behind the Prophet (God's peace and blessings be upon him), while another group arrayed itself against the enemy. He led those with him for a *rakʿa* and then kept standing while they finished by themselves and departed to face the enemy. The other group then came and he led them for one *rakʿa* that was left of his prayer, after which he kept sitting while they completed their prayer and then made the salutation with them". Al-Shāfiʿī based his opinion on this tradition. Mālik related exactly the same tradition from al-Qāsim ibn Muḥammad from Ṣāliḥ ibn Khawwāt as a *mawqūf* tradition (attributed to a Companion) like that of Yazīd ibn Rūmān that when he had completed the *rakʿa* with the second group he made the salutation and did not wait for them to finish their prayer. Mālik preferred this description. Al-Shāfiʿī preferred the *musnad* over the *mawqūf*, while Mālik preferred the *mawqūf* as it conforms with the general principles, that is, the *imām* is not to sit down[146] so that the second group may complete their prayer, for it is the *imām* who is to be followed and he is not the follower.

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[145] Qur'ān 4 : 102.

The third description appears in the tradition of Abū ʿUbayda from ʿAbd Allāh ibn Masʿūd from his father. It is related by al-Thawrī and others and is recorded by Abū Dāwūd. He said, "The Messenger of Allāh (God's peace and blessings be upon him) offered *ṣalāt al-khawf* with one group while another group faced the enemy. He offered a *rakʿa* and two prostrations with them and they left to face the enemy without making the salutation. The other group then came and he offered a *rakʿa* with them and made the salutation. They stood up and offered the second *rakʿa* by themselves, made the salutation and went away to stand in the place of the others facing the enemy. The first group returned to their positions and offered a *rakʿa* by themselves and made the salutation". This description was adopted by Abū Ḥanīfa and his disciples, except for Abū Yūsuf as has preceded.

The fourth description occurred in the tradition of Abū ʿAyyāsh al-Zuraqī, who said, "We were with the Messenger of Allāh (God's peace and blessings be upon him) at ʿUsfān and Khālid ibn al-Walīd was leading the unbelievers. We offered the *ẓuhr* prayer. The unbelievers said: 'We have been negligent, we should have attacked them while they were praying.' Allāh then revealed the verse about shortening the prayer between the *ẓuhr* and *ʿaṣr* times. When it was time for the *aṣr* prayer, the Messenger of Allāh (God's peace and blessings be upon him) stood up facing the *qibla*, and the unbelievers were arrayed in front of him. Praying behind the Messenger of Allāh (God's peace and blessings be upon him) was one row and behind this was another row. When the Messenger of Allāh (God's peace and blessings be upon him) bowed [*rukūʿ*] all of them bowed with him, and when he made the prostration the row behind him prostrated, while those in the other row stood guard over them. When these people made the two prostrations and stood up, those behind them prostrated. The first row then stepped back taking the place of the second, while the second row advanced and took the place of the first. The Messenger of Allāh (God's peace and blessings be upon him) then bowed and all bowed with him, he then prostrated and the row behind him prostrated, while those [now] in the second row stood guard over them. When the Messenger of Allāh (God's peace and blessings be upon him) and the row behind him adopted the sitting posture those behind them prostrated and finally all were seated. The Prophet then made the salutation and they all made the salutation after him". This prayer was offered at ʿUsfān and also at Banū Sulaym.

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[146] The editor of the original text notes that this should be "not to make the salutation" as in the previous lines.

Abū Dāwūd said that this tradition has also been related from Jābir, from Ibn ʿAbbās, from Mujāhid, from Abū Mūsā and Hishām ibn ʿUrwa from his father from the Prophet (God's peace and blessings be upon him). He said that this is the opinion of al-Thawrī, and that it is the most cautious of all, implying thereby that there is not much in this description opposing the generally accepted practice. This description was upheld by a host of the disciples of Mālik and al-Shāfiʿī. Muslim has recorded it from Jābir. Jābir said: "Just as you do when you guard your leaders".

The fifth description occurs in the tradition of Ḥudhayfa. Thaʿlaba ibn Zahdam said, "We were with Saʿīd ibn al-ʿĀṣ in Ṭabaristān. He stood up and said, 'Which one of you has offered *ṣalāt al-khawf* with the Messenger of Allāh (God's peace and blessings be upon him)'. Ḥudhayfa said, 'I did' ". He then offered one *rakʿa* with one group and the second *rakʿa* with another group, and they did not offer any other *rakʿa*. This conflicts extensively with the original form of the prayer. A similar tradition is related from Ibn ʿAbbās, who said, "Prayer, through the tongue of your Prophet, in a settlement is four *rakʿas*, two while travelling, and a single *rakʿa* in *khawf*". Al-Thawrī permitted this description.

The sixth description occurs in the tradition of Abū Bakr and in the tradition of Jābir from the Prophet (God's peace and blessings be upon him) that he led each of the two groups in two *rakʿas* at a time. Al-Ḥasan (al-Baṣrī) issued his opinion in accordance with this. In this there is an evidence of the possible discrepancy between the *niyya* of the *imām* and the that of the followers, for he intends the full prayer while they are curtailing it. It has been recorded by Muslim from Jābir.

The seventh description occurs in the tradition of Ibn ʿUmar from the Prophet (God's peace and blessings be upon him) that when he was asked about *ṣalāt al-khawf* said, "The *imām* and one group of people step out and the *imām* leads them in one *rakʿa*, when a second group from among them that is facing the enemy has not prayed. When those with him have prayed a *rakʿa*, they move back to the positions of those who have not, but they do not make the salutation. Those who have not prayed as yet then step out and pray a *rakʿa* with him. The *imām* then moves away after having prayed two *rakʿas*, and each group then prays by itself a *rakʿa* after the departure of the *imām*. Thus each group prays two *rakʿas*. If the threat of attack is grave the men may pray while standing or while riding, facing the *qibla* or otherwise". Among those who upheld this description are Ashhab, Mālik, and a group of jurists. Abū ʿUmar said that the proof of those who adopted this tradition of Ibn

ʿUmar is that it has been reported through the transmission of the jurists of Medina, who are authorities in transmission against those who adopted an opposite view. In addition, it is also more in conformity with the principles, as the first and the second groups did not pray the second *rakʿa* except after the Messenger of Allāh (God's peace and blessings be upon him) had completed his prayer, and this is well-known in the practice of delayed performance that is agreed upon for all prayers.

Most of the jurists uphold what has been mentioned in this tradition about the gravity of the attack that it is permitted to pray while facing the *qibla* or without facing it, and without there being any indication of bowing or prostration. Abū Ḥanīfa opposed this saying: "One under an apprehension of attack is not to pray, except while facing the *qibla*, nor one in a state of intense absorption". The reason for disagreement over this stems from its conflict with the principles.

A group of jurists maintained that all of these descriptions are permissible, and the *mukallaf* (subject) may pray in accordance with the one he prefers. It is also said that this discrepancy is because of the difference of the location (of each battle).

2.3.6. Chapter 6 The Prayer of the Sick (*Ṣalāt al-Marīḍ*)

The jurists agreed that the communication of the performance of prayer is addressed to the *marīḍ*, and that the obligation to stand up (and pray) is waived for him only if he is unable to do so, in which case he prays while seated. Likewise, the obligation for bowing and prostrating is waived if he is unable to do either or both, and he may make a sign in their place. They disagreed about the condition of a person who may pray while seated, about the sitting posture, and about the posture of one who is unable to sit or stand.

A group of jurists said about the person who may pray while seated that he is one who is not able to stand at all. Another group of jurists said that he is a person for whom it is difficult to stand up because of illness. This is Mālik's opinion. The reason for disagreement stems from the question of whether the obligation to pray while standing is waived because of hardship (*mashaqqa*) or because of the inability to stand up. There is no explicit text on this.

About the sitting posture, which is a substitute for standing, a group of jurists said that the person is to sit on his buttocks with folded legs. Ibn Masʿūd disapproved of such a sitting posture. Those who upheld such a sitting posture (*tarabbus*) did not distinguish between this posture and that adopted for *tashahhud*, while those who disapproved it maintained that it is not a posture for prayer.

With respect to the manner of prayer for one who is not able to stand or sit, a group of jurists said that the person may pray while reclining on one side (facing the *qibla*), while another group said that he is to pray as is convenient for him, and a third group said that he is to pray with his legs (feet) pointed in the direction of the Kaʿba. One group maintained that if he is not able to sit, he is to pray reclined on one side, but if he is not able to recline on his side, he is to rest on his back with his legs (feet) pointing in the direction of the *qibla* to the extent that he is able to do so. This opinion has been selected by Ibn al-Mundhir.

2.4. Part 4: Repetition, Delayed Performance, and Prostrations for Forgetfulness

This part covers the acts of prayer that are not considered performed on time (*adāʾ*), and these are repetition (*iʿāda*), delayed performance (*qaḍāʾ*), and rectification (*jabr*) of excesses or shortfalls by means of prostrations (for forgetfulness). In this part there are thus three chapters. The first chapter is about *iʿāda* (repetition or re-performance). The second chapter is about *qaḍāʾ* (delayed performance). The third chapter covers rectification that is accomplished with prostrations.

2.4.1. Chapter 1 Repetition (*Iʿāda*)

The discussion in this chapter relates to the causes that require repetition of a prayer, and these are factors vitiating prayer. They agreed that a person who prays without purification, whether intentional or due to forgetfulness, is obliged to repeat his prayer (after purification). Similarly, one who prays in a direction other than the *qibla*, whether by intention or by mistake. On the whole, then, a person who violates one of the conditions of prayer is under an obligation of a repeat performance (in the correct way). (All this is by agreement of the jurists.) The jurists disagreed because of their dispute over the validating conditions.

2.4.1.1. Issue 1

There are disputed issues related to this topic that are beyond the basic elements of prayer. One of these is their agreement that the occurrence of a cause of *ḥadath* (losing the state of purification) terminates (invalidates) prayer. They disagreed, *in this case, on whether it requires the repetition of prayer* from the beginning, including a *rakʿa* or two completed prior to the occurrence of *ḥadath*, or to continue the prayer based on that already performed. The majority maintained that he is not to base it on continuation, neither in the case of *ḥadath* nor for another terminating cause (like making unauthorized movements), except in the case of a nosebleed alone. Some of them were of the view that he does not base it on continuation at all, either for *ḥadath* or for a nosebleed. This is al-Shāfiʿī's opinion. The Kūfīs maintained that he is to base the prayer on continuation in all kinds of *ḥadath*.

The reason for their disagreement is that there is no recorded tradition of permissibility from the Prophet (God's peace and blessings be upon him) in such a case (i.e. continuation), but it is established that Ibn ʿUmar had a nosebleed and based the (repetition of the) prayer on continuation (after washing away his blood and) without performing ablution. Those who maintained that this act on the part of a Companion amounts to a precedent, for he could not have based such an act upon analogy, permitted such an act. Those for whom a nosebleed does not amount to *ḥadath* permitted continuation in the case of a nosebleed only, and this is Mālik's opinion. Those for whom a nosebleed is a cause of *ḥadath* permitted continuation in all cases of *ḥadath* on the basis of analogy. And those who maintained that an act of a Companion is not to be relied upon unless it is a precedent from the Prophet (God's peace and blessings be upon him), did not permit continuation either in the case of *ḥadath* or a nosebleed, for there is consensus on the point that a worshipper praying in a direction other than the *qibla* has breached his prayer and also when he is making excessive movements.

2.4.1.2. Issue 2

The jurists disagreed on whether the passing of something in front of the worshipper terminates his prayer when he is praying without a curtain (*sutra*), or when the thing passes between him and the curtain. The majority maintain that none of these terminates the prayer, and there is no obligation for repetition on the worshipper. A group of jurists maintained that prayer is cut off by (the passing of) a woman, a donkey, or a black dog.

The reason for this disagreement is the conflict of a pronouncement with an act, as Muslim has recorded from Abū Dharr that the Prophet (God's peace and blessings be upon him) said, "A woman, a donkey, and a black dog [passing before a worshipper in prayer] cut off prayer". Muslim and al-Bukhārī, (on the other hand), have recorded from ʿĀʾisha that she said, "I found myself lying in front of the Messenger of Allāh (God's peace and blessings be upon him), when he was praying, in the same way as the body in a funeral is placed". Opinions similar to that of the majority have been related from ʿAlī and from Ubayy.

There is no dispute among the jurists about the abomination of something passing in front of a single worshipper (praying alone) or in front of the *imām* when praying without a *sutra*, or of passing between him and the *sutra*. They saw no harm, however, in passing anything behind the curtain. Likewise, they saw no harm in passing in front of the followers, because of the authenticated tradition of Ibn ʿAbbās, and of others. Ibn ʿAbbās said, "I came on the back of a donkey, when I was approaching puberty, and the Messenger of Allāh (God's peace and blessings be upon him) was leading the people in prayer. I passed in front of some of the rows. I dismounted, leaving the ass to graze, and joined one of the rows. No one objected to my act". This, in their view, resembles a *musnad* (i.e. a tradition attributed to the Prophet), but this is subject to scrutiny.

The majority agreed about the abomination of something passing before the praying worshipper because of the warning issued in this regard, and also because of the words of the Prophet (God's peace and blessings be upon him) "Push him away, for he is the devil".[147]

2.4.1.3. Issue 3

They disagreed about belching during prayer; there are three opinions. One group of jurists regarded it as an abomination, but did not impose repetition of prayer on the person who belched. Another group made repetition obligatory on a person belching. A third group made a distinction between that which was heard and that which was not. The reason for their disagreement stems from the vacillation of (the definition of) belching between being speech and non-speech.

2.4.1.4. Issue 4

They agreed that laughter cuts off prayer. They disagreed about smiling. Their disagreement about smiling is based on the question of whether it can take the ruling of laughter.

2.4.1.5. Issue 5

They disagreed about the prayer of the person suppressing the call of nature (*ḥāqin*). The majority of the jurists consider abominable that a person should pray while he is suppressing the call of nature, because of the tradition of Zayd ibn Arqam, who said, "I heard the Messenger of Allāh (God's peace and blessings be upon him) saying, 'If one of you desires to go to the privy, he should do so before commencing prayer'", and because of what is related from ʿĀʾisha from the Prophet (God's peace and blessings be upon him) that he said, "No one should pray in the presence of food, nor when he is suppressing the two dirts", that is, urination and defecation, and also because of the report of the proscription from ʿUmar.

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[147] This is the tradition of Abū Saʿīd al-Khudrī that the Messenger of Allāh (God's peace and blessings be upon him) said, "When one of you is praying with a curtain between him and the people, and if another person attempts to pass in between, push him back. If he resists, fight him for he is a devil". Recorded in different versions by al-Bukhārī, Muslim, Abū Dāwūd and others.

A group of jurists maintained that prayer of such a person is not valid, and he has to repeat it. Ibn al-Qāsim's report from Mālik indicates that the prayer of a person suppressing the call of nature is invalid. The reason is that he reported from him that such a person must repeat the prayer before the expiry of the time, otherwise he has to do so as *qaḍāʾ*.

The reason for their disagreement arises from their dispute over the proscription whether it indicates the invalidity of the (performance of the) thing prohibited, or it merely indicates the sinfulness of the act in that condition, when the act so proscribed is originally obligatory or permissible. Those who upheld the invalidity of such a prayer relied on the tradition reported by the Syrians, with some reporting it from Thawbān, while others from Abū Hurayra from the Prophet (God's peace and blessings be upon him), who said, "It is not permitted for a believer to pray when he is forcibly suppressing the call of nature". Abū ʿUmar said that it is a tradition with a weak transmission, and it therefore has no legal force.

2.4.1.6. Issue 6

They disagreed about responding to the salutation by the praying worshipper. A group of jurists, among whom are Saʿīd ibn al-Musayyab, al-Ḥasan ibn al-Ḥasan al-Baṣrī, and Qatāda, permitted it. Another group disallowed responding in words, but permitted it with a gesture, and this is the opinion of Mālik and al-Shāfiʿī. Others prohibited responding by words or by gesture, and this is the opinion of Nuʿmām. One group permitted an inward (silent) response, while others said that he should respond when he has finished praying.

The reason for their disagreement stems from whether the response to a salutation is a kind of speech during prayer, which is proscribed. Those who maintained that it is a kind of speech prohibited in prayers, and restricted the verse, "When ye are greeted with a greeting, greet ye with a better than it or return it"[148] with traditions proscribing speech during prayer, said that it is not permitted to respond during prayer. Those who maintained that it is not included in the prohibited speech, and those who restricted the proscribing traditions with the command for responding to a greeting, permitted a response during prayer. Abū Bakr ibn al-Mundhir has said that those who say that the greeting is not to be responded to at all have opposed the *sunna*, for Ḥabīb has reported that the Prophet (God's peace and blessings be upon him) returned the greeting, with a gesture, of those who greeted him while he was praying.

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[148] Qurʾān 4 : 86.

2.4.2. Chapter 2 Delayed Performance (*Qaḍāʾ*)

The discussion in this chapter covers the identification of the person for whom *qaḍāʾ*[149] is obligatory, the description of the types of *qaḍāʾ*, and its conditions.

The Muslim jurists agreed that the person for whom *qaḍāʾ* is obligatory is one who forgets (to pray) or is asleep (till the expiry of the time). They disagreed about the case of one who delays praying intentionally and about one who faints. The Muslim jurists agreed about the obligation of *qaḍāʾ* for a person who misses prayer due to forgetfulness or sleep, because of the authentic reports about the words and acts of the Prophet (God's peace and blessings be upon him). By his words I mean the saying, "The Pen has been lifted on three counts", and here he mentioned one sleeping, and also his saying, "If one of you slept through [the time of] prayer or forgot it, then let him make up for it when he remembers". It is also reported that he himself overslept once till sunrise and then offered it as *qaḍāʾ*.

About the person who intentionally neglects prayer till its time is over, the majority hold that he is a sinner and *qaḍāʾ* is obligatory on him. Some of the Ẓāhirites have held that he is a sinner, but he is not to observe *qaḍāʾ*. One of the Ẓāhirites who held this was Abū Muḥammad ibn Ḥazm.

The reason for their disagreement is due to their dispute over two things. The first is the permissibility of employing *qiyās* (analogy) in the law. The second is the construction of analogy for the person who intentionally neglects to pray over one who forgets, once the validity of *qiyās* has been conceded. Those who made *qaḍāʾ* obligatory on him maintained that if *qaḍāʾ* has been imposed upon the person forgetting, whom the law has exempted in so many cases, it is appropriate that it be obligatory for the intentional forsaker who has no excuse. Those who did not permit the analogy of the person forgetting for the intentional relinquisher maintained that the person forgetting and the intentional relinquisher are opposites, and analogy cannot be undertaken for opposites, as the *aḥām* of the opposites are different, and that analogy is to be constructed for similar cases. The truth here is that if obligation (for *qaḍā'*) is considered as an enhanced liability (penalty) analogy would be true to form, but if it is considered as compassion for the person forgetting, for he has an excuse—and this benefit should not be denied to him—then the intentional relinquisher is the opposite of the person forgetting and the analogy is not formed since the person forgetting has an excuse while the intentional relinquisher does not. The principle is that *qaḍā'* is not obligatory because of the command of *adā'* (timely performance), but through a renewed command, as maintained by the Mutakallimūn, for the person forgetting lacks one of the conditions enabling him to perform the act in a valid manner, and this (condition) is time, which is one of the conditions of validity, and a delay in time amounts, in analogy, to a concession for him. There is a tradition, however, that settles the case of the persons forgetting and the persons sleeping; the case of the intentional relinquisher vacillates between being similar to their case and not being so. It is Allāh who guides to the truth.

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[149] The term "atonement" is used by some to convey the meaning of *qaḍāʾ*. This appears to be incorrect insofar as atonement is achieved through the performance of some other act. *Qaḍāʾ*, on the other hand, requires the performance of the same act.

For the person fainting, a group of jurists dropped *qaḍā'* altogether, while another group imposed *qaḍā'* upon him. Some of them stipulated *qaḍā'* of a specified number (of prayers) saying that he is to offer as *qaḍā'* five prayers or whatever is less. The reason for their disagreement arises from the vacillation of his case between that of one asleep and the insane person. Those who held him to be similar to one sleeping imposed *qaḍā'* on him, while those who compared him to an insane person waived *qaḍā'* in his case.

There are two kinds of *qaḍā'*: *qaḍā'* of the whole prayer, and *qaḍā'* in part. In the *qaḍā'* of the whole, the examination is of the description of *qaḍā'*, its conditions, and its time. The description of *qaḍā'* is identical to the description of *adā'*, if the two prayers have the same description with respect to the obligations. If, however, the circumstances of the two prayers are different, like remembering during a journey a prayer he missed when he was in a settlement, or remembering while in a settlement a prayer he missed during a journey, then, the jurists disagree about this, holding three opinions. A group of jurists said that he is to offer *qaḍā'* identical to the one he missed, disregarding his present condition. This is the opinion of Mālik and his disciples. Another group of jurists said that he is always to offer the prayer in its complete form, whether the prayer he missed was in a journey or in a settlement. Thus, according to their opinion if he remembers during a journey a prayer he missed in the settlement, he is to pray it as a prayer of the settlement, and if he remembers in a settlement a prayer he missed during a journey he is to pray it as a prayer of the settlement. This is al-Shāfi'ī's opinion. A third group of jurists said that he is always to pray *qaḍā'* as a prayer based on the present situation; thus, he is to offer *qaḍā'* during a journey as a curtailed prayer for a prayer missed in a settlement, and he is to offer in a settlement the prayer of a settlement for a prayer he missed during a journey. Those who likened *qaḍāʾ* to *adāʾ* took into account the time of the present situation and rendered the *ḥukm* according to it on the analogy of the sick person who remembers a prayer that he forgot while healthy, or that of the healthy person who remembers a prayer that he forgot during an illness, that is, his obligation is to pray the obligation of the prayer in the current situation. Those who compared *qaḍāʾ* with debts imposed the obligation of praying as *qaḍāʾ* a prayer identical to the one forgotten. Those, however, who imposed the obligation of always praying the prayer of the settlement took into account the description in one case and the circumstances in the other, that is, if he remembers a prayer of the settlement during a journey the description of the prayer offered as *qaḍāʾ* is to conform with the description of the prayer missed, but if he remembers the prayer of a journey within a settlement the current situation is taken into account. This amounts to a disarray (of thought) outside the ambit of analogy, unless the opinion is based on the principle of precaution, which can be conceived particularly when curtailment (of prayer in a journey) is considered as an exemption.

2.4.2.1. *Section 1: The conditions of* qaḍāʾ *and its timing*

They differed over the order (of offering prayers), that is, they disagreed about the obligation of observing an order among the forgotten prayers, and between them and the *adāʾ* prayer. Mālik maintained that observing a sequential order is obligatory for five prayers or whatever is less, and that the person is to begin with a forgotten prayer even if the time of the current prayer is to be missed. He went as far as saying that if he is occupied with the current prayer and remembers a forgotten prayer, the current prayer is invalidated for him. Similar views were expressed by Abū Ḥanīfa and al-Thawrī, except that they upheld the obligation of a sequential order only when the period for the current prayer is long enough (for the *qaḍāʾ* and the *adāʾ* prayers). These jurists agreed about the dropping of the obligation of order in the case of forgetfulness. Al-Shāfiʿī said that there is no obligation of maintaining an order, but if he does this and the time is long enough to accommodate the current prayer, it is commendable.

The reason for their disagreement stems from the conflict of the traditions on the issue, and also from their difference over the existence of a resemblance between *qaḍāʾ* and *adāʾ*. There are two conflicting traditions on the issue. The first is what is related from the Prophet (God's peace and blessings be upon him) that he said, "A person who has forgotten a prayer [and remembers it] while he is offering another with an *imām* should continue with the *imām*.

After he has offered this prayer, he should repeat [offer] the prayer he has forgotten and then repeat the prayer he offered with the *imām*". The disciples of al-Shāfiʿī consider this to be a weak tradition, while they authenticate the tradition of Ibn ʿAbbās that the Prophet (God's peace and blessings be upon him) said, "If one of you forgets a prayer and remembers it while he is offering another prescribed prayer, then, he should complete that which he is offering, and once he has finished it he should offer as *qaḍā*ʾ the forgotten prayer". Yet, the authentic tradition on this topic is one that has preceded, where the words of the Prophet (God's peace and blessings be upon him) are: "If one of you slept through [the time of] prayer or forgot it, then let him observe the prayer when he remembers".

Their disagreement by way of comparing *qaḍā*ʾ with *adā*ʾ is that those who maintained that a sequential order in *adā*ʾ (timely performance) is binding because the timings are specific to the prayer, and the prayers are ordered in themselves, as time cannot be conceived except as sequential, did not extend this obligation to *qaḍā*ʾ, for there is no specific time for *qaḍā*ʾ. Those who maintained that the order in prayers is sequential with respect to the act, even if the time is the same like the combining of two prayers in the time specific to one, held *qaḍā*ʾ to be similar to *adā*ʾ. The Mālikites were of the opinion that the sequential order be obligatory for the delayed prayer with respect to time and not with respect to the the act, because of the words of the Prophet (God's peace and blessings be upon him), "He should offer it when he remembers". They said that the time for the forgotten prayer is the time when it is remembered, therefore, it is necessary that the prayer he is currently offering be invalid at that time. This is meaningless, because if the time a prayer is remembered is the time for the forgotten prayer, then it is the time for the current prayer also, or of the forgotten prayers if there are more than one prayer. If the timing is the same then there is no question that the occurring disturbance in it is due to the sequence between the prayers, like the sequence of the different parts of one prayer, for one prayer is not more deserving of the time than its companion prayer, as the time is the same for both, unless an evidence of a sequence can be adduced. I am not in possession of anything here that I may render as a principle governing this topic with respect to a sequence in forgotten prayers except (the sequence in) combining, according to those who concede it. The sequential prayers have different timings and the sequence in *qaḍā*ʾ is conceived essentially in a single time for two prayers taken together. Understand this, for there is some ambiguity here. I believe that Mālik, may Allāh have mercy on him, made an analogy for this from combining (*jam*ʿ). All, however, adopted preference (*istiḥsān*) of sequence in forgotten prayers, when there is no apprehension of the current prayer being lost, because of the five prayers offered consecutively by the Prophet (God's peace and blessings be upon him) on the day of the Battle of Khandaq (Ditch). Those who make *qaḍā'* obligatory for the intentional relinquisher argued on the basis of this (case), but this has no strength for it (the precedent) stands abrogated, and further it was a forced delay with a legitimate excuse. As for the determination of the number five or whatever is less, there is no basis for it, unless it is said that it is consensus (*ijmā'*). This, then, is the *ḥukm* of *qaḍā'* that takes place for the whole prayer.

The *qaḍā'* that is offered for part of the prayer is either due to forgetfulness or it is due to the *imām* having advanced further than the follower, that is, the follower loses part of the prayer of the *imām*. In the case where the follower has lost part of the prayer, there are three fundamental issues. The first is when is a *rak'a* considered to be lost. Second, does the observance of what is lost, after the prayer of the *imām*, amount to *adā'* or *qaḍā'*? Third, when is the *ḥukm* of the prayer of the *imām* applicable to him and when is it not?

2.4.2.1.1. Issue 1

The question as to when a *rak'a* is deemed to be lost entails two issues. First, when the worshipper joins in when the *imām* has bent for the *rukū'*, and second, when he is praying with the *imām* and forgets to follow him in the *rukū'* or something in the nature of jostling occurs that prevents him from doing so.

2.4.2.1.1.1. Sub-issue 1

There are three opinions on this issue. The first, which is held by the majority, is that if he can catch up with the *imām* before he raises his head from the *rukū'* and is able to bow with him, then, he has caught the *rak'a* and there is no *qaḍā'* for him. These jurists differed on whether it is a condition for this person joining in that he pronounce two *takbīrs*, the initial *takbīr* and one for the *rukū'*, or is the *takbīr* of the *rukū'* to be sufficient for him, and if it is deemed compensated, is it a condition for it that he intends through it the initial *takbīr* also? Some of them said that a single *takbīr* would be sufficient if he includes in it the intention of the initial *takbīr*. This is the opinion of Mālik and al-Shāfi'ī but, the preference in their view is for two *takbīrs*. A group of jurists said that (pronouncing) two *takbīrs* is necessary. Another group said that one is sufficient even if he does not intend the initial *takbīr* through it.

The second opinion is that if the *imām* has gone into *rukū'*, the person has lost the *rak'a*, and that he cannot attain it unless he had done so after standing with the *imām*. This is attributed to Abū Hurayra. The third opinion is that if he approaches the last row when the *imām* has raised his head from the *rukū'*, but some of those in the row have not and he joins them in *rukū'*, he has gained the *rak'a*, for some are leading the others. This was upheld by al-Sha'bī. The reason for this disagreement derives from the vacillation of the meaning of the term *rakʿa* between the act of bowing alone, and the combined meaning of bowing and standing taken together. The Prophet (God's peace and blessings be upon him) has said, "One who has caught a *rakʿa* of the prayer has caught the prayer". Ibn al-Mundhir states that this tradition was established as authentic from the Messenger of Allāh (God's peace and blessings be upon him). Those for whom the term *rakʿa* is applied to mean both bowing and standing said that if the person has missed the standing posture with the *imām*, he has lost the *rakʿa*. Those for whom the term *rakʿa* is applied to bowing itself deemed the catching of bowing as the attainment of the *rakʿa*. The equivocality (*ishtarāk*) that is found in this term is its vacillation between the literal and the technical meanings, as the term in its literal sense applies to bowing only, but in its technical meaning it applies to standing, bowing, and prostrating. Those who maintained that the term *rakʿa* in the words of the Prophet (God's peace and blessings be upon him), "One who has caught a *rakʿa*", applies to the technical meaning, and also did not adopt the opinion of those who accept part of what is indicated by names, said that it is necessary for the person to observe all three acts with the *imām*, that is, standing bowing and prostrating. It is possible that those who were inclined to consider bowing only took into account the major part indicated by the term, as the person who has been able to participate in bowing has caught two parts, while the person who has missed bowing has been able to secure one part alone. On the basis of this, their disagreement refers to the dispute about accepting part of what is denoted by a term or by the entire denotation. It is possible to find disagreement with both views.

He who takes into account the bowing of the followers in the (last) row does so because the *rakʿa* of the prayer may be attributed to the *imām* alone or it may be attributed to the *imām* as well as the followers. The reason for disagreement, therefore, are the equal probabilities of such an association, that is, in the words of the Prophet (God's peace and blessings be upon him), "One who has caught a *rakʿa* of the prayer has caught the prayer", and the opinion of the majority here has a higher probability.

The reason for their disagreement over whether he is to pronounce one *takbīr* or two, that is, the follower joining the prayer when the *imām* is bowing, stems from whether it is a condition for the initial *takbīr* that it be pronounced while standing. Those who maintained that the posture in which it is pronounced is a condition for it, on the basis of the act of the Prophet (God's peace and blessings be upon him), and also on the grounds that every *takbīr* is an obligation, said that there must be two *takbīrs*. Those who maintained that the posture is not a condition for it on the basis of the general implication of the words of the Prophet (God's peace and blessings be upon him), "Its commencement is the *takbīr*", and also because, in their view, only the initial *takbīr* is obligatory, said it is permitted to him to pronounce that (the initial *takbīr*) alone. Those who permitted him to pronounce a single *takbīr* without intending the initial *takbīr* adopted, it is said, the opinion of those who do not consider the initial *takbīr* to be an obligation, and it is also said that they adopted the opinion of those who permit the delaying of the intention (*niyya*) of prayer till after the initial *takbīr*. This is because the intention of the initial *takbīr* has no meaning except in association with the intention of commencing prayer. As the initial *takbīr* has two attributes, associated intention and precedence, that is, its occurrence at the beginning of the prayer, they stipulated both attributes, and said that there should be an accompanying *niyya*. Those who were satisfied with a single attribute were also satisfied with a single *takbīr* even if it was not associated with intention.

2.4.2.1.1.2. Sub-issue 2

About the person forgetting to follow the *imām* in *rukū*ʿ till the *imām* prostrates, a group of jurists said that if he has failed to observe the *rukū*ʿ with him, he has lost the *rak*ʿ*a* and it is obligatory for him to offer it as *qaḍā*ʾ (before his own *salām*). Another group of jurists said that he can count the *rak*ʿ*a* (as performed) if it is possible for him to complete the *rukū*ʿ before the *imām* has commenced the next *rak*ʿ*a*. A third group of jurists said that he is to follow him and count the *rak*ʿ*a* as performed as long as the *imām* has not raised his head after bowing in the second *rak*ʿ*a*. This disagreement exists among the disciples of Mālik, and there is considerable dispute over details, along with disagreements among them relating to whether what was missed occurred due to forgetfulness or due to jostling, and whether it happened in a *jumu*ʿ*a* prayer or another, and whether this situation was faced by the follower in the first *rak*ʿ*a* or in another *rak*ʿ*a*.

Since our purpose is not to record the details of the opinions or to derive them, but only to indicate the fundamental issues and their (underlying) principles, we say the following:

The reason for the the disagreement in this issue arises from the dispute about whether it is a condition for the movements of the follower that they should accompany (or immediately follow) those of the *imām*, and whether this condition applies to all the three constituent acts of the *rak*ʿ*a*, that is, standing, bowing and prostrating, or is it a condition only for some of them? Further, when does his act go against him if this act does not (immediately) follow the act of the *imām*, that is, when he is performing one act and the *imām* is performing the next? Those who held that it is a condition for each constituent act of a single *rak*ʿ*a*—that is, the act of the follower should be concurrent with the same act of the *imām*, for otherwise this would amount to dissociating himself from the *imām*, and the Prophet (God's peace and blessings be upon him) has said, "The *imām* has been appointed so that he be followed, so do not go against him"—said that if he fails to accompany the *imām* in the *rukū*ʿ, even though a small part of it, he would miss the *rak*ʿ*a*. Those who took into account only a part of it said that he collects the *rak*ʿ*a* if he collects a part of the *rak*ʿ*a* before the *imām* rises for the next *rak*ʿ*a*, and this does not amount to going against him. If the *imām* has risen into the second *rak*ʿ*a* and the follower is pursuing him (in the acts of the first), then, this amounts to going against him for the first *rak*ʿ*a*. Those who said that he may pursue his acts as long the *imām* has not bowed in the next *rak*ʿ*a*, held the opinion that it is not a condition for each segment of the act of the follower that it coincide with each segment of the act of the *imam* nor as a whole, but the condition is only that it take place after it. They agreed that if the *imām* has risen after bowing in the second *rak*ʿ*a*, then, the follower is not to count that *rak*ʿ*a* as performed, if he has been pursuing his acts in it, for these would be assigned the *ḥukm* of the first while the *imām* is subject to the *ḥukm* of the second, and this evidently amounts to going against him.

2.4.2.1.2. Issue 2

The second of the three fundamental issues that act as principles of the topic is whether the performance by the follower of the part of the prayer he has missed, from the *imām's* prayer, amounts to *adā*ʾ or *qaḍā*ʾ. There are three opinions on this issue.

A group of jurists said that the part he observes after the *imām's* salutation is *qaḍā*ʾ and what he has observed with the *imām* is not the first part of his prayer. Another group said that what he observes after the salutation of the *imām* is *adā*ʾ and what he observed with the *imām* is the first part of his prayer. A third group made a distinction between words and acts and said that he performs the words as *qaḍā*ʾ, that is, the recitation, and continues on with the acts, meaning *adā*ʾ thereby. Thus, according to the first opinion, the opinion which regards the missed part that the follower performs as *qaḍā*ʾ, the person who is able to catch one *rak*ʿ*a* of the *maghrib* prayer will stand up when the *imām* ends his prayer with the salutation and offer two *rak*ʿ*as* reciting the *umm al-Qur*ʾ*ān* and another *sūra* in each one of them, without adopting the sitting posture in between the two. In accordance with the second opinion, that is based on continuation, he will stand up for one *rak*ʿ*a* reciting in it the *umm al-Qur*ʾ*ān* and another *sūra* and then adopt the sitting posture, after which he will rise for another *rak*ʿ*a* and recite in it only the *umm al-Qur*ʾ*ān*. In accordance with the third opinion, he will stand up for a *rak*ʿ*a* reciting in it the *umm al-Qur*ʾ*ān* and another *sūra* and then take the sitting posture, after which he will rise for the second *rak*ʿ*a* also reciting in it the *umm al-Qur*ʾ*ān* and another *sūra*.

All three opinions have been attributed to the School (Mālik's) and the authentic opinion from Mālik is that he performs the words as *qaḍā* and continues in the acts, because there is no discrepancy in his opinion about the sunset prayer that if the person catches one *rakʿa* (with the *imām*) then he is to stand for the second *rakʿa* and then adopt the sitting posture; and there is no dispute about his opinion that the person is to recite the *umm al-Qurʾān* and another *sūra* as *qaḍāʾ*. The reason for disagreement was that in some versions of the well-known tradition it is laid down: "Pray what you are able to catch and complete what you have lost", and completion implies that what he has been able to observe is the first part of his prayer. In other versions the words are, "Pray what you are able to catch and offer as *qaḍāʾ* what you have lost", where *qaḍāʾ* implies that what he has been able to observe (with the *imām*) is the last part of his prayer. Thus, those who adopted the opinion of completion said that what he has observed is the first part of his prayer. Those who adopted the opinion of *qaḍāʾ* said that what he observed was the last part of his prayer. Those who adopted the method of reconciliation deemed the words to be *qaḍāʾ* and the acts as *adāʾ*. This, however, is weak, that is, part of the prayer should be *adāʾ* and part *qaḍāʾ*.

Their agreement on the obligation of a sequential order in the parts of the prayer, and on the occasion of pronouncing the initial *takbīr* is the commencement of prayer, implies the existence of a clear evidence that what he has been able to observe (with the *imām*) is the first part of the follower's prayer, but the intention of the *imām* and that of the follower have differed about the sequential order, so think over it. It appears that this is what was taken into account by those who maintained that his observance is the last part of the prayer.

2.4.2.1.3. Issue 3

The third of the three issues is the case in which the *ḥukm* of the prayer of the *imām* extends to the follower. This entails sub-issues. The first is when is he assumed to catch the *jumuʿa* prayer? The second is when is he liable for the *ḥukm* of the prostrations of forgetfulness along with the *imām*, that is, for the forgetfulness of the *imām*? The third is when is it binding for a traveller who joins up behind an *imām* (whose status is that of a resident) to complete his prayer (and not to curtail it) if he catches part of the prayer of the *imām*?

2.4.2.1.3.1. Sub-issue 1

A group of jurists said that if he is able to catch a *rakʿa* of *jumuʿa* then he has observed the *jumuʿa* prayer, and he is to perform the second *rakʿa* after the salutation of the *imām*, but if he catches less than a *rakʿa* he is to pray the four *rakʿas* as *ẓuhr*. This is the opinion of Mālik and al-Shāfiʿī. Another group of jurists said that he is to complete two *rakʿas* irrespective of what he has been able to catch of the prayer with the *imām*. This is Abū Ḥanīfa's opinion.

The reason for disagreement in this matter stems from what is supposed to be a conflict between the general implication of the words of the Prophet (God's peace and blessings be upon him), "Pray what you are able to catch (behind the *imām*), and complete what you have missed", and the meaning of his words, "He who has caught a *rakʿa* of a prayer (behind the *imām*) has caught the prayer". Those who decided on the basis of the words, "complete what you have missed", made it obligatory that the follower pray two *rakʿas* even if he has been able to catch (a little) less than two *rakʿas*. Those for whom there is an implied word in the words of the Prophet (God's peace and blessings be upon him), "he has caught the prayer", that is, he has caught the *ḥukm* of the prayer, said that the (indirect) indication of the text (*dalīl al-khiṭāb*) implies that one who has caught less than one *rakʿa* has not caught the *ḥukm* of the prayer. The implied word, however, in this text has multiple possibilities, for it is possible that it means the merit of the prayer, it is possible that it means the time of the prayer, and it is also possible that it means the *ḥukm* of the prayer. Perhaps the possible meaning in one of these is not more obvious than the other. If this is the case, then it belongs to the category of *mujmal* (unelaborated implication), which does not imply a *ḥukm*, and the other (text with a) general meaning becomes preferable. If, however, we concede that it is obvious in one of these implied meanings, for example, the *ḥukm* of the prayer in accordance with the opinion of those who hold this, then, this obvious meaning is not in conflict with the general meaning (in the other text), unless it is treated as a category of the indication of the text (*dalīl al-khiṭāb*), but the general meaning is stronger, unanimously, than the indication of the text, especially an indication based on several probabilities or on the obvious meaning. On the other hand, the opinion of those who maintain that the words of the Prophet (God's peace and blessings be upon him), "he has caught the prayer", include all the implied meanings, is weak and unknown in Arab usage, unless it is maintained that there is such a customary or technical meaning.

2.4.2.1.3.2. Sub-issue 2

On the issue of the follower following the *imām* in prostrations, that is, the prostrations of forgetfulness, a group of jurists fixed one *rakʿa* as the basis, that is, that he should catch at least a *rakʿa* with the *imām*; another group of jurists did not take this into account. Those who did not take this into account decided on the basis of the general implication of the words of the Prophet (God's peace and blessings be upon him), "The *imām* has been appointed so that he be followed". Those who took the *rakʿa* into account decided according to the meaning of the words of the Prophet (God's peace and blessings be upon him), "He has caught the prayer". It is for this reason that they also differed on the third sub-issue.

2.4.2.1.3.3. Sub-issue 3

A group of jurists said that if the traveller catches less than one *rakʿa* of the prayer of the *imām* (who is) in a settlement he is not to complete the rest of the prayer as one having the status of the resident, but if he catches one *rakʿa* completion is binding upon him.

This, then, is the *ḥukm* of *qaḍāʾ* for part of the prayer when the *imām* had started prayer before the follower.

The jurists agreed with respect to the *ḥukm* of *qaḍāʾ* for part of the prayer that occurs because of the forgetfulness of the *imām* or of the individual (praying independently), that he is to observe as *qaḍāʾ* whatever is an essential element (*rukn*) of the prayer, that is, an obligation, and it is not valid for him unless he performs this (part). There are, however, issues in it over which they disagreed, with some making *qaḍāʾ* (making up the missing parts) obligatory in them and the others imposing repetition, as in the case of the person who forgets to make four prostrations in four *rakʿas*, missing one prostration in each *rakʿa*. A group of jurists, thus, said that he rectifies the fourth by the prostrating and deems the earlier *rakʿas* as nullified and then repeats them. This is Mālik's opinion. Another group of jurists said that the prayer is nullified as a whole and repetition becomes binding upon him. This is one of the narrations from Aḥmad. A third group said that he performs four consecutive prostrations and his prayer stands completed. This was held by Abū Ḥanīfa, al-Thawrī, and al-Awzāʿī. A fourth group said that the fourth is rectified with two prostrations. This is al-Shāfiʿī's opinion.

The reason for the disagreement over this stems from the consideration of sequential order. Those who took it into account in the *rakʿas* and prostrations nullified the prayer. Those who took it into account for prostrations alone nullified the *rakʿas*, except the last on the analogy of what a follower misses of the prayer of the *imām*. Those who did not take sequential order into account permitted the prostrations of the (entire) prayer at one time in a single *rakʿa*, especially when they believed that a sequential order is not obligatory in an act that is repeated in each *rakʿa*, that is, in the prostrations, because each *rakʿa* comprises standing, bowing, and prostrating and the prostration is repeated. Thus, the disciples of Abū Ḥanīfa thought that as the prostrations are repeated it is not obligatory to take into account repetition in the sequential order. Of the same nature is a disagreement among the disciples of Mālik about the person who forgets to recite the *umm al-Qurʾān* in the first *rakʿa*. It is said that the *rakʿa* is not to be counted (as observed) and is to be performed as *qaḍāʾ*; it is said that he is to repeat the entire prayer, and it is also said that he is to make prostrations of forgetfulness for making his prayer complete.

There are a number of cases under this topic and all are not expressly stated in the texts, but our purpose here is to record those that are of the nature of principles.

2.4.3. Chapter 3 Prostrations of Forgetfulness

The prostrations transmitted in the law apply in one of two cases: first, in unintended excess or deficiency of acts or words; and second, in the case of doubt in the acts of the prayer. In the case of the prostrations resulting from forgetfulness, and not from doubt, the discussion is covered in six sections. The first section is about the identification of the *ḥukm* of the prostrations. The second is about their occasions in the prayer. The third relates to the identification of the species of the acts and the acts themselves because of which the prostrations are made. The fourth is about the description of the prostrations of forgetfulness. The fifth is about the identification of the person for whom the prostrations are obligatory. The sixth is about the means with which the follower alerts the *imām* about his forgetfulness.

2.4.3.1. *Section 1: Are the prostrations of forgetfulness an obligation or a* sunna?

They disagreed about the prostrations of forgetfulness, whether they are an obligation or a *sunna*. Al-Shāfiʿī held that they are a *sunna*, while Abū Ḥanīfa held them to be an obligation, but as one of the conditions of the validity of prayer. Mālik made a distinction between the prostrations of forgetfulness caused by forgetting words or forgetting some acts, and also those caused by an excess or a deficiency. He said that the prostrations of forgetfulness that are performed because of deficient acts are obligatory, and are, according to him, one of the conditions of the validity of prayer. This is the well-known report. It is also reported from him that prostrations on account of deficiency are obligatory and prostrations on account of excess are recommended.

The reason for their disagreement arises from their dispute about the interpretation of the acts of the Prophet (God's peace and blessings be upon him) related to this topic, whether they convey an obligation or recommendation. Abū Ḥanīfa interpreted the acts of the Prophet (God's peace and blessings be upon him) as obligatory, as that is the principle in his view, for they occur as an elaboration of an obligatory act. The Prophet (God's peace and blessings be upon him) said, "Pray as you see me praying". Al-Shāfiʿī interpreted his acts as conveying recommendation, and he deviated from the original meaning of the principle on the basis of analogy. He held that as prostrations, in the view of the majority, do not become a substitute for an obligation, but are a substitute for a recommended act; therefore, a substitute for something that is not obligatory cannot be obligatory. For Mālik there was greater emphasis on the acts as compared to the words, for they form the structure for the prayer more than the words, I mean, the obligations that are related to acts are more than those related to words. Thus, it was as if he held that there is greater emphasis for the acts as compared to words, even though the prostrations of forgetfulness become a substitute only for acts that are not obligatory. His distinction between prostrations made on account of deficiency and those made for excess, in accordance with the second narration, is based on the fact that the prostrations on account of deficiency are stipulated as compensation for what is dropped from the acts of the prayer, while prostrations on account of excess are like a repentance not a substitute.

2.4.3.2. *Section 2: The occasions for the prostrations of forgetfulness*

They disagreed about (the time) when the prostration of forgetfulness is to be made; there were five opinions. The Shāfiʿites held that the occasion for the prostrations of forgetfulness is always immediately before the salutation. The Ḥanafites maintained that the occasion for them is always after the salutation. The Mālikites made a distinction saying that if the prostrations are on account of a deficiency their occasion is before the salutation, but if they are on account of excess their occasion is after the salutation. Aḥmad ibn Ḥanbal said that the prostrations are made before the salutation for the occasions on which the Messenger of Allāh (God's peace and blessings be upon him) prostrated before the salutation and they are made after the salutation for occasions on which the Messenger of Allāh (God's peace and blessings be upon him) prostrated after the salutation. Those that are besides these occasions for them the prostrations are always before the salutation. The Ẓāhirites said that the prostrations are to be made only for the five occasions on which the Messenger of Allāh (God's peace and blessings be upon him) made them. Besides these cases, if the omission was for something obligatory he has to make them, but if they are recommended the person is under no obligation.

The reason for their disagreement stems from the established fact that the Prophet (God's peace and blessings be upon him) made prostrations at times before salutation and at others after it. Thus, it is established from the tradition of Buḥayna, who said, "The Messenger of Allāh (God's peace and blessings be upon him) led us in praying two *rakʿas* after which he stood up, not taking the sitting posture, and the people stood up with him. When he had performed the prayer, he made two prostrations while still seated". It is established from the tradition of Dhū al-Yadayn that has preceded where he had (first) made the salutation from the two *rakʿas*. Those who permitted analogy in the prostrations of forgetfulness—I mean, those who held the extension of the *ḥukm* for the occasions on which he (God's peace and blessings be upon him) prostrated to the cases similar to them in these authentic traditions—held three (differing) opinions. The first is based on the method of preference (*tarjīḥ*) and the second on the method of reconciliation (*jamʿ*). The third is based on the method or reconciliation between preference and (original) reconciliation.

Those who preferred the tradition of Ibn Buḥayna maintained that the prostrations are before the salutation. They argued for this on the basis of the authentic tradition of Abū Saʿīd al-Khudrī that the Prophet (God's peace and blessings be upon him) said, "If one of you is in doubt about his prayer and does not recollect how many he prayed, three or four, he should pray a *rakʿa* and prostrate twice while he is sitting prior to the salutation. If the *rakʿa* he prayed happens to be the fifth he will be converting it to an even count with these two prostrations, but if it is the fourth, the two prostrations are an affront to the devil". They said that in this are prostrations for an excess before the salutation, for it is possible for a fifth to occur. They also argued on the basis of what is related from Ibn Shihāb, who said, "One of the last commands from the Messenger of Allāh (God's peace and blessings be upon him) was about prostrations before the salutation".

Those who preferred the tradition of Dhū al-Yadayn said that the prostrations are after the salutation. They argued for the preference of this tradition that the tradition of Ibn Buḥayna had been opposed by the tradition of Mughīra ibn Shuʿba "that the Prophet (God's peace and blessings be upon him) stood up after the two *rakʿas* and did not sit down, he then made prostrations after the salutation". Abū ʿUmar said that this tradition is not equal in terms of transmission so that it may be opposed by it. They also argued for it on the basis of the authentic tradition of Ibn Masʿūd "that the Messenger of Allāh (God's peace and blessings be upon him) prayed a fifth *rakʿa* out of forgetfulness and made prostrations for his forgetfulness after the salutation".

Those who adopted the method of reconciliation said that these traditions do not contradict each other, as the prostrations in them that are after the salutation are due to excess, and the prostrations before salutation are due to deficiency; thus it is obligatory that the *ḥukm* of the prostrations in the remaining cases be like these cases. They said that this (reconciliation) is preferable to interpreting the traditions as being in conflict.

Those who adopted the method of reconciliation as well as preference said that prostrations are to be made in cases in which the Messenger of Allāh (God's peace and blessings be upon him) made the prostrations and in a manner in which he made them, for this is the *ḥukm* of those cases. The occasions on which the Messenger of Allāh did not make the prostrations, the *ḥukm* for them is that of prostrations prior to the salutation. It was as if they made analogy for these over those in which the Messenger of Allāh (God's peace and blessings be upon him) made prostrations before salutation, but not on the prostrations that he made after the salutation, while the original occasions on which he made the prostrations retained their rule. Thus, from one aspect they maintained the *ḥukm* of the occasions for which they occurred and assigned them differing *aḥkām*, this being a kind of reconciliation and the removal of conflict between the implications. From another aspect they extended the meaning of some to the exclusion of others, and attached those on which the law is silent to them, this being a kind of preference, that is, they made an analogy from those prostrations that were made before the salutation but not from those that were after the salutation.

As to those, and these are the Ẓāhirites, who did not understand from these cases a *ḥukm* existing outside of these cases, confined their *ḥukm* to the cases of their occurrence; thus they confined the prostrations in these cases to these cases alone. Aḥmad ibn Ḥanbal's view, on the other hand, is intertwined partially with the view of the Ẓāhirites and partially with that of those who made the analogy, because he confined the prostrations after the salutation, as we have said, to cases that occurred in the traditions and did not extend them, while he extended (by analogy) the cases of prostrations occurring before the salutation.

For each of these jurists there are evidences through which they come to prefer their opinions by means of analogy, I mean, for those upholding analogy. Our purpose in this book is not the copious recording of disagreement necessitated by analogy just as it is not our purpose to mention the issues on which the law is silent except to a minimum, and that too when they are well-known and serve as principles for cases besides them or when their occurrence is very frequent.

The five cases in which forgetfulness is associated with the Messenger of Allāh (God's peace and blessings be upon him) are: first, when he stood up after praying two *rakʿas* as in the tradition of Buḥayna; second, when he made the salutation after praying two *rakʿas*, as recorded in the tradition of Dhū al-Yadayn; third, when he prayed five *rakʿas*, according to what is in the tradition of Ibn ʿUmar, which is recorded by Muslim and al-Bukhārī; fourth, when he made the salutation after praying three *rakʿas* according to the tradition of ʿImrān ibn al-Ḥuṣayn; fifth, the prostrations on account of doubt according to what is in the tradition of Abū Saʿīd al-Khudrī, which will come up later.

They disagreed about the reason why prostrations of forgetfulness have been obligatory. It is said that they are obligatory because of an excess or deficiency (in the prayer), and this is the well-known view. It is also said that they are obligatory because of forgetfulness itself, and this was the view of the Ahl al-Ẓāhir and al-Shāfiʿī.

2.4.3.3. *Section 3: The words and acts leading to prostrations of forgetfulness*

The upholders of the prostrations of forgetfulness, whether for excess or deficiency that may occur in the prayer by way of forgetfulness, agreed that the prostrations are on account of (omission of) the *sunan* of the prayer and not the obligations nor on account of the desirable acts (*raghāʾib*) (lesser than *sunan*). There is no liability in their view for omission of this category, that is, if the person forgets one of them in prayer, unless they happen more than once. For example, Mālik is of the view that there is no obligation for prostrations on account of forgetting a single *takbīr*, but there is a prostration for leaving out more than one act of this category. There can be no validity with the omission of obligations. They are to be performed and undertaken. The consequence of forgetting them is the repetition of the prayer as a whole, as has preceded in the discussion of what leads to repetition and what leads to *qaḍāʾ*, I mean, like a person who may relinquish one of the constituent elements of prayer.

The prostrations of forgetfulness on account of an excess, on the other hand, occur due to an excess in the obligations as well as the *sunan*. In this statement, there is no dispute among them; they disagree only on the basis of their dispute as to what acts are obligations and what are not, what are *sunan* and what are not, and what is a *sunna* and what is a desirable act (*raghība*). An example of which is *qunūt*. According to Mālik the person is not to make prostrations for relinquishing *qunūt* for it is merely desirable (*mustaḥab*) (lesser than a *sunna*) in his view, but he is to make prostrations according to al-Shāfiʿī as it is a *sunna* in his view.

This is not unclear for you because of the discussion that has preceded about their disagreement over what is a *sunna*, an obligation (*farīḍa*), or a desirable act (*raghība*). According to Mālik and his disciples there are prostrations of forgetfulness for a minor excess in prayer, even if it is not from the category of prayer. It is necessary to know that *sunna* and *raghība*, in their view, both belong to the recommended (*nadb*) category. They differ, however, when in their view it is (a) higher or a lower (recommendation), that is, the emphasis in the command about them. This has reference to the surrounding circumstances of this form of worship. Their disagreement, therefore, becomes excessive in this category so much so that some of them hold that if certain *sunan* are relinquished intentionally or done intentionally if they were to be relinquished, their *ḥukm* becomes enhanced, that is, it becomes obligatory if it is a *sunna*, or a sin if it was a prohibition. This is to be found often with the disciples of Mālik. You therefore find them agreeing, except for the Ẓāhirites, that a person relinquishing *sunan* regularly as a whole is a sinner. Thus, a person relinquishing always the *witr* prayer or the two *rakʿas* of the morning prayer would be a *fāsiq* and a sinner. It is as if some forms of worship are obligatory in kind and in genus, like the five daily prayers, while some are *sunna* in kind and obligation in genus, like *witr* and the two *rakʿas* of the morning prayer and whatever is similar to them from among the *sunan*. Likewise, some of the desirable acts (*raghāʾib*) in their view are desirable in kind but *sunan* by genus, like what we have related from Mālik about the obligation of prostrations on account of (omission of) more than one *takbīr*, that is, for forgetting it. I do not think that they have a category that is *sunna* in kind as well as in genus.

The *sunan* according to the Ẓāhirites are *sunan* in genus alone, because of the words of the Prophet (God's peace and blessings be upon him) to the Bedouin who asked him about the obligations in Islam, "He will succeed if he speaks the truth, he will enter *janna* if he speaks the truth", and this after the man had said to him, "I swear by Allāh that I will not add to it or reduce from it", that is, to or from the obligations, and this tradition has preceded.

They agreed under this topic on the requirement of the prostrations of forgetfulness for the omission of the middle sitting posture, differing over it whether it is an obligation or a *sunna*. Similarly, they disagreed whether the *imām* may revert to it when he is reminded after rising from it. If he may revert to it, then at what stage? The majority said that he may revert to it as long as he has not stood up straight. A group of jurists said that he may revert to it as long as he has not commenced the third *rakʿa*. Another group of jurists said that he is not to revert to it if he has risen up to the measure of a spread out hand (*shibr*). If he reverts to it in the view of those who do not uphold that he should do so, his prayer is valid according to the majority, but a group of jurists said that it is nullified.

2.4.3.4. *Section 4: The description of the prostrations of forgetfulness*

They (the jurists) disagreed about the description of the prostrations of forgetfulness. Mālik was of the view that the *ḥukm* of the two prostrations of forgetfulness when they are after the salutation is that the person should recite the *tashahhud* and offer the salutation. This was Abū Ḥanīfa's opinion also as the prostrations in his view are after the salutation in each case. If the prostrations are before the salutation then he should recite the *tashahhud* alone, and the salutation of the prayer is the salutation for the prostrations. This was al-Shāfiʿī's opinion as such prostrations are always before the salutation in his view. It is also related from Mālik that he is not to recite *tashahhud* in the case of those that are before the salutation. This was also the opinion of a group of jurists. Abū ʿUmar has said that the salutation after those that follow (come after) the salutation (of the prayer) is established from the Prophet (God's peace and blessings be upon him), as for the *tashahhud*, I cannot trace it in an authentic narration.

The reason for this disagreement stems from their dispute over is the authenticity of what has been reported about it in the tradition of Ibn Masʿūd, that is, that the Prophet (God's peace and blessings be upon him) said, "Recite the *tashahhud* and then offer the salutation", and also the semblance between the prostrations of forgetfulness and the last two prostrations of the prayer. Those who compared the two did not make *tashahhud* obligatory, especially when both were within the same prayer. Abū Bakr ibn al-Mundhir has said that the jurists differed over this issue and had six opinions. One group said that there is no *tashahhud* in them and no salutation. This was the opinion of Anas ibn Mālik, al-Ḥasan, and ʿAṭāʾ. A second group said the opposite of this, that there is *tashahhud* as well as salutation in them. A third group said that there is *tashahhud*, but not salutation. This was the opinion of al-Ḥakam, Ḥammād, and al-Nakhaʿī. A fourth group said the opposite of this, that there is salutation in them, but not *tashahhud*. This is the opinion of Ibn Sīrīn. The fifth opinion is that it is up to the worshipper; if he likes he may recite the *tashahhud* and offer the salutation, but he is not obliged to do so. This is related from ʿAṭāʾ. The sixth opinion is that of Aḥmad ibn Ḥanbal that if the person is prostrating after the salutation he is to recite the *tashahhud*, but if he is prostrating prior to the salutation he is not to recite the *tashahhud*. This is what we related from Mālik. Abū Bakr said that it has been established from the Prophet (God's peace and blessings be upon him) that he pronounced a *takbīr* four times and then offered the salutation, but the authentication of his reciting *tashahhud* needs scrutiny.

2.4.3.5. *Section 5*: Ḥukm *of the prostrations of forgetfulness*

They agreed that performing the prostrations of forgetfulness is a *sunna* for the single worshipper as well as the *imām*. They disagreed about the follower who forgets while praying behind the *imām* whether he is he under an obligation to make the prostrations. The majority maintained that the *imām* bears the responsibility for forgetfulness on behalf of the follower, but Makḥūl made a deviant statement making the prostrations binding for his own forgetfulness.

The reason for their disagreement arises from their dispute over wha constituent elements of prayer the *imām* bears on behalf of the follower. The agreed that if the *imām* forgets something the follower follows him in hi prostrations of forgetfulness, even if he joined him after his forgetfulnes

They disagreed as to when the follower is to prostrate if he has missed part of the prayer with the *imām*, who has to make the prostrations. A group of jurists said that he makes the prostrations with the *imām* and then stands up to perform the part he had missed, whether the *imām* performed his prostrations before or after the salutation. This was upheld by ʿAṭāʾ, al-Ḥasan, al-Nakhaʿī, al-Shaʿbī, Aḥmad, Abū Thawr, and the upholders of *raʾy* (opinion). Another group of jurists said that he is to complete his prayer and then prostrate. This was held by Ibn Sīrīn and Isḥāq. A third group of jurists said that if the *imām* makes the prostrations before the salutation, he should prostrate with him, but if the *imām* makes the prostrations after salutation he is to complete his own prayer and then make the prostrations. This was upheld by Mālik, al-Layth, and al-Shāfiʿī. The fourth group of jurists said that he is first to make the prostrations with the *imām* and then to make them a second time after completing his prayer. This was held by al-Shāfiʿī.

The reason for their disagreement stems from their dispute over what is better and more meritorious. To follow the *imām* in the prostrations (of forgetfulness) at the same time or to prostrate after completing his own prayer? It was as if they agreed that following the *imām* is *wājib* because of the words of the Prophet (God's peace and blessings be upon him), "The *imām* has been appointed so that he be followed", but disagreed over whether the time of prostrating for the follower was its regular determined occasion, that is, at the end of his own prayer, or whether the time was that of the prostrations of the *imām*. Those who preferred the combining the follower's act with the act of the *imām* over the regular time of making the prostrations and held that it is a condition of the following, that is, that their acts should actually coincide, said that he should prostrate with the *imām* even if he did not prostrate at the time determined for the prostrations. Those who preferred the determined time of prostrations said that he should delay them till the end of his prayer. Those who made both forms obligatory placed an obligation on him for prostrating twice, but this is weak.

2.4.3.6. *Section 6: How to alert the person who forgets in prayer*

They agreed that the way to alert a person who forgets in his prayer is to pronounce *tasbīḥ* (saying *subḥāna Allāh*). This, however, is for men because of what is established from the Prophet (God's peace and blessings be upon him) that he said, "Why is it that I see you clapping hands (*taṣfīq*) frequently. One who is afflicted by something in his prayer should engage in the glorification of Allāh (*tasbīḥ*), for when he utters the *tasbīḥ*, he will attract attention. And clapping hands is for women".

They disagreed in the case of women. Mālik and a group of jurists said that *tasbīḥ* is both for men and women. Al-Shāfiʿī and a group of jurists said that *tasbīḥ* is for men, while *tasfīq* (striking the back of the left hand with the palm of the right) is for women.

The reason for their disagreement arises from their dispute over the implication of the words of the Prophet (God's peace and blessings be upon him), "*tasfīq* is for women". Those who held that the meaning of these words is that *tasfīq* is the *ḥukm* for women in case of forgetfulness, which is the apparent meaning, said that the women are to engage in *tasfīq* and not in *tasbīḥ*. Those who comprehended a derogation of *tasfīq* from this said that men and women are equal in terms of *tasbīḥ*, but there is some weakness in this view because it amounts to a departure from the apparent meaning without an evidence, unless an analogy with the case of men is drawn for women. The *ḥukm* for women is often different from that of men in the case of prayer, a fact which weakens the analogy.

With respect to performing the prostrations of forgetfulness that are occasioned by doubt, the jurists disagreed—holding three opinions—about the case of a person who feels doubt about (whether) his his prayer (was properly observed) and does not know how many *rakʿas* he has offered: whether one, two, three, or four *rakʿas*. A group of jurists said that he is to base the preceding part of the prayer on certainty, which is the least (number) for he is not to estimate, and after completing the prayer accordingly he should make the prostrations of forgetfulness. This is the opinion of Mālik, al-Shāfiʿī, and Dāwūd. Abū Ḥanīfa said that if this is the first occasion (of doubt in the prayer) his prayer becomes invalid, but if it recurs he is to make an estimation and act on the basis of the preponderant conviction in his mind (about the number), and then he is to make the prostrations of forgetfulness following the salutation. Another group of jurists said that if the person is in doubt he is neither to have recourse to certain conviction nor to estimation, but is simply obliged to make the prostrations of forgetfulness.

The reason for their disagreement is the conflict derives from the apparent meanings of the traditions laid down on the issue, and there are three traditions on the subject. The first is the tradition prescribing continuation on the basis of certainty (the lesser number). This is the tradition of Abū Saʿīd al-Khudrī, who said, "The Messenger of Allāh (God's peace and blessings be upon him) said, 'If one of you falls in doubt about his prayer and does not know how many (*rakʿas*) he has prayed, three or four, then he should relinquish his doubt and base his prayer on that of which he is certain, and thereafter make two prostrations before making the salutation. If he has prayed five they will even out his prayer, but if he has prayed to complete four, they will be an affront for the devil'". It is recorded by Muslim. The second tradition is from Ibn Masʿūd that the Prophet (God's peace and blessings be upon him) said, "If one of you forgets while praying, then he should make an estimate and thereafter make two prostrations". Another version from him says, "He should make an inquiry into what appears to be the most correct [number], then make the salutation and thereafter make two prostrations, recite the *tashahhud* and make the salutation". The third is the tradition of Abū Hurayra, which is recorded by Mālik and al-Bukhārī, that the Messenger of Allāh (God's peace and blessings be upon him) said, "When one of you stands up to pray the devil comes and confuses him so that he does not recollect how many (*rakʿas*) he prayed, then, if one of you finds this he should make two prostrations while seated". Of the same implication is the tradition of ʿAbd Allāh ibn Jaʿfar, which has been recorded by Abū Dāwūd, that the Messenger of Allāh (God's peace and blessings be upon him) said, "One who is in doubt about his prayer should make two prostrations after it and then make the salutation".

In these traditions the jurists adopted either the method of reconciliation or that of preference. Some of those who adopted the method of preference ignored the conflicting text, and some interpreted the conflicting text and reconciled it with the preferred interpretation. There were also those who combined the two ways, that is, reconciled some of them and preferred some, reinterpreting the meaning not preferred to suit the preferred interpretation. Some of them reconciled some of them and dropped the *ḥukm* of the others.

Those who adopted the method of preference in part and that of reconciliation in part, along with the interpretation of the unpreferred directing it to the preferred meaning, include Mālik ibn Anas. He interpreted the tradition of Abū Saʿīd al-Khudrī to apply to the person who is not afflicted by doubt, and he interpreted the tradition of Abū Hurayra to apply to a person who is overcome by doubt and is afflicted by it. This (method) belongs to the category of reconciliation. He interpreted the tradition of Ibn Masʿūd so as to mean that the meaning of estimation here is having recourse to certainty. This acknowledged, in accordance with his methodology, all the traditions.

Those who adopted the method of reconciling part and dropping part, which is preference without interpreting the subordinated text (that is, not preferred text) include Abū Ḥanīfa. He said that the tradition of Abū Saʿīd implies a *ḥukm* for the person who has no preponderant basis to rely on, while the tradition of Ibn Masʿūd applies to one who does have such a basis to rely on. He dropped the *ḥukm* of the tradition of Abū Hurayra, and this by saying that the traditions of Abū Saʿīd and Ibn Masʿūd include an addition, and when there is an addition it must be accepted and followed. This too is a kind of reconciliation. Those who preferred part and dropped part are those who said that he is liable simply to prostrations. The reason is that they preferred the tradition of Abū Hurayra and dropped the traditions of Abū Saʿīd and Ibn Masʿūd. Thus, this is the weakest of the opinions.

This is what we thought of recording in this division of the two divisions of the Book of Prayer, and which is a discussion of the obligatory prayers. We now turn to a discussion of the second division of the prescribed prayers and these are prayers that do not impose a universal obligation.

III

THE SECOND BOOK OF PRAYER (ṢALĀH)

Prayers that are not prescribed as a universal obligation include prayers that are a *sunna*, or are supererogatory (*nafl*), or prayers that are prescribed as a communal obligation (*farḍ kifāya*). As (each of) these have *aḥkām*, some agreed upon and some disputed, we deemed it proper to take up the discussion of each prayer separately. These prayers together are ten in number: the two *rakʿas* of the morning prayer, the *witr* prayer, supererogatory prayers, the two *rakʿas* on entry into a mosque, prayers during Ramaḍān, the eclipse (*kusūf*) prayer, prayer for rain, the two *ʿīd* prayers, and the prostrations (on reciting certain parts) of the Qurʾān, which are also a kind of prayer. This book, therefore, comprises ten chapters. We shall be discussing funeral prayers separately under the chapter on the *aḥkām* of the dead, as is the practice of the jurists and that is what they compile under the title: "the book of *janāʾiz*".

3.1. Chapter 1 Discussion of the *Witr* Prayer

They disagreed about *witr* on five points: its *ḥukm*, its description, its time, the supplication (*qunūt*) during it, and its observance while travelling on a riding beast.

The discussion of its *ḥukm* has been covered in the discussion of obligatory prayers. Mālik (God bless him), in its description, preferred that it be offered as three *rakʿas* of *witr*, separated with a salutation.[150] Abū Ḥanīfa said that *witr* consists of three *rakʿas* without any separation between them by means of the salutation. Al-Shāfiʿī said that *witr* is a single *rakʿa*. For each group there are opinions coming down from the generations of the Companions and the Tābiʿūn.

The reason for their disagreement stems from the conflict of traditions on the subject. It is established from the Prophet (God's peace and blessings be upon him) through the tradition of ʿĀʾisha "that he used to pray eleven

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[150] That is, two *rakʿas* ending with a salutation plus one *rakʿa*.

rakʿas at night, offering one as *witr*". It is established from Ibn ʿUmar that the Messenger of Allāh (God's peace and blessings be upon him) said, "The prayers during the night are (observed) two at a time, and if you find that the morning is going to overtake you, then, offer one *rakʿa* as *witr*". Muslim has reported from ʿĀʾisha "that the Prophet (God's peace and blessings be upon him) used to pray thirteen *rakʿas* at night, and offered five of these as *witr* without sitting in between, except at the end of the last". Abū Dāwūd has reported from Abū Ayyūb al-Anṣārī, "*Witr* is a prescribed duty for every Muslim, thus, he who prefers to observe it with five may do so, he who prefers to observe it with three may do so, and he who prefers to observe it with one may do so". Abū Dāwūd has recorded that the Prophet (God's peace and blessings be upon him) used to observe *witr* with seven, nine, and five *rakʿas*. He recorded (a tradition) from ʿAbd Allāh ibn Qays, who said, "I said to ʿĀʾisha, 'With how many (*rakʿas*) did the Messenger of Allāh (God's peace and blessings be upon him) observe *witr*?' She said, 'He used to observe *witr* with four and three, six and three, eight and three, ten and three, but he did not observe it with less than seven or with more than thirteen'". There is also the tradition of Ibn ʿUmar from the Prophet (God's peace and blessings be upon him) that he said, "The sunset prayer (*maghrib*) is the *witr* of the prayers of the day".

The jurists adopted the method of preference in these traditions. Those who held that *witr* is a single *rakʿa* decided on the basis of the words of the Prophet (God's peace and blessings be upon him), "If you are apprehensive about the (approach of) dawn offer a single *rakʿa* as *witr*," and also on the basis of the tradition of ʿĀʾisha, "He used to observe *witr* with one *rakʿa*". Those who maintained that *witr* is three *rakʿas*, without there being a separation between them, and confined the *ḥukm* of *witr* to three only, have nothing to rely upon as proof in this matter, as all traditions imply a choice, except the tradition of Ibn ʿUmar that the prophet (God's peace and blessings be upon him) said, "The sunset prayer (*maghrib*) is the *witr* of the prayers of the day". Abū Ḥanīfa would say: "When one thing is compared with another and the *ḥukm* of both is made the same, it is appropriate that the things compared have the same description, thus, when *maghrib* is compared with the *witr* of the prayers of the day and as *maghrib* consists of three it follows that the *witr* of the night be also three".

Mālik, on the other hand, relied on the argument that the Prophet (God's peace and blessings be upon him) never observed *witr* unless it followed an even number (of *rakʿas*). He, therefore, held that this was the *sunna* of *witr* and that the minimum in this is two *rakʿas*. *Witr*, in his view, may in fact be a single *rakʿa* preceded by an even number of *rakʿas*, or that *witr*, which is prescribed has to include an even number along with it. Thus, if a *witr* is added to an even number of *rakʿas*, the whole becomes *witr* (an odd number). This opinion is supported by the tradition of ʿAbd Allāh ibn Qays—mentioned earlier—which describes *witr* prayers as comprising an even number of *rakʿas* and then an odd number. His belief that *witr* comprises a single *rakʿa* is revealed in his statement: "How can *witr* be observed when nothing precedes it, and for what is it a *witr* (odd number)?" The Messenger of Allāh (God's peace and blessings be upon him) has said, "What has been prayed before it makes it odd". The apparent meaning of this statement agrees with his view that the technical meaning of *witr* is the odd number itself, that is, something not consisting of an even number plus an odd number, because in such a case it is not an odd number in itself but because of the odd number besides it. This interpretation is better.

The truth, however, is that all these traditions imply a choice in the description of the *witr* prayer ranging from one to nine as has been reported in the acts of the Messenger of Allāh (God's peace and blessings be upon him). The inquiry (to be made) is whether it is a condition for the *witr* that it be preceded by an even number of *rakʿas*. It is possible to say that this is a condition as that was the case with the *witr* of the Messenger of Allāh (God's peace and blessings be upon him). It is also possible to say that it is not a condition for it as Muslim has recorded that the Prophet (God's peace and blessings be upon him) used to wake ʿĀʾisha up for her *witr* prayer when he had prayed up to the point of the *witr*. The apparent meaning of this is that she used to observe *witr* without it having been preceded by an even number. He (Muslim) has also recorded a tradition from ʿĀʾisha "that the Messenger of Allāh (God's peace and blessings be upon him) used to observe *witr* with nine *rakʿas*, sitting down in the eighth and ninth, and he did not offer the salutation except in the ninth. He then offered two *rakʿas* while seated. These are eleven *rakʿas*. When he grew older and put on some weight he used to observe *witr* with seven *rakʿas* sitting only in the sixth and the seventh, and not offering the salutation except at the end of the seventh. He then used to offer two *rakʿas* while seated, and these come to nine *rakʿas*". In this tradition the *witr* precedes the even number, and it contains a proof that it is not a condition for the *witr* that it be preceded by an even number, and that the term *witr* is applied to mean three. This is supported by what is related by Abū Dāwūd from Ubayy ibn Kaʿb, who said, "The Messenger of Allāh (God's peace and blessings be upon him) used to recite in the *witr* (the chapters) "Glorify the name of your Lord, the most High . . .", 'Say O disbelievers . . .', and 'Say, Allāh is One . . .' ".[152] There is a similar tradition from ʿĀʾisha where she says about the third recitation, "Say, Allāh is One

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[151] That is, chapters 87, 109, and 112.

. . ., and the *mu'awwidhatān* ['Say, I seek refuge with the Lord of the daybreak . . .,' and 'Say, I seek refuge with the Lord of mankind . . .']"

The jurists agreed that the time of *witr* is after the *ishā'* prayer up to the break of the dawn, as this has been reported from the Prophet (God's peace and blessings be upon him) through a variety of channels. One of the most authentic of these is what is reported by Muslim from Abū Nuḍra al-'Awfī that Abū Sa'īd informed them that they had asked the Prophet (God's peace and blessings be upon him) about *witr*, and he said, "The *witr* is before the morning (prayer)". They disagreed about the permissibility of observing it after the dawn. A group of jurists prohibited this, while another group permitted it as long as the worshipper had not yet performed the morning prayer. The first opinion was held by Abū Yūsuf and Muḥammad, the disciples of Abū Ḥanīfa, and by Sufyān al-Thawrī. The second was held by al-Shāfi'ī, Mālik, and Aḥmad.

The reason for their disagreement derives from the conflict between the practice of the Companions in this regard and the traditions. The apparent meaning in the traditions about this (matter) is that it is not permitted to observe *witr* after dawn as in the tradition of Abū Nuḍra that has already been mentioned. Further, the tradition of Abū Ḥudhayfa is explicit about this as recorded by Abū Dāwūd, where it is said, "It has been prescribed for you (from the time) between the *ishā'* prayer till the break of the dawn". There is no dispute among the authorities on *uṣūl* (*al-fiqh*) that what occurs after the word *ilā* (till) has a *ḥukm* that is the opposite of what precedes it as it represents the limit. Though this belongs to one of the categories of the indirect indication of the text (*dalīl al-khiṭāb*), it is of a kind that is agreed upon as in the words of the Exalted, "Then strictly observe the fast till nightfall",[152] and in His words, "(Wash your hands) Up to the elbows".[153] There is no dispute among the jurists about (the propositon) that what is beyond the limit is the opposite of what is before the limit.

The conflict between practice and traditions is discernible from what is related from Ibn Mas'ūd, Ibn 'Abbās, 'Ubāda ibn al-Ṣāmit, Ḥudhayfa, Abū al-Dardā', and 'Ā'isha that they used to observe *witr* after the break of the dawn and before the morning prayers, and there was no opposition from the other Companions over this. A group of jurists held that such a case is within the category of consensus (*ijmā'*), but such a claim is not justified, as an opinion of one person about an issue cannot be attributed to another who is silent about it, that is to say, the opinion of a person on an issue should not to be ascribed to a consensual opinion when his opinion is not known. As to the issue at hand, how is it correct to say that there is no reported dispute among the Companions over it. What dispute can be greater than the dispute of the Companions who related these (differing) traditions, I mean, their disagreement with those who permitted the *witr* prayer after the break of the dawn.

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[152] Qur'ān 2 : 187.

[153] Qur'ān 5 : 6.

What I think of their practice on the issue, however, is that it does not go against the traditions reported on it, that is, the permissibility of praying *witr* after dawn. In fact, the permissibility in this regard belongs to the category of *qaḍāʾ* not to that of *adāʾ*. Their practice would go against the traditions if they considered praying *witr* after daybreak to be of the category of *adāʾ*. Think over this. The dispute over this issue actually relates to the question of whether *qaḍāʾ* in worship with determined timings is in need of a renewed command, that is, a command other than the command for *adāʾ*. Thus, such an interpretation ascribed to them is more suitable as the practice was reported from most of them that they were seen observing the *witr* as *qaḍāʾ* before the (morning) prayer, but after the break of the dawn. An opinion has been related from Ibn Masʿūd on this, that is, he used to say, "The time for *witr* is from the last time of *ishāʾ* up to the morning prayer". The existence of this opinion, however, does not necessarily mean that we should ascribe it to all of the Companions whom we have mentioned, that all shared that opinion because one Companion was seen praying *witr* after daybreak, and it is necessary to ponder over the nature of the transmission from them about this. Ibn al-Mundhir has reported five opinions about the timing of *witr* including the two well-known opinions that I have mentioned. The third opinion is that the worshipper should observe the *witr* even if he has offered the morning prayer. This is the opinion of Ṭāwūs. The fourth is that he should observe it even after sunrise. This was maintained by Abū Thawr and al-Awzāʿī. The *fifth is that he may observe the witr of the previous night. This is the opinion* of Saʿīd ibn Jubayr.

The reason for this disagreement stems from their dispute about the emphasis laid on observing *witr* and the degree of its nearness to the category of obligation (*farḍ*). Those who held it to be closer to obligation prescribed its *qaḍāʾ* in a period that is beyond that of the period determined for it. Those who held that it was not close to being an obligation prescribed *qaḍāʾ* in the shorter period. Those who held it to be a *sunna* like all the other *sunan* deemed *qaḍāʾ* to be weak in this case as *qaḍāʾ* is necessary in obligations. Hence, their disagreement about the *qaḍāʾ* of *īd* prayers for one who has missed it. It is necessary that no distinction be made in this between recommendation and obligation, that is, those who hold that *qaḍāʾ* of an obligation is through a renewed command should maintain the same about recommendation, and those who hold that it is obligatory through the original command should maintain the same about recommendation.

In their disagreement about the *qunūt* (supplication), Abū Ḥanīfa and his disciples maintained that the worshipper should recite it in the *witr* prayer. Mālik disallowed it, while al-Shāfiʿī permitted it during the second half of Ramaḍān. One group of jurists permitted it for the first half of Ramaḍān and a second group for the entire month of Ramaḍān.

The reason for their disagreement arises from the conflict of traditions. It has been related from the Prophet (God's peace and blessings be upon him) that he always recited the *qunūt*. It is also related that he permitted it for a month. Again, it is related that in his last days he did not recite *qunūt* in any part of the prayer. Finally, it is related that he prohibited it. This issue has been discussed earlier.

Observing the *witr* prayer while riding on a beast, whichever way it is facing, has been permitted by the majority as it has been established through the acts of the Prophet (God's peace and blessings be upon him), that is, he used to observe *witr* while riding. This is what they relied upon to prove that it is not an obligation, for it has been established from the Prophet (God's peace and blessings be upon him) that "he used to offer supererogatory prayers while riding", while it has not been established from him at all that he used to observe obligatory prayers while riding. In the view of the Ḥanafites, because of their agreement with the majority that on the premise that no obligatory prayer is to be observed while riding, and because of their belief that the *witr* prayer is obligatory, it must necessarily follow that it should not be prayed while riding, and they rejected the tradition on the basis of analogy, which is weak.

Most of the jurists held that if a person observes *witr* and then goes to sleep, he may not observe *witr* a second time if he wakes up to observe supererogatory prayers; this is because of the words of the Prophet (God's peace and blessings be upon him), "*Witr* is not observed twice in a night". It is recorded by Abū Dāwūd. Some of them held that he may make the first *witr* even by adding a *rakʿa* to it and then observe it a second time after offering an even prayer. This is an issue that they termed *naqḍ al-witr*. It is weak from two aspects: first, that *witr* cannot be converted to a supererogatory prayer by making it even; second, that observing a single *rakʿa* as a supererogatory prayer is not known in the law. Permitting it or not permitting it is the cause of disagreement on the issue. Those who took into account the underlying meaning in *witr*, which is the opposite of even, said that it is converted by making it even through the addition of a second *rakʿa*. Those who took into account the technical meaning said that it is not converted by making it even as the even prayer is supererogatory, while the *witr* is an emphatic *sunna* (*muʾakkada*) or it is obligatory.

3.2. Chapter 2 The two *Rakʿas* of the Morning Prayer

They agreed that the two *rakʿas* in the morning are *sunna* because of their being persistently observed by the Prophet (God's peace and blessings be upon him), more so than the *rakaʿas* of any other supererogatory prayer. He (God's peace and blessings be upon him) did so because he considered performing them as desirable and also because he performed them as *qaḍāʾ* after sunrise—when he had (once) overslept till after sunrise—thus praying the whole morning prayer as *qaḍāʾ*. They disagreed about it in (several) issues, one of which is the recommended (Qurʾānic) recitation in it.

According to Mālik it is recommended that only the *umm al-Qurʾān* be recited in it. Al-Shāfiʿī said that there is no harm if the *umm al-Qurʾān* is recited in it along with another short *sūra*. Abū Ḥanīfa said that there is no recorded precedent in it for recommended recital, and it is permitted that a person may recite from his nightly portion of Qurʾānic recitation.

The reason for their disagreement is the variation in the reported recitation by the Prophet (God's peace and blessings be upon him) in this prayer, and also their disagreement about the identification of recitation in the prayer. It is related about the Prophet (God's peace and blessings be upon him) "that he used to observe two light [short] *rakʿas* in the morning", and it is related from ʿĀʾisha, who said, "They [the two *rakʿas*] were so short that I wondered whether he had recited in them the *umm al-Qurʾān*". The apparent implication of this is that he used to recite only the *umm al-Qurʾān* in them. It is related through Abū Hurayra, as recorded by Abū Dāwūd, that "he [the Prophet] used to recite 'Say, God is One . . .', and 'Say, O disbelievers . . .', in them". Those who adopted ʿĀʾisha's tradition chose the recitation of the *umm al-Qurʾān* alone, while those who adopted the second tradition chose to recite the *umm al-Qurʾān* and a short *sūra*. Those who abided by their principle that no specific recitation is to be fixed for prayers, because of the words of the Exalted, "So recite of it that which is easy [for you]",[154] said that the person is to recite what he likes.

The second issue concerns the manner of the recitation that is recommended for it. Mālik, al-Shāfiʿī and most of the other jurists held that the recommendation is to recite it inaudibly. A group of jurists maintained that the recommendation is for audible recitation, while another group granted a choice (to the worshipper) between reciting it inaudibly and audibly.

The reason for disagreement in this stems from the conflict of the implied meanings of the traditions. In the (preceding) tradition of ʿĀʾisha the apparent implied meaning is that "the Prophet (God's peace and blessings be upon him) used to recite inaudibly in them". If this had not been the case ʿĀʾisha would not have had reason to doubt whether the Prophet recited the *umm al-Qurʾān* in them. The apparent meaning of what has been related from Abū Hurayra is that he used to recite "Say, O disbelievers . . .," and "Say, Allāh is One . . .", in them, and that the recitation of the Prophet (God's peace and blessings be upon him) used to be audible, for had this not been the case, Abū Hurayra would not have come to know what he was reciting in them. Those who adopted the method of preference in these two traditions either upheld the audible recitation, when the tradition of Abū Hurayra was preferred, or they upheld inaudible recitation, when the tradition of ʿĀʾisha was preferred. Those who upheld the method of reconciliation upheld a choice for the worshipper.

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[154] Qurʾān 73 : 20.

The third issue is about case of a person who has not offered the two *rakʿas* and finds the *imām* engaged in the (obligatory) prayer, or who enters the mosque to offer the two *rakʿas*, but finds that the obligatory prayer is about to commence. In such a case, Mālik held that if he enters the mosque and the obligatory prayer is being performed, then he is to pray with the *imām* and not to offer the two *rakʿas* in the mosque (when the *imām* is observing the obligatory prayer). If, however, he has not entered the mosque and he does not fear losing a *rakʿa* with the *imām*, he may offer the two *rakʿas* outside the mosque, but if he is afraid of losing a *rakʿa* he should pray with the *imām* and then offer them after sunrise. Abū Ḥanīfa agreed with Mālik in making the distinction between the case of a person having entered the mosque or not yet having done so, but he went against him in the detailed ruling. He said that the person may pray outside the mosque as long as he thinks that he will be able to offer one *rakʿa* of the morning prayer with the *imām*. Al-Shāfiʿī said that if the prescribed prayer has commenced he is not to offer the two *rakʿas* inside or outside the mosque. Ibn al-Mundhir has related that a group permitted the offering of the two *rakʿas* inside the mosque while the *imām* is observing the (obligatory) prayer, but this is a deviant opinion.

The reason for their disagreement arises from their dispute over the meaning of the words of the Prophet (God's peace and blessings be upon him), "If the prayer has commenced, then, there is no other prayer but the one prescribed". Those who adopted the general implication of this tradition did not allow the two morning *rakʿas*, either outside the mosque or inside it, if the prescribed prayer had commenced. Those who restricted this meaning to apply to praying inside the mosque permitted praying outside the mosque as long as the obligation is not lost, or if a part of the obligation is not lost. The underlying meaning (*ʿilla*) of the proscription, according to those who adopted the general meaning, is the occupation with supererogatory prayers to the neglect of the obligatory prayers. The underlying meaning according to those who restricted this to the mosque is the offering of two prayers at the same time as that would amount to going against the *imām*. It is related from Abū Salama ibn ʿAbd al-Raḥmān that he said, "Some people heard the prayer being undertaken so they stood up to pray. The Messenger of Allāh (God's peace and blessings be upon him) came out to them and said, 'Two prayers at one time? Two prayers at one time?' He said that this was during the time of the morning prayer and about the two *rakʿas* that are before the obligatory morning prayer".

Mālik and Abū Ḥanīfa disagreed over the portion of the obligatory prayer that is to be taken into account in determining whether a person should first engage in the two *sunna rakʿas* or join the *imām*. The dispute stems from their disagreement over the portion that ensures securing the merit of the congregational prayer. Further, there is disagreement over whether the congregational prayer is greater in merit than the two *rakʿas*. Those who maintained that by losing a *rakʿa* of the obligatory prayer the credit for the prayer with the congregation is lost said that he may remain occupied with the two *rakʿas* as long is a *rakʿa* of the obligatory prayer is not lost. Those who maintained that he secures the merit (of the congregation) as long he prays even a single *rakʿa* of the obligatory prayer (with the *imām*), said so because of the words of the Prophet (God's peace and blessings be upon him), "He who has caught a *rakʿa* of a prayer has caught the prayer", that is, he secures its merit. They interpreted this tradition so as to convey a general application covering one relinquishing the prayer intentionally or without exercising a choice, and thus said that he may remain occupied with it as long as he thinks that he can catch at least one *rakʿa* (with the *imām*). Mālik interpreted this tradition (Allāh knows best) to apply to a person who has missed the obligatory prayer intentionally. He therefore held that if he misses a single *rakʿa* from it he loses its merit.

The reason for the opinion of those who permitted the two morning *rakʿas* inside the mosque when the obligatory prayer had commenced is based on one of two reasons: either the tradition did not prove authentic in their view or it did not reach them. Abū Bakr ibn al-Mundhir has said that it is an authentic tradition, that is, the words of the Prophet (God's peace and blessings be upon him) "If the prayer has commenced, then, there is no other prayer but the one prescribed". Abū ʿUmar ibn ʿAbd al-Barr has also declared it authentic, and its authenticity is also related from ibn Masʿūd.

The fourth issue is about the time of their *qaḍāʾ* when they have been missed because of offering the morning (obligatory) prayer. A group of jurists said that the person is to offer them as *qaḍāʾ* after the (obligatory) morning prayer. This opinion was held by ʿAṭāʾ ibn Jurayj. Another group of jurists said that he is to offer them as *qaḍāʾ* after sunrise. Some of these jurists determined this inflexible time for it, while others declared it to be flexible saying that he may offer them from the time of the rising of the sun up to the time of its decline, but he is not to offer them after the declining of the sun. Some of these jurists, who upheld his offering them as *qaḍāʾ*, considered it a recommendation, while others granted the person a choice. The basis for praying them as *qaḍāʾ* is the Prophet's praying them as *qaḍāʾ* after sunrise when he overslept.[155]

3.3. Chapter 3 The Supererogatory Prayers (*Nawāfil*)

They disagreed about supererogatory prayers, whether they are to be observed as two *rakʿas*, four, or three. Mālik and al-Shāfiʿī said that voluntary prayers during the night or the day are to be offered as two *rakʿas* at a time with a salutation after every two *rakʿas*. Abū Ḥanīfa said that if the worshipper likes he may offer them as two at a time, or three, or four, or six, or eight, without offering a salutation in between. A group of jurists distinguished between prayers during the night and those during the day, saying that prayers during the night are two at a time while prayers during the day are four at a time.

The reason for their disagreement in this arises from the conflict of the traditions on the subject. A tradition from Ibn ʿUmar is related that a man asked the Prophet (God's peace and blessings be upon him) about prayers during the night, and he said, "The prayer during the night is two at a time, and if you find that the morning is going to overtake you, then, offer one *rakʿa* as *witr*". It is also established from the Prophet (God's peace and blessings be upon him) "that he used to pray two *rakʿas* before *ẓuhr* and two after it, two *rakʿas* after *maghrib*, two *rakʿas* after the Friday prayer, and two *rakʿas* before *ʿaṣr*". Those who adopted these two traditions said that prayers during the night as well as the day are two *rakʿas* at a time. It is established through a tradition of ʿĀʾisha in which she describes the prayer of the Messenger of Allāh (God's peace and blessings be upon him) by saying "He prayed four *rakʿas* and you cannot imagine how beautiful they were or how long! He then then prayed four and you cannot imagine how beautiful they were or how long! He then prayed three, and I said, 'O Messenger of Allāh, do you sleep before observing the *witr*?' He said, 'O ʿĀʾisha, my eyes go to sleep, but my heart does not'". It is also established, through a narration of Abū Hurayra, that the Prophet (God's peace and blessings be upon him) said, "He who prays after the *jumuʿa* should pray four". Al-Aswad has related from

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[155] Once, on a journey, the Prophet asked Bilāl, before going to sleep, to wake them up for the morning prayer at the right time. Bilāl overslept, and the company continued to sleep until they were scorched by the heat of the sun. The Prophet and his company had to perform that morning prayer as *qaḍāʾ*.

ʿĀʾisha "that the Messenger of Allāh (God's peace and blessings be upon him) used to offer nine *rakʿas* during the night"—"but when he grew older, he prayed seven". Those who adopted the apparent meaning in these traditions permitted supererogatory prayers as four or three at a time without a break between them with the salutation. The majority maintained that supererogatory prayers are not offered through a single *rakʿa*, and I think there is some deviant disagreement in this.

3.4. Chapter 4 The two *Rakʿas* on Entering the Mosque

The majority maintain that the two *rakʿas* (to be offered) upon entry into a mosque are recommended and are not obligatory. The Ẓāhirites said that they are obligatory. The reason for the disagreement over this is whether the command, in the words of the Prophet (God's peace and blessings be upon him), "If one of you enters the mosque he should kneel for two *rakʿas*", is to be interpreted to imply a recommendation or an obligation. The tradition is agreed upon (by al-Bukhārī and Muslim) for its authenticity. Those who maintained with the majority that the rule is to construe absolute commands as implying obligation, unless an evidence indicates a recommendation and there is no objection against the evidence that transfers the *ḥukm* from being an obligation to that conveying a recommendation, said that these two *rakʿas* are obligatory. Those who raised an objection to the evidence converting the commands to recommendation, or for whom the rule is that the commands are to be construed to imply a recommendation, unless there is an evidence indicating an obligation, a rule which is held by one group, said that the two *rakʿas* are not obligatory.

The majority, however, construed the command in this case to indicate a recommendation owing to the existence of a conflict between this tradition and the traditions which we have mentioned at the beginning of this book, like the tradition of the desert dweller, (the traditions) that imply through their apparent, or explicit, meaning that the obligatory (daily) prayers are only five. The reason is that if the command here is construed to imply obligation it necessarily follows that the obligatory prayers become more than five. Those who made them obligatory maintain that the obligation here is related to the entry into a mosque and is not an absolute command like that for the five obligatory prayers. The (majority of the) jurists maintain that qualifying the command with respect to place is similar to qualifying it with respect to time.[156] The Ẓāhirites, however, hold that a specific place is not one of the conditions of the validity of prayer, while time is a condition for the validity of the obligatory prayers.[157]

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[156] Thus, treating them as an obligation will make the obligatory prayers more than five.

The jurists disagreed, under this subject heading, about the case of a person who enters a mosque and has already prayed the two *rakʿas* of the morning prayer in his house, whether he should offer the *rakʿas* on entering the mosque. Al-Shāfiʿī said that he should, and this is also a narration of Ashhab from Mālik. Abū Ḥanīfa said that he is not to offer them, and this is also a narration of Ibn al-Qāsim from Mālik. The reason for their disagreement stems from the conflict of the general implication of the Prophet (God's peace and blessings be upon him), "When one of you enters a mosque he is to offer two *rakʿas*", with the apparent meaning of his words, "There is no prayer after daybreak, except the two *rakʿas* of the morning". Here there are two general implications and two particular implications. The first is about time and the second about prayer. The reason is that the tradition prescribing prayer upon entry into a mosque is general with respect to time, but is particular with respect to prayer, while the tradition proscribing prayer after daybreak, except the two morning *rakʿas*, is particular with respect to time and general with respect to prayer. Those who exempted the particular case of prayer from the general upheld bowing (prayer) after the two morning *rakʿas*, while those who exempted the particular case of time from the general did not make this obligatory.

We have already said that if such a conflict arises, it is not binding to decide on the basis of either particular implication except on the basis of (further) evidence. Further, the proscribing tradition is not opposed by the tradition establishing the command, Allāh knows best. If the tradition is proved authentic then the evidence is to be sought from another quarter.

3.5. Chapter 5 Prayers during Ramaḍān

They (the jurists) agreed that the Ramaḍān night prayer is more desirable than the night prayer during any of the other months, because of the words of the Prophet (God's peace and blessings be upon him), "He who celebrates the Ramaḍān nights praying and worshipping because of his faith and only for Allāh's sake will be forgiven all prior sins that have issued forth from him". The (jurists agreed that the) *tarāwīh* prayers, the congregation in the mosque for which was started by ʿUmar, are desirable. They differed, however, on whether these (night prayers during Ramaḍān known as *tarāwīh*) have greater merit or the prayers during the later part of the night, that is, the prayer preferred by the Messenger of Allāh (God's peace and blessings be upon him). The majority held that the prayers of the later part of the night have greater merit because of the words of the Prophet (God's peace and blessings be upon him), "The best prayer is the prayer in your houses, except the obligatory prayers". There is also ʿUmar's saying that "those for which you give up sleep have greater merit".

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[157] The analogy, therefore, on the basis of which the argument is made that considering them as obligatory makes the obligations more than five, is not valid.

They disagreed about the preferred number of *rakʿas* that are to be undertaken by the people during the nights of Ramaḍān. Mālik, in one of his opinions, Abū Ḥanīfa, al-Shāfiʿī, Aḥmad, and Dāwūd preferred twenty *rakʿas* excluding *witr*. Ibn al-Qāsim has recorded from Mālik that he used to prefer offering thirty-six *rakʿas*[158] plus three of *witr*.

The reason for their disagreement comes from the conflict of transmission over this, as Mālik has related from Yazīd ibn Rūmān that he said, "The people, in the time of ʿUmar, used to pray twenty-three *rakʿas*. Ibn Abū Shayba has reported from Dāwūd ibn Qays, who said, 'I prayed with the people during the time of ʿUmar ibn ʿAbd al-ʿAzīz and Abbān ibn ʿUthmān and they used to pray thirty-six *rakʿas* and offered (another) three as *witr*'". Ibn al-Qāsim has reported from Mālik that this was the earlier directive, that is, praying thirty-six *rakʿas*.

3.6. Chapter 6 Eclipse Prayer

They agreed that the prayers for the solar eclipse are a *sunna* and that they are to be undertaken in a congregation. They disagreed about its description, about the description of the recitation during it, about the timings during which it is permitted, and also whether a sermon is one of its conditions. They also disagreed on whether the same sort of prayer is to be performed in the case of a lunar eclipse. There are thus five issues under this topic.

3.6.1. Issue 1

Mālik, al-Shāfiʿī, the majority of the jurists of Ḥijāz, and Aḥmad maintained that the eclipse prayer comprises two *rakʿas* with the *rukūʿ* (bowing) occurring twice in each. Abū Ḥanīfa and the Kūfīs held that the eclipse prayer is comprised of two *rakʿas* on the pattern of the *ʿīd* and Friday prayer.

The reason for their disagreement stems from the conflict of traditions on the issue and the conflict of analogy with some of them. This is so as it has been established in the tradition of ʿĀʾisha, in which she said, "A solar eclipse occurred during the period of the Messenger of Allāh (God's peace and blessings be upon him). He led the people in prayer, and stood praying for a long time after which he made the bow and bowed a long time. He then straightened up and prayed for a long time, but this was shorter than the first, after which he bowed for a long time, but this was shorter than the first bow. Thereafter he raised himself and prostrated once. He then sat up, then prostrated again. He then did the same in the second *rakʿa*. He then went away when the sun had brightened again". It is also established in the same manner through the tradition of Ibn ʿAbbās, that is, two bows in a *rakʿa*. Abū ʿUmar has said that these two are the most authentic traditions that have been related on the topic.

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[158] The reason behind this number, Allāh knows best, was that those in Mecca performed circumambulation around the Kaʿba between each set of four *rakʿas* of *tarāwīh*. Those in Medina, to compensate for this, added four *rakʿas* for each *ṭawāf*. This made sixteen (4 x 4) additional *rakʿas*, making it a total of thirty-six (20 + 16) of *tarāwīh*.

Those who relied on these two traditions and preferred them over the others on the basis of transmission said that the eclipse prayer comprises two *rukūʿs* in a single *rakʿa*. It has also been related in the traditions of Abū Bakr, Samura ibn Jundab, ʿAbd Allāh ibn ʿUmar, and al-Nuʿmān ibn Bashīr that the Prophet (God's peace and blessings be upon him) prayed two *rakʿas* during an eclipse like the prayer of *ʿīd*. Abū ʿUmar ibn ʿAbd al-Barr has said that all these are authentic and well-known traditions and the best of these is the tradition of Abū Qalāba from al-Nuʿmān ibn Bashīr, who said, "The Messenger of Allāh (God's peace and blessings be upon him) led us in prayer during an eclipse like your prayer where you bow and prostrate two *rakʿas* at a time, seeking the favour of Allāh till the brightening of the sun". Those who preferred these traditions, because of their large number and their conformity with analogy, that is, conformity with the other prayers said that the eclipse prayer is two *rakʿas*. The Qāḍī (Ibn Rushd) said that the tradition of Samura has been recorded by Muslim.

Abū ʿUmar said that on the whole each group adopted the traditions that had been reported by their predecessors, and for that reason some of the jurists have held that all this is a matter of choice. One of those who said this is al-Ṭabarī. The Qāḍī (Ibn Rushd) said that this is better, as reconciliation is better than preference. Abū ʿUmar said that in the case of the eclipse prayer ten *rukūʿs* in two *rakʿas*, eight in two, six in two, and four in two have been reported, but through channels that are unreliable. Abū Bakr ibn al-Mundhir and Isḥāq ibn Rahwayh have said that all this is mutually supportive and not conflicting as the consideration here is given to the brightening of the sun, and the excess in bowing occurred in accordance with variation in the brightening of the sun during the eclipse in which prayer was offered. It is related from al-ʿAlāʾ ibn Ziyād that in his view the worshipper should look at the sun when he raises his head from the bowing posture. If the sun has brightened he should prostrate and add to it a second *rakʿa*, but if it has not brightened in the first *rukūʿ* he should bow a second time and then look at the sun again, and if it has still not brightened he should bow a third time in the first *rakʿa* and continue this way till the sun brightens up. Isḥāq ibn Rahwayh used to say that this is not to exceed four *rukūʿs* in one *rakʿa*, as an excess beyond that has not been established from the Prophet (God's peace and blessings be upon him). Abū Bakr ibn al-Mundhir has said: "Some of our colleagues used to say that a choice in the matter of the eclipse has been established, and the choice lies with the worshipper, if he likes he may bow twice in one *rakʿa*, or thrice, or four times". He did not, however, consider this to be valid, but he maintained that these records imply that the Prophet (God's peace and blessings be upon him) prayed at length on a number of occasions during the eclipses. The Qāḍī (Ibn Rushd) said: "What he has mentioned has been recorded by Muslim and I do not know how Abū ʿUmar has said that these have been reported through weak channels. As for ten *rukūʿs* in a *rakʿa*, it has been reported by Abū Dāwūd alone".

3.6.2. Issue 2

They disagreed about the (nature of the) recitation in this prayer. Mālik and al-Shāfiʿī held that the recitation in it is to be inaudible. Abū Yūsuf, Muḥammad ibn al-Ḥasan, Aḥmad, and Isḥāq ibn Rahwayh maintained that the recitation in it is to be audible.

The reason for their disagreement arises from the conflict of traditions on the subject with respect to their implications and the form of words used. Thus, the implication of the authentic tradition of Ibn ʿAbbās is that the Prophet (God's peace and blessings be upon him) recited inaudibly in it, because of Ibn ʿAbbās's words about the Prophet, "that he prayed in it equal to the length of *sūrat al-Baqara*". The same is narrated from him expressly that he said, "I stood on one side of the Messenger of Allāh (God's peace and blessings be upon him) and I did not hear a word from him". It has been related through Ibn Isḥāq from ʿĀʾisha about the eclipse prayer that she said, "I listened intently to his recitation and guessed that he recited *sūrat al-Baqara*".

Those who preferred these traditions said that the recitation in it is to be inaudible, and because of what has been mentioned in these traditions, Mālik and al-Shāfiʿī considered it desirable to recite *sūrat al-Baqara* in the first *rakʿa*, *sūrat Āl ʿImrān* in the second, the length of one hundred and fifty verses of *sūrat al-Baqara* in the third, the length of fifty verses of *sūrat al-Baqara* in the fourth, and to recite the *umm al-Qurʾān* in each one of these *rakʿas*. They preferred their opinion also on the basis of what has been related from the Prophet (God's peace and blessings be upon him) that he said, "The prayers during the day are inaudible", but there are traditions that oppose this tradition. One of these is the report "that the Prophet (God's peace and blessings be upon him) in one of the *rakʿas* of the eclipse prayer recited *sūrat al-Najm*", and this means that he must have recited audibly. Aḥmad and Isḥāq used to support such an opinion through the tradition of Sufyān ibn al-Ḥasan from al-Zuhrī from ʿUrwa from ʿĀʾisha "that the Prophet (God's peace and blessings be upon him) recited audibly in a prayer of the solar eclipse". Abū ʿUmar has said that Sufyān ibn al-Ḥasan is not a reliable narrator. He maintained that his tradition was also narrated by others (by way of *mutābaʿa*) from al-Zuhrī from ʿAbd al-Raḥmān ibn Sulaymān ibn Kathīr and none of them is to be found in the tradition of al-Ẓuhrī. Further, the tradition of Ibn Isḥāq from ʿĀʾisha that has preceded opposes it. These jurists also supported their argument with *qiyās al-shabah*, saying that recitation in a *sunna* prayer that is observed in a congregation during the day must be audible, and the basis for this are the prayer for *ʿīd* and that for rain (*istisqāʾ*).

Al-Ṭabarī granted a choice in all this. This is the method of reconciliation, and we have already stated that it is preferable to the method of preference, if it is possible. There is no dispute about it that I know of among the experts on *uṣūl*.

3.6.3. Issue 3

They disagreed about the time in which it is to be observed. Al-Shāfiʿī said that it may be observed at all times, those in which prayer is prohibited and those in which it is not. Abū Ḥanīfa held that it is not to be observed in timings in which prayer is prohibited. Ibn Wahb has related from Mālik that he said: "Prayer for the solar eclipse is not to be observed except in timings in which supererogatory prayers are permitted". Ibn al-Qāsim has related that the established practice is to observe it from sunrise up to the decline of the sun.

The reason for their disagreement on this issue springs from their dispute over the categories of prayer that are not to be observed during the prohibited periods. Those who held that the prohibition applies to all categories of prayer during these periods did not permit the observance of the eclipse prayer or any other prayer in such timings. Those who maintained that these traditions are confined to the supererogatory prayers, and the eclipse prayer according to them is a *sunna*, permitted its observance (in such timings). Those who maintained that this prayer is supererogatory did not permit it either in the proscribed timings. The report of Ibn al-Qāsim from Mālik, however, has no basis except its semblance to the *ʿīd* prayer.

3.6.4. Issue 4

They also disagreed on whether delivering a sermon after the prayer is one of its conditions. Al-Shāfiʿī held that it is one of its conditions. Mālik and Abū Ḥanīfa maintained that there is to be no sermon after the eclipse prayer.

The reason for their disagreement stems from their dispute over the underlying cause for which the Messenger of Allāh (God's peace and blessings be upon him) addressed the people after he had completed the eclipse prayer, as is reported in ʿĀʾisha's tradition. She related "that when he had completed the prayer and the sun had brightened, he praised Allāh and glorified Him and then said, 'The sun and the moon are two signs from among the signs of Allāh, and they are not eclipsed for anyone's death nor for his life . . ' ".[159] Al-Shāfiʿī, therefore, believed that he delivered this sermon as a sermon is one of the practices of this prayer, as is the case with the *ʿīd* prayer and the prayer for rain. Some of those who adopted the opinion of the others believed that the sermon by the Prophet (God's peace and blessings be upon him) on that day was delivered because the people believed that the sun was eclipsed for the death of his son Ibrāhīm (God's peace and blessings be upon him).

3.6.5. Issue 5

They disagreed about the (kind of prayer that should be offered during a) lunar eclipse. Al-Shāfiʿī maintained that prayers for it are to be observed in a congregation in a manner similar to that for the solar eclipse. This was also held by Aḥmad, Dāwūd, and a group of jurists. Mālik and Abū Ḥanīfa maintained that prayers for it are not to be observed in a congregation and they recommended that people pray two *rakʿas* for it individually as is the case with all the other supererogatory prayers.

The reason for their disagreement arises from their dispute over the meaning of the words of the Prophet (God's peace and blessings be upon him), "The sun and the moon are two signs from among the signs of Allāh, and they are not eclipsed for anyone's death nor for his life, so when you see them eclipsed supplicate Allāh and pray till what has befallen you clears up, and then give alms". It has been recorded by al-Bukhārī and Muslim. Those who understood from this that the prescription for observing prayer in it is the same, which is the manner in which it is observed for the solar eclipse, held that prayer is to observed in a congregation. Those who comprehended a different meaning here, for it has not been related about the Prophet (God's peace and blessings be upon him) that he observed prayer for the lunar eclipse despite the frequency of its occurrence (during its lifetime), held that the meaning here is the minimum to which the term *ṣalāh* is applied in law and that is supererogatory prayer observed individually. The upholders of this opinion maintained that the principle here is to construe the term *ṣalāh* in the law, when it is prescribed, to imply the minimum that is covered by the term in the law, unless another evidence indicates the contrary. Thus, when the acts of the Prophet (God's peace and blessings be upon him) with respect to the solar eclipse do not indicate it (i.e., prayer in a congregation) the meaning retains its (original) implication for the lunar eclipse in conformity with the principle. Al-Shāfiʿī, however, construes the acts of the Prophet (God's peace and blessings be upon him) with respect to the solar eclipse as an elaboration of an unelaborated (*mujmal*) meaning, and insofar as prayer for it has been prescribed it is necessary to rely on it. Abū ʿUmar ibn ʿAbd al-Barr believed that it has been related from Ibn ʿAbbās and ʿUthmān that both of them prayed two *rakʿas* with the congregation for the lunar eclipse, bowing twice in each *rakʿa*, just as is the opinion of al-Shāfiʿī.

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[159] The author quotes the tradition in full a few paragraphs below.

A group of jurists recommended praying (on other occasions of natural occurances such as) earthquakes, storms, darkness (heavily overcast skies), and other such signs on the analogy of the lunar eclipse and the solar eclipse because of the Prophet's expressly stating the underlying cause for these, which is their determination as signs. This is one of the strongest categories of analogy in their view, for it is analogy on the basis of an underlying cause that is explicitly stated; but this was not the view of Mālik or al-Shāfiʿī, nor of any group of jurists. Abū Ḥanīfa said that if a prayer is observed on the occurance of an earthquake it is an excellent thing for there is no harm done anyway. It is related that Ibn ʿAbbās used to pray for it in the same way as for the eclipse prayer.

3.7. Chapter 7 Prayer for Rain

The jurists agreed that going out for seeking rain, moving away from the dwelling area, supplicating Allāh and entreating Him to sending down rain is a *sunna* established by the Messenger of Allāh (God's peace and blessings be upon him). They disagreed about prayer (*ṣalāh*) for rain. The majority maintain that this is one of the *sunan* when going out for seeking rain, except that Abū Ḥanīfa said that (formal) prayer itself is not one of its *sunan*.

The reason for disagreement stems from the conflict of traditions. It is related in some traditions that the Prophet (God's peace and blessings be upon him) made supplications for rain and also prayed, but in other traditions (formal) prayer is not mentioned. One of the best known traditions on the point that he did pray, and which was relied upon by the majority, is the tradition of ʿAbbād ibn Tamīm from his (paternal) uncle "that the Messenger of Allāh (God's peace and blessings be upon him) led the people out to make a supplication for rain and there he led them in a prayer of two *rakʿas* in which he recited audibly, raised his hands up to his shoulders, turned his cloak inside out, faced the *qibla*, and made a supplication for rain". It has been recorded by al-Bukhārī and Muslim. The traditions in which supplication is mentioned but prayer is not include the tradition of Anas ibn Mālik, which is recorded by Muslim, that he said, "A man came up to the Messenger of Allāh (God's peace and blessings be upon him) and said, 'O Messenger of Allāh, the animals are dying (of thirst), the paths have been blocked, so make a supplication to Allāh'. The Messenger of Allāh (God's peace and blessings be upon him) made a supplication, and then the rain poured from one Friday to the next". There is also, among them, the tradition of ʿAbd Allāh ibn Zayd al-Māzinī, in which he said, "The Messenger of Allāh went out and made a supplication for rain. He turned his cloak inside out when he faced the *qibla*". Prayer was not mentioned in this tradition. Those who adopted the apparent meaning of this tradition thought that this is related from ʿUmar ibn al-Khaṭṭāb, that is, he went out to the place of prayer and made a supplication, but did not pray. The argument of the majority is that because a tradition does not mention something, it cannot be used as evidence against that which does.

The implications of the conflict of the traditions is that prayer is not a condition for the validity of the supplication for rain, for it has been established that the Prophet (God's peace and blessings be upon him) "made a supplication for rain from the pulpit", but not that it (prayer) is not one of the *sunan* for rain, as has been held by Abū Ḥanīfa.

Those who maintained that prayer is one of the *sunan* for rain agreed that the sermon is also one of its *sunan*, because of its occurrence in a tradition. Ibn al-Mundhir said that it is established that the Messenger of Allāh (God's peace and blessings be upon him) observed the prayer for rain and delivered a sermon. They disagreed then on whether it should be delivered before the prayer or after it, because of the conflict of traditions on this point. One group maintained that it is after the prayer on the analogy of the two *ʿīd* prayers. This was upheld by Mālik and al-Shāfiʿī. Al-Layth ibn Saʿd said that the sermon is to be delivered prior to prayer. Ibn al-Mundhir has said that "it is related from the Prophet (God's peace and blessings be upon him) that he made a supplication for rain and delivered the sermon before prayer," and the same has been related from ʿUmar ibn al-Khaṭṭāb and that is what we accept. The Qāḍī (Ibn Rushd) said that this has been recorded by Abū Dāwūd through different channels, and those who mention the sermon state, to my knowledge, that it is delivered before the prayer.

They agreed that the recitation in it is to be audible, but they differed on whether the (the number of) *takbīrs* to be pronounced in it should be the same as that in the two *ʿīd* prayers. Mālik held that the *takbīrs* are to be pronounced in it as they are in the ordinary prayers, while al-Shāfiʿī maintained that the *takbīrs* are to be pronounced in it as they are in the *ʿīd* prayers. The reason for their disagreement arises from their dispute about its analogy over the two *ʿīd* prayers. Al-Shāfiʿī argued for his opinion by relying on what has been related from Ibn ʿAbbās "that the Messenger of Allāh (God's peace and blessings be upon him) observed two *rakʿas* in it as they are observed in the *ʿīd* prayers".

They agreed that one of its practices (*sunan*) is that the *imām* should face the *qibla* while standing, and he should make a supplication, turn his cloak inside out, and raise his hands, as has been related in the traditions. They disagreed, however, about the manner of doing this, and about the time when he should do it. With respect to the question as to how it is done, the majority maintain that he should turn his cloak from the right side on to his left (shoulder) and that on his left side to his right (shoulder). Al-Shafiʿī said that he should turn the lower part upward, what is on his right to his left, and what is on the left to his right. The reason for their disagreement derives from the conflict of traditions on the issue. It is reported in the tradition of ʿAbd Allāh ibn Zayd "that the Prophet (God's peace and blessings be upon him) went out to the place of prayer to make a supplication for rain. He faced the *qibla*, turned his cloak, and prayed two *rakʿas*". In some of its versions the tradition says, "I said: 'Did he place the left side toward the right and the right toward the left, or did he turn the lower part toward the top?' He said, 'In fact, he turned the left over to the right and the right over to the left'". Further, it is recorded in the tradition of this (person) ʿAbd Allāh that he said, "The Messenger of Allāh (God's peace and blessings be upon him) made a supplication for rain and (at that time) he was wearing a black shirt that he had. He tried to take hold of its lower part to turn it toward the top, but when this became difficult he placed it over his shoulders".

As to when the *imām* is required to do this, both Mālik and al-Shāfiʿī said that he does this after delivering the sermon. Abū Yūsuf held that he turns his cloak when the early part of the sermon is over. This has also been related from Mālik. All of them maintain that if the *imām* turns his cloak while standing the people are to turn theirs while sitting, because of the words of the Prophet (God's peace and blessings be upon him), "The *imām* has been appointed so that he be followed". The exception are Muḥammad ibn al-Ḥasan, al-Layth ibn Saʿd, and some of the disciples of Mālik. The followers (behind the *imām*) in their view are not to turn their cloaks because of the *imām's* turning his, as this has not been reported in the traditions about the Prophet's prayer when he led them.

A group of jurists held that the time of departure for this prayer is the same as that of the *ʿīd* prayers, except for Abū Bakr ibn Muḥammad ibn ʿAmr ibn Ḥazm, who said that the time for departure for it is at the declining of the sun. It is reported by Abū Dāwūd from ʿĀʾisha "that the Messenger of Allāh

(God's peace and blessings be upon him) departed for the supplication for rain when the rim of the sun had appeared".

3.8 Chapter 8 Prayer on the two *ʿĪds*

The jurists agreed upon the religious merit of bathing for (each of) the two *ʿīd* prayers and that they are observed without the call for prayers and (without) the pronouncement of the *iqāma*, as this was the established practice of the Messenger of Allāh (God's peace and blessings be upon him), except for the innovation in this practice by Muʿāwiya as recorded in a most authentic statement according to Abū ʿUmar. Likewise, they agreed that the *sunna* is to observe the prayer before the sermon, as that too has been established from the Messenger of Allāh (God's peace and blessings be upon him), except what is related from ʿUthmān ibn ʿAffān that he delayed the prayer and advanced the sermon so that the people should not disperse prior to the *khuṭba*. They also agreed that there is no time limit set for the recitation in the *ʿīd* prayers. Most of them recommended that *sūrat al-Aʿlā* be recited in the first *rakʿa* and *sūrat al-Ghāshiya* in the second as this is transmitted through *tawātur* (by the whole community) from the Messenger of Allāh (God's peace and blessings be upon him). Al-Shāfiʿī recommended that *sūrat Qāf* and *sūrat al-Qamar* be recited, because it was established from the Prophet (God's peace and blessings be upon him).

They disagreed in this over (several) issues, the foremost of which is their disagreement over *takbīr*. Abū Bakr ibn al-Mundhir has narrated close to twelve opinions about this, though we will mention only those that rely upon the statement of a Companion or upon transmission. Thus we say:

Mālik held that the *takbīrs* in the first *rakʿa* of the *ʿīd* prayers are seven, including the initial *takbīr* prior to recitation, and are six in the second *rakʿa*, including the *takbīr* for rising up from the prostrations. Al-Shāfiʿī said that in the first they are eight[160] and in the second they are six along with the *takbīr* for rising up from the prostrations. Abū Ḥanīfa said that in the first *rakʿa* he is to pronounce three *takbīrs* raising his hands in each after the initial *takbīr*, then he is to recite the *umm al-Qurʾān* followed by another *sūra* after which he is to bow pronouncing the *takbīr*, but without raising hands. When he rises for the second *rakʿa*, he is to pronounce the *takbīr* without raising his hands and recite the *Fātiḥat al-Kitāb* and another *sūra*. He is then then to pronounce three *takbīrs* with the raising of hands after which he pronounces a *takbīr* for the bow but does not raise his hands. A group of jurists said that there are nine (*takbīrs*) in each *rakʿa*. This is related from Ibn ʿAbbās, al-Mughīra ibn Shuʿba, Anas ibn Mālik, Saʿīd ibn al-Musayyab, and it was also upheld by al-Nakhaʿī.

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[160] Note by the editor of the original text: That is, the initial *takbīr* is included in them.

The reason for their disagreement derives from the conflict of the traditions transmitted on the issue from the Companions. Mālik, may Allāh have mercy on him, relied on what is related from Ibn ʿUmar, who said, "I witnessed (celebrated) *al-aḍḥā* and *al-fiṭr* [the two *ʿīds*] with Abū Hurayra and he pronounced seven *takbīrs* in the first *rakʿa* prior to recitation and five in the other *rakʿa*, prior to recitation". Further, the practice (*ʿamal*), in his view, in Medina was in accordance with this. This tradition was relied upon by al-Shāfiʿī, except that he interpreted the seven as excluding the initial *takbīr*, just as in the five *takbīrs* in the second *rakʿa* he excluded the *takbīr* for rising up. It appears that what led Mālik to conclude that the initial *takbīr* is to be counted among the seven and the *takbīr* for rising up is to be counted as an addition to the reported five is the prevailing practice. This appears, in his view, to be a kind of reconciliation between the tradition and (prevailing) practice. Abū Dāwūd has recorded the contents of Abū Hurayra's tradition in reports going up to ʿĀʾisha and ʿAmr ibn al-ʿĀṣ. It is related that Abū Mūsā al-Ashʿarī and Ḥudhayfa ibn al-Yamān were asked as to how the Messenger of Allāh (God's peace and blessings be upon him) pronounced the *takbīrs* during *al-aḍḥā* and *al-fiṭr*. Abū Mūsā said, "He used to pronounce four *takbīrs* (just as he did) on the funerals". Ḥudhayfa said, "He has spoken the truth". Abū Mūsā then added, "This is what I used to do at Baṣra when I was appointed (governor) over them". A group of jurists upheld this opinion. Abū Ḥanīfa and the rest of the Kūfians relied for this upon Ibn Masʿūd, for it is established from him that he used to teach them to observe the *ʿīd* prayer in the manner that has preceded.

All of them decided this by adopting the opinions of Companions on the issue as nothing has been established from the Prophet (God's peace and blessings be upon him) on this, and it is known that the act of a Companion in such a case serves as a precedent, for analogy has no role in such an issue (of worship).

Likewise, they disagreed about the raising of hands while pronouncing each *takbīr*. Some of them recommended that practice, and this is the opinion of al-Shāfiʿī. Some held that the raising of hands was applicable only at the time of commencement, while others granted a choice in this.

They disagreed about the person on whom the *ʿīd* prayer is obligatory, that is, obligation as a *sunna*. A group of jurists said that it is to be observed by a resident as well as a traveller, and this was upheld by al-Shāfiʿī and al-Ḥasan al-Baṣrī. Al-Shāfiʿī also maintained that it is to be observed by the people living in the countryside and the desert, and even those who do not gather for prayer like women in their houses. Abū Ḥanīfa and his disciples held that the Friday congregation and the *ʿīd* prayer are obligatory only on the residents of towns and cities. It is reported from ʿAlī that he said that there is no Friday prayer and no *tashrīq* except in the city where people congregate. It is related from al-Zuhrī that he said: "There is no *aḍḥā* or *fiṭr* prayer for the traveller".

The reason for this disagreement stems from their dispute about its analogy with the Friday prayer. Those who made the analogy with the Friday prayer held the same view about it as they did about the Friday prayer. Those who did not draw such an analogy held that the command is addressed to each subject unless an exemption for such a communication is proved in his case, because it is established that "the Prophet (God's peace and blessings be upon him) ordered the women to go out for observing the two *ʿīd* prayers, but he did not do so in the case of the Friday congregation".

They also differed about the location from which it was necessary to go for the prayer just as they disagreed about the (obligation of the) Friday prayer—from up to three miles to a distance of a whole day's journey.

They agreed that the time for *ʿīd* prayer extends from the rising of the sun up to its decline. They disagreed about the obligation of those whom information has not reached that the day of *ʿīd* has come, until after the time of the declining of the sun. A group of jurists said that they are not obliged to pray that day or the next. This was the opinion of Mālik, al-Shāfiʿī, and Abū Thawr. Some other jurists said that they are to go and pray on the second day of *ʿīd*. This was the opinion of al-Awzāʿī, Aḥmad, and Isḥāq. Abū Bakr ibn al-Mundhir said that this is what we uphold on the basis of the tradition that we have related from the Prophet (God's peace and blessings be upon him) "that he ordered them to break the fast, and on the next morning to go to their place of prayer". The Qāḍī (Ibn Rushd) said that this is recorded by Abū Dāwūd, but that it is from an unknown Companion, and the principle in their case, may Allāh be pleased with them (the Companions), is to assume *adāla* (moral probity).

If the *ʿīd* day falls on a Friday, should the *ʿīd* (prayer) replace the Friday congregation? They disagreed over this. A group of jurists said that *ʿīd* acts as a substitute for the Friday prayer and the subject is not under an obligation for anything (during the rest of the afternoon) except the *ʿaṣr* prayer. This was upheld by ʿAṭāʾ and has been related from Ibn al-Zubayr and ʿAlī. Another group of jurists said that this is only an exemption for the people living in the countryside (with widely scattered dwellings)[161] who come to the cities specifically for *ʿīd* and the Friday congregation. It has been related from ʿUthmān that he addressed the people on an *ʿīd* that was a Friday and said: "Those from the countryside who like to wait for the Friday congregation may do so, and those who wish to return may return. It is recorded by Mālik in *al-Muwaṭṭa*ʾ". He also related a tradition similar to it attributed to ʿUmar ibn ʿAbd al-ʿAzīz, and this opinion was adopted by al-Shāfiʿī. Mālik and Abū Ḥanīfa said that if the *ʿīd* falls on a Friday the subject remains under an obligation for both, *ʿīd* as a *sunna* and the Friday congregation as an obligation, and one cannot be a substitute for the other. This is the principle unless an evidence is established to which recourse is necessary. Those who adopted ʿUthmān's view did so not because it is an opinion, but because his statement is based on a precedent,[162] and it is not totally inconsistent with the principles. As to the dropping of the obligation of *ẓuhr* or *jumuʿa* (which is its substitute) due to the existence of the *ʿīd* prayer, it falls far beyond the ambit of the principles, unless there is established an evidence to which recourse is necessary.

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[161] When a settled community forms a congregation it becomes like a village or town and its inhabitants are then bound by all congregational obligations.

They disagreed about the case of a person who has lost the prayer with the *imām*. A group of jurists said that he is to pray four *rakʿas*. This was upheld by Aḥmad and al-Thawrī, and it was related from Ibn Masʿūd. Another group of jurists said that he is to offer two *rakʿas* as *qaḍāʾ* in the same way as the prayer of the *imām*, pronouncing the *takbīrs* in it like those of the *imām* and reciting audibly like him. This was upheld by al-Shāfiʿī and Abū Thawr. A third group said that he observes two *rakʿas* without pronouncing the *takbīrs* in it or reciting audibly. A fourth group said that if the *imām* observed the prayer in the place of prayer the person is to observe two *rakʿas* else he is to observe four *rakʿas*. A fifth group of jurists said that there is no *qaḍāʾ* for him. This is the opinion of Mālik and his disciples. Ibn al-Mundhir has related from him an opinion similar to that of al-Shāfiʿī.

Those who maintained that he is to observe four *rakʿas* compared it (the *ʿīd* prayer) to the Friday congregation, but this is a weak comparison. Those who held it to be two *rakʿas* like those observed by the *imām* did so on the basis of the principle that *qaḍāʾ* must be performed in the same way as the *adāʾ*. Those who disallowed *qaḍāʾ* maintained that it is a prayer that has stipulated conditions of a congregation and an *imām* like the Friday prayer; therefore, they did not prescribe the *qaḍāʾ* of either two or four *rakʿas* for they do not substitute for anything. These two opinions are those around which the issue revolves, that is, the opinion of al-Shāfiʿī and the opinion of Mālik. As for the other opinions, they are weak and meaningless, for the

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[162] That is, such an opinion is assumed to be based upon an earlier precedent from the Prophet (God's peace and blessings be upon him) about which the Companion has knowledge.

Friday prayer is a substitute for *ẓuhr*, but these prayers do not form a substitute for anything. How, then, can we draw an analogy from one with the other for *qaḍā*ʾ? In fact, the *ẓuhr* prayer of the person who has missed the Friday congregational prayer is not *qaḍā*ʾ rather it is *adā*ʾ, because on missing the substitute this becomes obligatory. Allāh is the Grantor of truth.

They disagreed about supererogatory prayers before the *ʿīd* prayer and after it. The majority maintain that he (the worshipper) is not to offer supererogatory prayers either before it or after it. This is related from ʿAlī ibn Abī Ṭālib, Ibn Masʿūd, Ḥudhayfa, and Jābir, and it is also upheld by Aḥmad. It is said, however, that he is to offer supererogatory prayers both before it and after it. This is the opinion of Anas and ʿUrwa, and it has been upheld by al-Shāfiʿī. There is a third opinion in this that he is to offer supererogatory prayers after it but not before it. This was upheld by al-Thawrī, al-Awzāʿī, and Abū Ḥanīfa, and it is also related from Ibn Masʿūd. A group of jurists made a distinction between whether the prayer was in a place of prayer (for *ʿīd*) or in the mosque, and this is the well-known opinion of Mālik's school.

The reason for their disagreement is that it has been established "that the Messenger of Allāh (God's peace and blessings be upon him) went out on the day of *fiṭr* or on the day of *aḍḥā* and prayed two rakʿas without praying before them or after them". On the other hand, it is related that the Prophet (God's peace and blessings be upon him) said, "When one of you enters a mosque he should bow in two *rakʿas*". The ambiguity also arises from the aspect of its being prescribed, that is, whether the recommendation of supererogatory prayers both before and after it arises from its *ḥukm* of being a prescribed prayer. Those who considered the relinquishment of prayer before it and after as belonging to the category of relinquishment of prayer before the *sunan* and after them, and in whose view the term "mosque" did not apply to the place of prayer (for *ʿīd*), did not prescribe supererogatory prayers before it or after it. It was for this reason that the opinion of the School vacillated with respect to prayers before it when the *ʿīd* is observed inside the mosque, as the implication of the act is in conflict with the words. I mean, it is recommended that the person should pray insofar as he has entered the mosque, but insofar as he is about to observe the *ʿīd* prayer (at the place of *ʿīd* prayer) it is recommended that he should refrain from praying (prior to it) on the analogy of the act of the Prophet (God's peace and blessings be upon him). Those who maintained that it belongs to the category of exemptions, and also held that the term "mosque" applies to the place of prayer, approved of supererogatory prayers being offered before it. Those who compared it to the obligatory prayers deemed it recommended that he pray before it and after it, as we have said. A group of jurists held that supererogatory prayers before it and after it belong to the permissible (*mubāḥ*) category and not the recommended category nor the disapproved (*makrūh*) category. This has minimum ambiguity, if the term "mosque" does not encompass the place of (*ʿīd*) prayer.

They disagreed about the time of *takbīr* during *ʿīd al-fiṭr*, after the majority had agreed upon its recommendation, because of the words of the Exalted, "He desireth not hardship for you; and (He desireth) that ye should complete the period, and that ye should magnify Allāh for having guided you".[163] The majority said that the worshipper should start pronouncing the *takbīrs* from the time of departure for the prayer. This is the opinion of Ibn ʿUmar and a group of Companions and the Tābiʿūn, and was also upheld by Mālik, Aḥmad, Isḥāq, and Abū Thawr. A group of jurists said that he should start pronouncing the *takbīrs* from the night of *ʿīd al-fiṭr* when the moon has been sighted till the departure for the prayer and the emergence of the *imām*. The same, in their view, is the rule for the night of *aḍḥā* if they are not *ḥajj* pilgrims. The complete denial of pronouncing *takbīrs* is related from Ibn ʿAbbās, unless the *imām* pronounces it.

They agreed about the pronouncement of *takbīr* immediately after each prayer during the days of *ḥajj*, but they disagreed extensively over the time set for this. A group of jurists said that he is to pronounce *takbīrs* from the morning prayer on the day of ʿArafa till the time of *ʿaṣr* on the last of the (three) days of *tashrīq*.[164] This was upheld by Sufyān, Aḥmad, and Abū Thawr. It is said that he is to pronounce *takbīrs* from the time after the *ẓuhr* prayer on the day of sacrifice up to the morning prayer on the last day of *tashrīq*. This is the opinion of Mālik and al-Shāfiʿī. Al-Zuhrī said that a *sunna* has prevailed that the *imām* should pronounce *takbīr* in the cities after the *ẓuhr* prayer on the day of sacrifice up to *ʿaṣr* of the last day of *tashrīq*.

On the whole, there is extensive disagreement over this, and Ibn al-Mundhir has related ten opinions in it. The reason for their disagreement over this stems from the fact that it has been based on acts and that no determinable saying has been transmitted in this regard. When the Companions disagreed among themselves over this, their followers likewise disagreed. The basis for this subject are the words of the Exalted, "Remember Allāh through the appointed days".[165] The majority maintained that this command, even if it is primarily directed at the pilgrims, applies generally to others, and this has been derived from practice, even though there is disagreement about the time set for it. Perhaps, the fixing of a time for *takbīr* is a matter of choice for all of them agreed about the fixing of time while they differed over the act itself. A group of jurists said that the *takbīr* after prayer on these days applies only to the person praying with the congregation. They also differed about the description of the *takbīr* during these days. Mālik and al-Shāfiʿī said that the worshipper is to pronounce it three times: *Allāhu Akbar*, *Allāhu Akbar*, *Allāhu Akbar*. And it is said that the words *lā ilāha illallāhu waḥdahu lā sharīka lah*, *lahu ʾl-mulk wa lahu ʾl-ḥamd*, *wa huwa ʿalā kulli shayʾin qadīr*, are to be added after this. It is related from Ibn ʿAbbās that he used to say, *Allāhu Akbar Kabīra*, three times and then with the fourth he would say *wa lillāhi ʾl-ḥamd*. A group of jurists said that there is nothing determined for this.

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[163] Qurʾān 2 : 185.

[164] That is, the three days following the *aḍḥā* day.

[165] Qurʾān 2 : 203.

The reason for their disagreement over this arises from the absence of a determination in the law along with their understanding from the law that there is such a determination, that is, according to the understanding of most. This is the cause of their disagreement about the fixing of a time for *takbīr*, that is, comprehending such fixing in the absence of a text for it.

They agreed that it is recommended that the worshipper eat something on the day of *ʿīd al-fiṭr* before departing for the place of (*ʿīd*) prayer, and that he should not eat anything on the day of *ʿīd al-aḍḥā* except after the completion of prayer. They also held that it is recommended that he should return by a path different from the one he treaded (while going for prayer), because this practice has been established through the act of the Prophet (God's peace and blessings be upon him).

3.9. Chapter 9 Prostrations of the Qurʾān

The discussion of this topic is covered in five sections: the *ḥukm* of the prostrations; the number of prostrations that are obligatory, that is, those (occasions) for which the person is to prostrate; the times during which he may prostrate; the person who is under an obligation to prostrate; and the description of the prostrations.

About the *ḥukm* of the prostrations of recitation, Abū Ḥanīfa and his disciples said that they are obligatory. Mālik and al-Shāfiʿī said that they are prescribed as a *sunna* and are not obligatory. The reason for disagreement arises from their dispute about the implication of the commands requiring prostrations and the traditions that convey the meaning of commands. For example, whether the (following) words of the Exalted, "When the revelations of the Beneficent were recited unto them, they fell down, adoring and weeping",[166] are to be interpreted as an obligation or a recommendation. Abū Ḥanīfa interpreted them in their apparent meaning of obligation, while Mālik and al-Shāfiʿī followed the (interpretation of) the Companions, for they were the ones best grounded in the meaning of the commands of law. Thus, it has been established that ʿUmar ibn al-Khaṭṭāb recited *sūrat al-Sajda* on a Friday. He descended (from the pulpit) and made a prostration, and the people prostrated with him. On the next Friday, he recited it again and the people prepared for the prostrations, so he said, "Wait! Wait! Allāh has not prescribed it for us, unless we want to do it". They said that this occurred in the presence of the Companions, and no disagreement was transmitted from any of them. They were the ones who best knew the essence of the law. This is used in support of that view by those who rely on the opinion of a Companion when there is no other conflicting evidence. The disciples of al-Shāfiʿī argued on the basis of the tradition of Zayd ibn al-Thābit, who said, "I used to read out the Qurʾān for the Messenger of Allāh (God's peace and blessings be upon him). Once I recited *sūrat al-Ḥajj* and he did not prostrate, and neither did we". These jurists also argued on the basis of the report "that the Prophet (God's peace and blessings be upon him) did not prostrate during (the recitation of) *al-Mufaṣṣal sūrahs*", and also on the reports that he did prostrate during their recitation; a reconciliation between these implies that the prostrations are not obligatory. Each one of them reported what he saw, that is, those who said that he prostrated and those who said that he did not.

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[166] Qurʾān 19 : 58.

Abū Ḥanīfa, on the other hand, relied in this on the argument that the principle is to construe the commands as implying an obligation, and also those reports that amount to commands. Abū al-Maʿālī has said that the argument of Abū Ḥanīfa on the basis of the prescribed commands has no validity, as the absolute obligation of prostrations does not imply their obligation in a qualified sense at the time of recitation, that is, the recitation of the verses of prostration. He said that had the position been as is believed by Abū Ḥanīfa, prayer would have become obligatory on the recitation of the verses that contain the commands for prayer, and as this is not obligatory the prostrations too are not obligatory upon recitation of the verses in which the commands for prostration have been laid down. Abū Ḥanīfa, however, would say that the Muslims (jurists) have agreed that the reports about prostrations during the recitation of the Qurʾān are in the form of a command, and this is for most occasions. If this is the case, then, the command prescribing prostrations applies to the time of recitation, and as the command also occurs in an absolute sense it is necessary to construe the absolute in the qualified sense. The case of prostrations in not the same as prayer as the obligation of prayer has been qualified through other restrictions. Further, the Prophet (God's peace and blessings be upon him) did prostrate on such occasions, so the meaning of commands occurring on these occasions becomes obvious to us, that is, they apply to the time of recitation. Thus, it is necessary to construe the implication of the command as an obligation.

With respect to the number of requirements of prostrations, Mālik says in *al-Muwaṭṭa*ʾ: "The position, in our view, is that the prescription regarding the prostrations of the Qurʾān is for eleven prostrations that do not include anything from the *Mufaṣṣal sūrahs*". His disciples said that the first of these is at the end of *al-Aʿrāf*;[167] the second is in *al-Raʿd* after the words, "And unto Allāh falleth prostrate whosoever is in the heavens and the earth, willingly or unwillingly, as do their shadows in the morning and the evening hours";[168] the third is in *al-Naḥl* after the words, "And unto Allāh maketh prostration whatsoever is in the heavens and whatsoever is in the earth of living creatures, and the angels (also), and they are not proud. They fear their Lord above them, and do what they are bidden";[169] the fourth is in *Banī Isrāʾīl* after the words, "They fall down on their faces, weeping, and it increaseth humility in them";[170] the fifth is in *Maryam* after the words, "When the revelations of the Beneficent were recited unto them, they fell down, adoring and weeping";[171] the sixth is in *al-Ḥajj* being the first one after the words, "Hast thou not seen that unto Allāh payeth adoration whosoever is in the heavens and whosoever is in the earth, and the sun, and the moon, and the stars, and the hills, and the trees, and the beasts, and many of mankind, while there are many unto whom doom is justly due. He whom Allāh scorneth, there is none to give him honour. Lo! Allāh doeth what He will";[172] the seventh is in *al-Furqān* after the words, "And when it is said unto them: Adore (prostrate to) the Beneficent! they say and what is the Beneficent? Are we to adore (prostrate to) whatever thou (O Muhammad) biddest us? And it increaseth aversion in them";[173] the eighth is in *al-Naml* after the words, "So that they worship not (prostrate not to) Allāh, Who bringeth forth the hidden in the heavens and the earth, and knoweth what ye hide and what ye proclaim, Allāh: there is no God save Him, the Lord of the tremendous Throne";[174] the ninth is in *al-Sajda* after the words, "Only those believe in our revelations who, when they pray are reminded of them, fall down prostrate and hymn the praise of their Lord, and they are not scornful";[175] the tenth is in *Ṣād* after the words, "And David guessed that We had tried him, and he sought forgiveness of his Lord, and he bowed himself and fell down prostrate and repented";[176] and the eleventh is in *Fuṣṣilat* after the words, "And of His portents are the night and the day and the sun and the moon. Adore not (prostrate not to) the sun nor the moon; but adore (prostrate to) Allāh Who created them, if it is in truth Him whom ye worship", and it is said that it is after the words, "But if they are too proud—still those who are with thy Lord glorify Him night and day and tire not".[177]

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[167] Qurʾān 7 : 206.
[168] Qurʾān 13 : 15.
[169] Qurʾān 16 : 49, 50.
[170] Qurʾān 17 : 109.
[171] Qurʾān 19 : 58.
[172] Qurʾān 22 : 18.
[173] Qurʾān 25 : 60.
[174] Qurʾān 27 : 25, 26.
[175] Qurʾān 32 : 15.
[176] Qurʾān 38 : 25.

Al-Shāfiʿī said that there are fourteen prostrations. Three of these are in the *Mufaṣṣal sūrahs*, that is, in *al-Inshiqāq*, *al-Najm*, and *al-ʿAlaq*, but he did not believe that there was a prostration in *Ṣād*, the occasion there, in his view, being that of thankfulness. Aḥmad said that there are fifteen prostrations adding a second one in *al-Ḥajj* and including the prostration in *Ṣād*. Abū Ḥanīfa said that there are twelve prostrations. Al-Ṭaḥāwī said that this (the number in Abū Ḥanīfa's opinion) includes every prostration that is expressed in the form of a report.

The reason for their disagreement stems from their choice of source regarding the number of prostrations. Some of them relied upon the practice of the jurists of Medina, some relied on analogy, and some relied on transmission. Those who relied upon practice (*ʿamal*) are Mālik and his disciples. Those who relied upon analogy are Abū Ḥanīfa and his disciples, as they maintained that all the prostrations that they agreed upon were found to be expressed in the form of a report—and these were the prostrations in *al-Aʿrāf*, *al-Naḥl*, *al-Raʿd*, *al-Isrāʾ*, *Maryam*, the first occasion in *al-Ḥajj*, *al-Furqān*, *al-Naml*, and *al-Sajda*—and this made it necessary to link with them the remaining prostrations expressed in the form of reports, which are in *Ṣād* and *al-Inshiqāq*. The three that occur in the form of a command were dropped, and these occur in *al-Najm*, the second occasion in *al-Ḥajj*, and in *al-ʿAlaq*. Those who relied upon transmission decided on the basis of what has been established from the Prophet (God's peace and blessings be upon him) about the prostrations in *al-Inshiqāq*, *al-ʿAlaq*, and *al-Najm*. This has been recorded by Muslim.[178] Al-Athram said that Aḥmad was asked about the prostrations in *al-Ḥajj*, and he replied that there were two prostrations. He declared the tradition of ʿUqba ibn ʿĀmir from the Prophet (God's peace and blessings be upon him) as authentic, and in which he said, "In *al-Ḥajj* there are two prostrations". This is also the opinion of ʿUmar and that of ʿAlī. The Qāḍī (Ibn Rushd) said: "This has been recorded by Abū Dāwūd".

Al-Shāfiʿī decided upon dropping the prostration in *Ṣād* on the basis of what has been related by Abū Dāwūd of the tradition of Abū Saʿīd al-Khudrī

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[177] Qurʾān 41 : 37, 38.

[178] The reference to this tradition occurs a few paragraphs below, where another similar tradition is deemed a *munkar* by Abū ʿUmar.

"that the Prophet (God's peace and blessings be upon him) was reciting the verse of prostrations in *sūrat Ṣād*, while on the pulpit, when he descended and prostrated. When he recited it on another day the people prepared themselves for the prostrations, so he said, 'This is repentance for a Prophet, but as I had seen you preparing for a prostration I came down and prostrated'". In this there is a kind of evidence for Abū Ḥanīfa in upholding the obligation of prostrations, for he (the Prophet) declared the underlying cause of relinquishment of prostrations in this prostration to be a cause that is absent in the other occasions of prostration. Thus, it becomes necessary that the *ḥukm* in which an underlying cause is absent be different from that in which the underlying cause is established. This is a kind of demonstrative proof, and there is disagreement over it, as it belongs to the category of assigning a metaphorical meaning to the indirect indication of the text (*dalīl al-khiṭāb*).

Some jurists, who did not uphold the occurrence of prostrations in the *Mufaṣṣal sūrahs*, argued on the basis of the tradition of ʿIkrima from Ibn ʿAbbās, which has been recorded by Abū Dāwūd, "that the Messenger of Allāh (God's peace and blessings be upon him) did not prostrate in any of the *Mufaṣṣal sūrahs* from the time that he migrated to Medina". Abū ʿUmar said that it[179] is a *munkar* (inconsistent) tradition, as Abū Hurayra who has related the prostrations of the Prophet in the *Mufaṣṣal sūrahs* did not become a Companion of the Prophet (God's peace and blessings be upon him) except in Medina. Trustworthy narrators have related from him "that the Prophet (God's peace and blessings be upon him) prostrated in *al-Najm*".[180]

They disagreed about the time of the prostrations. A group of jurists prohibited the prostrations during a period of time that is proscribed for prayer. This is the opinion of Abū Ḥanīfa in accordance with his principle of prohibiting the obligatory prayers in these timings.[181] Mālik has also disallowed these in the *Muwaṭṭaʾ*, as these are supererogatory in his view, and supererogatory worship is prohibited during these timings according to him. Ibn al-Qāsim has related from him that the prostrations may be made after *ʿaṣr* as long as the sun has not turned yellow or changed in colour. Likewise after the morning prayer. This was upheld by al-Shāfiʿī. This is based on the view that the prostrations are a *sunna*, and the *sunan* may be observed in these timings as long as the sun is not about to set or about to rise.

About the person towards whom the *ḥukm* is directed they agreed unanimously that it is directed towards the person reciting, whether in prayer or otherwise. They disagreed about whether the listener is obliged to prostrate. Abū Ḥanīfa said that he is under an obligation to prostrate, and he did not differentiate between a man or a woman. Mālik said that the listener is to prostrate on two occasions: first, when he has sat down to listen to the Qurʾān, and second, when the reciter himself prostrates, and that the latter can validly be an *imām* for the listener. Ibn al-Qāsim has related from Mālik that the listener is to prostrate himself once he has sat down to listen to the reciter even if the reciter is not qualified to be an *imām*.

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[179] This apparently refers to a tradition attributed to Abū Hurayra about the *Mufaṣṣal sūrahs*. This tradition has not been reproduced by the author in the discussion; however, it appears to be similar in content to, and could be a version of, the tradition following it, which has also been referred to above. It is also possible that some text before this sentence is missing.

[180] This is the authentic tradition referred to in the paragraph before last above.

[181] These prostrations are also obligatory in his view.

The majority of the jurists said about the description of the prostrations that when the person reciting prostrates he should pronounce the *takbīr* on lowering himself and upon rising. Mālik's opinion has differed on the issue when the person is not observing prayer, but when he is praying he is to pronounce *takbīr* without a dispute.

V

THE BOOK OF *ZAKĀT*

A comprehensive discussion[191] of this form of worship, after the determination of its obligation, is covered in five chapters. The first chapter is about the persons on whom it is obligatory. The second chapter deals with the identification of the kinds of wealth on which it is imposed. The third chapter is about the identification of the rates and the amounts on which it is levied. The fourth chapter is about the identification of the periods during which it is levied and the periods in which it is not. The fifth chapter is about the identification of the persons for whom it is to be paid and of the amounts due to them.

The determination of its obligation through the Qurʾān, the *sunna*, and from *ijmāʿ* (consensus) is well-known, and there is no dispute about this.

5.1. Chapter 1 The Persons on whom *zakāt* is Obligatory

They agreed that it is obligatory upon every Muslim who is free, *bāligh*, sane, and who owns wealth equal to the (minimum) prescribed scale (*niṣāb*) through a complete (unencumbered) ownership. They disagreed about its obligation upon the orphan, the insane, the slaves, the *ahl al-dhimma*, and the person with deficient (encumbered) ownership like a person who is in debt or is a creditor, or when for example the capital (of the wealth) is held in a trust (*ḥabs, waqf*).

With respect to minors, one group said that *zakāt* is obligatory on their wealth. This was the opinion of ʿAlī, Ibn ʿUmar, Jābir, and ʿĀʾisha from among the Companions, and of Mālik, al-Shāfiʿī, al-Thawrī, Aḥmad, Isḥāq, Abū Thawr, and others from among the jurists of the provinces. Another group said that there is no *zakāt* at all on the wealth of the minor. This was the opinion of al-Nakhaʿī, al-Ḥasan, and Saʿīd ibn Jubayr from the Tābiʿūn. One group of jurists made a distinction between the yield of the land and wealth not derived from the land. They said that there is *zakāt* on the yield from the land, but there is no *zakāt* on what is besides this like cattle, liquid assets, goods (chattel). This was the opinion of Abū Ḥanīfa and his disciples. Yet another group distinguished between liquid assets and other things saying that there is *zakāt* on the wealth except on liquid assets.

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[191] Editor's note: The manuscript we are using deals with the Book of *Zakāt* before the Book of Fasting; therefore, we are following the same order, although the Egyptian manuscript deals with the Book of Fasting first.

The reason for their disagreement over the persons on whom *zakāt* is obligatory arises from their dispute over the nature of the legal form of *zakāt*, whether it is a kind of worship like prayer and fasting or whether it is an obligatory right of the poor over the rich. Those who said that it is worship stipulated *bulūgh* of the person as a condition (for the obligation), while those who said that it is an obligatory right of the poor and the needy over the wealth of the rich did not take into account *bulūgh* of the person, among other things. Those who made a distinction between the yield of the land and what is not derived from it, and also between visible and invisible wealth, for them I am not aware at this time of the evidence relied upon.

Most of the jurists agree that there is no *zakāt* on all categories of the *ahl al-dhimma*, except what is related by a group about the imposition of *zakāt* for the Arab Christians of Banū Taghlab, I mean, for example, that an amount should be taken from them equal to what is taken from the Muslims on all things. Those who held this opinion include al-Shāfiʿī, Abū Ḥanīfa, Aḥmad, and al-Thawrī. There is no narration of an opinion from Mālik on this. These jurists came to this decision on the basis of what ʿUmar ibn al-Khaṭṭāb decided for these people, and it appears that they considered this to be a precedent, but the principles conflict with it.

The jurists are divided on the question of the obligation of *zakāt* on slaves. There are three opinions. One group said that there is no *zakāt* at all on their wealth. This is the opinion of Ibn ʿUmar and Jābir from among the Companions and of Mālik, Aḥmad, and Abū ʿUbayd from among the jurists. Another group said that, in fact, *zakāt* on the wealth of the slave is levied on the master. This was al-Shāfiʿī's opinion as related by Ibn al-Mundhir, and of al-Thawrī, Abū Ḥanīfa, and his disciples. A third group imposed *zakāt* on the slave for his wealth. This is related from Ibn ʿUmar (again) from among the Companions, and it was the opinion of ʿAṭā" from among the Tābiʿūn, and of Abū Thawr, the Ẓāhirites, and some others from among the jurists. The majority of those who said that there is no *zakāt* on the wealth of the slave also maintained that there is no *zakāt* on the wealth of the *mukātab* until he is free. Abū Thawr, however, held that there is *zakāt* on the wealth of the *mukātab*.

The reason for their disagreement over *zakāt* on the wealth of the slave is based on their dispute over whether the slave owns his wealth through a complete ownership or whether this is deficient. Those who maintained that his ownership is deficient and it is the master who is the owner, as his wealth cannot be separated from that of the master, said that the *zakāt* is due from the master. Those who maintained that *zakāt* is to be imposed on one of the two persons who owns it through a complete ownership said that this person is not the master for the wealth is in the possession of the slave not in that of the master, and it is also not the slave's for the master has the right to take it away from him. They, therefore, held that there is no *zakāt* at all on the wealth of the slave. Those who maintained that possession of the wealth determines the incidence of *zakāt*, because of the right of disposal in it on the analogy of the right of disposal of a free man, said that the *zakāt* is to be imposed on the slave, especially in the view of those who held that the general communication of the law includes both free men and slaves and that the payment of *zakāt* is a worship that relates to the subject (*mukallaf*) because of his right of disposal in the wealth.

The jurists disagreed about those owners (of wealth) who are in debt, and whose debts are greater than their wealth, or they cover an amount on which *zakāt* can be levied while they have in hand wealth on which *zakāt* is due. A group of jurists said that there is no *zakāt* on the wealth, whether it is in the form of grain or something else, unless the debts are deducted from it. If the remaining amount (after payment of debts) reaches the minimum amount which is subject to *zakāt*, it is to be paid otherwise not. This was the opinion of al-Thawrī, Abū Thawr, Ibn al-Mubārak, and a group of jurists. Abū Ḥanīfa and his disciples said that debts do not ward off *zakāt* on grain, but they do prevent it on other kinds of wealth. Mālik said that debts prevent *zakāt* on liquid assets alone, unless these include goods that can pay off the debt, in which case *zakāt* is not prevented. A group of jurists maintained, in contrast to the first view, that debts do not prevent *zakāt* at all.

The reason for their disagreement (again) stems from their dispute on whether *zakāt* is a form of worship or a right assessed on the wealth for the needy. Those who maintained that it is a right due to needy said that there is no *zakāt* on the wealth of a person who is burdened with debt, as the right of the creditor is prior, with respect to time, to the right of the needy, for the wealth in reality is owned by the creditor and not the person who has possession over it. Those who maintained that it is worship said that it is to be levied on the person who has possession of it, as that is the basis of liability (*taklīf*) and a criterion for imposing the obligation on the subject irrespective of his being in debt. Further, there is a conflict here between two kinds of rights, the right of Allāh and the right of man, and the right of Allāh has a higher priority for being met. Yet the dropping of *zakāt* in the case of the debtors is closer to the purposes of the (divine) law, because of the words of the Prophet (God's peace and blessings be upon him), "(It comprises) a charitable donation that is acquired from the wealthy and granted to the poor", and debtors are not wealthy. Those who distinguished between grain and other kinds of wealth, and between liquid assets and tied assets, for them I cannot find a clear analogy. Abū ʿUbayd used to say that if it cannot be known whether the person has a debt, except by his own claim, he is not to be considered truthful, but if it can be known (through other means) *zakāt* is not to be levied on him. This does not contradict the opinion of those who maintain that *zakāt* is to be dropped because of debt, in fact, it contradicts those who maintain that he is to be considered truthful for claiming a debt just as he is deemed truthful in stating the amount of his wealth.

The wealth that exists as a liability, that is, as a liability upon someone else (credit), and is not in the possession of the owner, is also a debt, and about this too they differed. A group of jurists said that there is no *zakāt* on this even when it returns to the hands of its owner until the conditions of *zakāt* are met while it is with the possessor, and this is the passage of a year (*ḥawl*) while it is in his possession. This is one of the two opinions of al-Shāfiʿī, and it was maintained by Abū Thawr or is derivable by analogy from his views. Another group of jurists said that if he comes to possess it he is to be charged for the past years (for which it stood unpaid). Mālik said that he is to be charged *zakāt* for a single *ḥawl* (year), even if it has stayed with the debtors for a number of years, in case the principal has been given in return for compensation. If it was not linked to compensation, like inheritance, then the *ḥawl* begins from the moment of possession. There are a number of details about this in the School (Mālik's).

In this topic there is also their dispute about *zakāt* on fruit when the trees belong to a trust, and about the land held on a tenancy, as to who is liable for the *zakāt* on the yield, whether it is owed by the landlord or the tenant. There is also their disagreement over *kharāj* land when it is transferred from those liable for *kharāj* to the Muslims, who are liable for *ʿushr*. Then there is the dispute over *ʿushr* land when it is converted to *kharāj* land, that is given to the *ahl al-dhimma*. It appears that the reason for dispute over all this is due to the fact that these are deficient forms of ownership.

5.1.1. Issue 1

This issue relates to fruit from trees, when the trees are the property of a trust. Mālik and al-Shāfiʿī used to impose *zakāt* on them, while Makḥūl and Ṭāwūs used to say that there is no *zakāt* on them. A group of jurists used to make a distinction when the trees were a trust for the needy generally or for a specified group. They imposed *zakāt* on them when the beneficiaries were a determined (specified) group, but they did not do so when the beneficiaries were the needy generally. There is no justification in imposing the *zakāt* on the needy as two disqualifying factors operate in this: first, it amounts to a deficient ownership, and second, the needy are an indeterminate category of people on whom the *zakāt* funds are to be spent and not those from who it is due.

5.1.2. Issue 2

The second issue relates to land given out on rent. It deals with the question as to who is liable for *zakāt* on the yield of this land. A group of jurists said that the *zakāt* is to be levied on the tenant, who is the owner of the plants. This was the opinion of Mālik, al-Shāfiʿī, al-Thawrī, Ibn al-Mubārak, Abū Thawr, and a group of jurists. Abū Ḥanīfa and his disciples maintained that *zakāt* is due from the owner of the land and the person who rents it from him does not owe anything.

The reason for their disagreement arises from the question of whether *ʿushr* is a duty related to the land or to cultivation or to both. No one has said that it is a duty related to both when, in fact, it is a duty related to both. They agreed that it is a duty incumbent upon one of the two, but they disagreed on which one has precedence for being associated with a point on which there is agreement, and that is the occasion when the crop as well as the land belong to a single owner. The majority maintained that it is related to the thing from which *zakāt* is to be paid, and that is grain (or the yield). Abū Ḥanīfa maintained, however, that it is related to the thing that is the basis of the obligation, and that is land.

With respect to their dispute over *kharāj* land, when it is transferred to the Muslims, as to whether *ʿushr* is imposed on it along with *kharāj* or whether there is no *ʿushr*, the majority maintained that there is *ʿushr*, that is, *zakāt*, while Abū Ḥanīfa and his disciples held that there is no *ʿushr* on it. The reason for their disagreement stems, as we have said, from the question of whether *zakāt* is a duty related to the land or to the crop. If we maintain that it is a duty related to the land, then, two duties cannot be linked to it at the same time, and these are *ʿushr* and *kharāj*. If we maintain that *zakāt* is linked to the crop, then, *kharāj* would be assigned to the land and *zakāt* to the crop. This dispute arises because the ownership is deficient as we have stated and it was because of this that the jurists disagreed over the sale of *kharāj* land. If, however, *ʿushr* land is transferred to a *dhimmī* who cultivates it, the majority maintain that there is no liability on him. Al-Nuʿmān held that when the *dhimmī* buys *ʿushr* land it is converted into *kharāj* land. It appears that he considered *ʿushr* to be a duty owed on Muslim land and he considered *kharāj* to be a duty owed on the land of the *dhimmīs*, but on the basis of this rule it was necessary for him to say that if the *kharāj* land was transferred to the Muslims it would be converted to *ʿushr* land, just as in his view if the *ʿushr* land was transferred to a *dhimmī* it would be converted to *kharāj* land.

5.1.3. Issue 3: Issues related to the owner of wealth

There are sub-issues related to the owner of wealth the discussion of which is suitably placed is this section. The first of these is (the situation) when a man sets aside *zakāt* but it is lost. Second, when the setting aside of *zakāt* is possible but when part of the wealth is destroyed before *zakāt* is set aside. Third, where the owner was under an obligation to pay *zakāt*, but died before paying it. Fourth, who is to pay *zakāt* if he sells off the crop or fruit on which *zakāt* was due, and similarly when he gives it away as a gift.

5.1.3.1. Sub-issue 1

This (issue) deals with the problem where the owner sets aside *zakāt* and it is lost. A group of jurists said that he is to be given credit for it. Another group said that he is liable for it till he delivers it to its location. A third group made a distinction between his setting it aside later than when it was possible to do so and between setting it aside (promptly) at the beginning of the time when the obligation arises and when it is possible to do so. Some of these jurists said that if he sets it aside some days after the time at which the obligation arises and the possibility to do so, then he is liable but if he sets it aside at the first moment obligation arises and there was no negligence on his part he is not liable. This is a well-known opinion in Mālik's school. A fourth group of jurists said that if there was negligence on his part he is to compensate for it, but if he was not negligent he is to pay *zakāt* on the remainder alone. This was the opinion of Abū Thawr and al-Shāfiʿī. A fifth group said that what has been lost is to be counted as a loss for all parties, and the needy people as well as the owner are to be considered co-owners in proportion to their shares in the remaining wealth, as (is the case) with two partners when part of the common capital is lost but remain partners in the residue in the same ratio. Thus, we arrive at five opinions on the issue: first, that he is not to compensate for the loss at all; second, that he always compensates; third, that he compensates if he was negligent, but does not if he was not negligent; fourth, that he compensates if he was negligent and pays *zakāt* on the residue if he was not; and fifth, that they (the owner and the needy) become partners in the remaining wealth.

5.1.3.2. Sub-issue 2

When part of the wealth is lost after the commencement of the obligation and before it was possible to set aside *zakāt*, a group of jurists said that he pays *zakāt* on the residue, while another group held that the needy and the owner of the wealth are treated as partners part of whose capital has been lost.

The reason for their disagreement stems from the comparison between *zakāt* and debts, that is, the duty is associated with liability and not with the substance of the wealth, or it is its comparison with duties that are related to the substance of the property not with the liability of the person who is in possession of the wealth, as in the case of trustees and others. Those who considered the owners of wealth to be similar to the trustees said that if he sets it aside and it is lost there is nothing due from him. Those who considered them similar to debtors said that they are to compensate (for the loss). Those who made a distinction on the basis of negligence, and the absence of it, associated them with trustees from all aspects, as the trustee compensates (for the loss) in case of negligence. Those who maintained that if he was not negligent he is to pay *zakāt* on the residue compared the person who had lost part of his wealth after setting aside *zakāt* with one who had lost part of his wealth before the commencement of the obligation; just as that person pays *zakāt* at the time of the obligation on what exists with him, this person will pay *zakāt* on what exists with him. The reason for the disagreement arises from the variation in the association of the owner with a debtor, a trustee, a partner, and with one who has lost part of his wealth before the obligation.

If, however, *zakāt* became due and he was able to set it aside but did not do so till part of his wealth was lost, the jurists agreed, as far as I know, that he is liable except in the case of cattle, according to those who hold that the condition for their obligation is the arrival of the *zakāt* collector after the *ḥawl*, and this is Mālik's opinion.

5.1.3.3. Sub-issue 3

This relates to the person who dies after the commencement of the obligation of *zakāt*. A group of jurists said that it is to be taken out from his capital.[192] This was the opinion of al-Shāfiʿī, Aḥmad, Isḥāq, and Abū Thawr. Another group said that *zakāt* is to be paid only if he leaves a testament to the effect that it is to be paid from his estate. In that case, it is to be taken out from the third of the estate. Otherwise nothing is due. Some of these jurists said that *zakāt* is to be satisfied first if it is as much as the third or is less than that, while others said that it is not to be satisfied first. Both opinions are narrated from Mālik, but the well-known opinion is that it is to be treated as a bequest.

5.1.3.4. Sub-issue 4

With respect to their disagreement about wealth that is sold after *zakāt* has become due on it, a group of jurists said that the person from whom *zakāt* is due (the seller) may take the *zakāt* from the wealth itself, and the buyer is to have recourse to the seller for its value. This was the opinion of Abū Thawr.

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[192] That is, from his estate after payment of the cost of his funeral and before distribution among his heirs.

Another group of jurists said that the sale is rescinded, and this was al-Shāfiʿī's opinion. Abū Ḥanīfa said that the buyer has an option between the execution of the sale or its revocation, and the *ʿushr* is to be taken from the fruit or from the grain on which *zakāt* was due. Mālik said that the seller is liable for the payment of *zakāt*.

The reason for their disagreement arises from the comparison of the sale of the property with its loss and destruction. Those who considered them similar said that *zakāt* is the liability of the person destroying the property or causing its loss. Those who maintained that sale does not amount to destruction of the substance of the wealth nor its loss, but amounts to sale by a person of what does not belong to him said that *zakāt* is linked to the substance of the wealth. Whether the sale is to be rescinded is a separate discussion that will be taken up in the section on sales, God willing. Their dispute about *zakāt* on wealth that has been alienated by a gift is of a similar nature.

In some of these issues that we have mentioned there are detailed discussions in the School that we have not deemed proper for presentation here, as that is not compatible with our aim. Further, it becomes difficult to give the reasons for these distinctions, because most of them are based on *istiḥsān*, like their discussion of the details of debts that are liable for *zakāt* and those that are not, and debts that cause a waiver of *zakāt* and those that do not. This, then, is what we considered should be mentioned in this chapter and it relates to the identification of the person from whom *zakāt* is due, to the conditions of ownership with which it becomes due, and to the *aḥkām* of the person from whom it is due.

One well-known *ḥukm* from among the *aḥkām* of such a person remains and that relates to the question as to what is the *ḥukm* of the person who refuses to pay *zakāt*, but does not deny its obligation.

Abū Bakr (God be pleased with him) said that his *ḥukm* is that of the apostate. This is how he ruled in the case of those Arabs who refused to pay *zakāt* (after the death of the Prophet), and he fought with them and made their children captive. He was opposed in this by ʿUmar (God be pleased with him) who freed those of them who had been made captive. The majority adopted ʿUmar's view. A group decided to impute disbelief to those who refused to perform any of the religious obligations although they did not deny their being obligatory.

The reason for the disagreement stems from whether the term "faith (*īmān*)", which is the opposite of disbelief, can be applied to mean belief alone without practice, or whether the existence of accompanying practice is one of its conditions. Some of them held that one of its conditions is accompanying practice. Some did not stipulate this even when the person did not render verbal testimony (*shahāda*) for it. If he merely considered it to be true, he was considered to be a believer (*muʾmin*) in the sight of Allāh. The majority, and these are the Ahl al-Sunna, maintained that acts (practice) are not to be stipulated in it, that is, for the conviction of faith the opposite of which is disbelief, except the pronouncement of *shahāda*, because of the words of the Prophet (God's peace and blessings be upon him), "I have been commanded to fight the people until they say *lā ilāha illallāh,* and then believe in me". Thus, he stipulated speech with knowledge (of faith), which is a kind of act. Those who held the remaining obligatory acts to be similar to speech said that all the obligatory acts are a condition for the knowledge that is faith. Those who considered speech to be the same as the remaining acts, about which the majority agreed that they are not a condition for the knowledge that is faith, said that confirmation (by words) alone is a condition for faith, and with that his *ḥukm* becomes, in the sight of Allāh, the *ḥukm* of a believer (*muʾmin*). The (other) two views are deviant, and the exemption from all the acts by two pronouncements of the *shahāda* is what the majority uphold.

5.2. Chapter 2 The Kinds of Wealth Subject to *Zakāt*

They agreed about some of the categories in which *zakāt* is obligatory and disagreed about others. The categories which they agreed upon include two kinds of minerals, namely, gold and silver that are not moulded into jewelry, three categories of animals, namely, camels, cows and sheep, two categories of grains namely wheat and barley, and two categories of fruit, namely dates and raisins. There is some dispute about olives.

They disagreed about gold only when it is in the form of jewelry. This is so as the jurists of Ḥijāz, Mālik, al-Layth, and al-Shāfiʿī, maintained that there is no *zakāt* on it if it is intended for adornment and wearing. Abū Ḥanīfa and his disciples said that *zakāt* is to be levied on it. The reason for disagreement stems from its vacillation between being goods and being gold and silver that are used primarily as a medium of exchange for all other things. Those who held them to be similar to goods, whose primary purpose is utility, said that there is no *zakāt* in it (jewelry). Those who considered them similar to gold and silver, the primary purpose of which is to facilitate exchange, said that it is subject to *zakāt*. There is also another reason for their disagreement, and that is the conflict of traditions on the issue. It is related from Jābir from the Prophet (God's peace and blessings be upon him) that he said, "There is no *zakāt* in jewelry". ʿAmr ibn Shuʿayb has related from his father from his grandfather "that a woman came up to the Messenger of Allāh (God's peace and blessings be upon him) accompanied by her daughter, who was wearing (two) gold bracelets on her hands. He said to her, 'Do you pay *zakāt* on these?' She said, 'No!' He said, 'Would it please you if Allāh were to put on your hands, on the Day of Judgment, two bracelets of fire?' She took them off and placing them before the Prophet (God's peace and blessings be upon him) and said, 'They are for Allāh and His Messenger'". Both traditions are weak, particularly the tradition of Jābir.

Another major reason for their disagreement stems from the vacillation of jewelry acquired for adornment between its being gold and silver, the primary purpose of which is facilitating trade and not utility, and between being goods, whose primary purpose is the opposite of gold and silver, that is, use and not facilitating exchange. I mean by exchange their existence as currencies. Mālik's opinion differed about jewelry that is acquired for renting. He held it once to be similar to jewelry that is acquired for adornment, and on another occasion held it to be similar to gold metal that is used for transactions.

Their disagreement over animals includes their dispute over species and their dispute over categories. The disagreement about species relates to horses, as the majority maintain that there is no *zakāt* in horses. Abū Ḥanīfa maintained that if they pasture freely and their purpose is breeding there is *zakāt* on them, that is, when they are male and female. The reason for the disagreement arises from the conflict of analogy with the text as well as what is believed to be a conflict of one text with another. The text implying that there is no *zakāt* on them is the saying of the Prophet (God's peace and blessings be upon him), "There is no *ṣadaqa* (*zakāt*) for a Muslim on his horse and on his slave". The analogy that conflicts with this general meaning is that the purpose (of keeping) pasturing horses is growth and breeding because of which they resemble cows and sheep. The text that is assumed to conflict with this general meaning is the saying of the Prophet (God's peace and blessings be upon him) when "he mentioned horse and did not forget the right of Allāh in the horses themselves [as animals subject to *zakāt*], as well as in their growth as wealth". Abū Ḥanīfa held that the right of Allāh here means the payment of *zakāt* on them, and this is to be applied to the pasturing horses among them. The Qāḍī (Ibn Rushd) said: "It is better if this text is treated as unelaborated (*mujmal*) rather than general, so that it may be used as an argument for *zakāt*". Abū Ḥanīfa was opposed by his two disciples, Abū Yūsuf and Muḥammad on this issue. It is, however, established from ʿUmar, may Allāh be pleased with him, that he used to assess *zakāt* on them. It is, therefore, said that this was done as a voluntary contribution by the payees.

Their disagreement over categories (of animals) relates to (freely) pasturing camels, cows, and sheep as distinguished from the non-pasturing animals. A group of jurists imposed *zakāt* on these three categories irrespective of their being pasturing or non-pasturing animals. This was the opinion of al-Layth and Mālik. The remaining jurists of the provinces held that there is no *zakāt* on the non-pasturing animals in these three categories.

The reason for their disagreement comes from the conflict of an absolute meaning with a qualified meaning, and the conflict of analogy with the general implication of a text. The absolute meaning is in the saying of the Prophet (God's peace and blessings be upon him), "In forty sheep is [the *zakāt* of] one sheep". The qualified meaning is in the saying of the Prophet (God's peace and blessings be upon him), "On pasturing sheep there is *zakāt*". Those who gave predominance to the absolute implication over the qualified said that there is *zakāt* in pasturing as well as non-pasturing (animals), while those who gave predominance to the qualified meaning said *zakāt* is levied on the pasturing animals alone. It is possible to say that the reason for disagreement stems also from the conflict of the indirect indication of the text (*dalīl al-khiṭāb*) with the general implication. The indirect indication of the text in the saying of the Prophet (God's peace and blessings be upon him), "On pasturing sheep there is *zakāt*", implies that there is no *zakāt* on a non-pasturing sheep, while the general meaning in the saying of the Prophet, "In forty sheep is one sheep", implies that pasturing sheep here have the same status as the non-pasturing sheep, but the general meaning (as a rule) is stronger than the indirect indication of the text, just as the predominance of the qualified meaning over the absolute meaning is better known. Abū Muḥammad ibn Ḥazm, however, held that the absolute meaning governs the qualified meaning, and that on sheep, pasturing or non-pasturing, there is *zakāt*, so also on camels, because of the saying of the Prophet (God's peace and blessings be upon him), "There is no *ṣadaqa* on what is less than five camels", and as there is no established tradition about cows it is necessary to rely upon consensus which says that *zakāt* is levied on pasturing cows alone. Thus, with the distinction of cows from the rest this becomes a third opinion.

The analogy that is in conflict with the general implication of the saying of the Prophet (God's peace and blessings be upon him), "In forty sheep is one sheep", implies that it is the pasturing animal whose purpose is growth and profit, which is present here to the maximum. Moreover, *zakāt* is levied on surplus wealth and surplus is usually found in pasturing wealth (animals), and it is because of this that *ḥawl* (passage of one year) has been prescribed for it. Those who restricted the general meaning with this analogy did not impose *zakāt* on animals other than pasturing animals, but those who did not restrict it and held that the general meaning is stronger imposed it equally on both categories.

This, then, is what they differed over in the case of animals on which *zakāt* is levied. They agreed unanimously that there is no *zakāt* on what is derived from animals, except in the case of honey, over which they differed. The majority maintained that there is no *zakāt* on it. A group of jurists said that *zakāt* is levied on it. The reason for their disagreement stems from their dispute over the authentication of the tradition regarding on this subject, and that is the saying of the Prophet (God's peace and blessings be upon him), "For every ten bags is one bag". It is recorded by al-Tirmidhī and others.

The crops (vegetation) over which they disagreed, after their agreement over the four categories we have mentioned, relates to the species of crops. Some of them did not uphold *zakāt* on anything besides these four categories. This was the opinion of Ibn Abī Laylā, Sufyān al-Thawrī, and Ibn al-Mubārak. Some of them maintained that *zakāt* is to be levied on any vegetation (crop) that can be stored as food. This is the opinion of Mālik and al-Shāfiʿī. Some said that *zakāt* is to be levied on all that is produced from the land, except for grass, wood, and cane. This was Abū Ḥanīfa's the opinion.

The reason for disagreement among those who restricted *zakāt* to the categories agreed upon and those who extended it to storable food, is related to their dispute over whether *zakāt* on these four categories is specific to their substance or is due to an underlying cause they represent, which is that they are used as food. Those who maintained that it is for the categories in themselves restricted the obligation to them, and those who said that it is because of the underlying cause that they are food extended the obligation to all kinds of food. The reason for disagreement among those who restricted the obligation to food and those who extended it to everything produced from land, except those over which there is consensus, like grass, wood, and cane, is based on the conflict of analogy with a general text. The text implying a general application is the saying of the Prophet (God's peace and blessings be upon him), "There is *ʿushr* in what is watered by the sky, but in that which is irrigated by the watering-can there is one-half of *ʿushr*". *Mā* (what), a relative pronoun like the term *alladhī*, implies generality. The other text implying the general meaning are the words of the Exalted, "He it is Who produceth gardens trellised and untrellised, and the date-palm, and crops of divers flavour, and the olive and the pomegranate, like and unlike. Eat ye of the fruit thereof when it fruiteth, and pay the due thereof upon the harvest day".[193] Analogy implies that the purpose of *zakāt* is the elimination of need, and this is usually done through what is food. Those who restricted the general meaning with this analogy waived *zakāt* on what is other than food, but those who gave predominance to the general implication extended it to what is besides it, except the things excluded by consensus.

Those who agreed about food differed over certain things with reference to their dispute over whether these are in the category of food, and whether analogy can be constructed upon that which is agreed upon. This is like the disagreement of Mālik and al-Shāfiʿī over olives. Mālik upheld the obligation of *zakāt* on them, while al-Shāfiʿī disallowed this in his later opinion rendered in Egypt. The reason for disagreement is based on their dispute over whether olives are storable food. Of the same nature is the disagreement of Mālik's disciples about the obligation of *zakāt* on figs. Some of them held that *zakāt* is to be levied on fruits but not vegetables, and this is the opinion of Ibn Ḥabīb, because of the words of the Exalted, "He it is Who produceth gardens trellised and untrellised, and the date-palm, and crops of divers flavour, and the olive and the pomegranate, like and unlike. Eat ye of the fruit thereof when it fruiteth, and pay the due thereof upon the harvest day".[194] Those who distinguished between fruit and olives through the interpretation of the verse have no basis, except a very weak one.

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[193] Qurʾān 6 : 142.

They agreed that there is no *zakāt* on goods (chattel includes slaves) that are not intended for trade, but they disagreed about the imposition of *zakāt* on goods that are employed in trade. The jurists of the provinces upheld its obligation, but the Ẓāhirites disallowed it. The reason for their disagreement arises from their dispute about the imposition of *zakāt* through analogy, and also their dispute over the authenticity of the tradition of Samura ibn Jundub, who said, "The Messenger of Allāh (God's peace and blessings be upon him) used to order us to set aside *zakāt* on goods that we included in trade". It is also related from the Prophet (God's peace and blessings be upon him) that he said, "Pay *zakāt* on wheat". The analogy on which the majority relied is that the goods acquired for trade have growth as their purpose and therefore resemble the three species on which *zakāt* is levied by agreement, that is, crops, cattle, and gold and silver. Al-Ṭaḥāwī believed that *zakāt* on goods is established from ʿUmar and from Ibn ʿUmar and none of the Companions opposed them. Some thought that such a situation amounts to a consensus of the Companions, that is, when an opinion is transmitted from one of them, and nothing is transmitted from another Companion against it, but this is weak.

5.3. Chapter 3 The *Niṣāb* and Rates of *Zakāt*

This chapter deals with the identification of the *niṣāb* of each category of wealth on which *zakāt* is levied, and that is the quantity on which *zakāt* is charged for those items reaching the *niṣāb*. It also deals with the identification of the amount due on an item, that is, on itself and its quantity. We shall mention those things that they agreed upon and those over which they differed for each of the species, whether agreed upon or disputed. We will divide the discussion into sections. The first section is about gold and silver. The second is about camels. The third is about sheep. The fourth is about cows. The fifth is about crops. The sixth is about goods.

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[194] Qurʾān 6 : 142.

5.3.1. *Section 1: The* niṣāb *and rates for gold and silver*

They agreed that the quantity of silver on which *zakāt* is levied is five *awqiya* [ounces], because of the authentic saying of of the Prophet (God's peace and blessings be upon him), "There is no *ṣadaqa* in what is less than five *awqiya* [ounces] of silver". They disagreed about the stipulation of a *niṣāb* for minerals other than silver, and also about the amount due on them. An *awqiya*, in their view, was equal to five *dirhams* by weight. They agreed that the amount due on this is one-fourth of a tenth. This applies to gold as well, that is, *zakāt* is one-fortieth. This is so as long as they are in a state when they do not cease to be minerals.

Under this topic they disagreed over five points: first, the *niṣāb* for gold; second, does *waqṣ* apply to them, that is, is there no increase in *zakāt* with an increase in an amount above the *niṣāb*;[195] third, can one category be added to another for purposes of *zakāt* so that they are considered as an independent category, that is, at the time of the fixation of the *niṣāb*, or are they two separate categories; fourth, is it a condition for the *niṣāb* that there be a single owner for it and not two; and fifth, the consideration of the *niṣāb* for minerals, their *ḥawl*, and the amount due on them.

5.3.1.1. Issue 1

The first issue deals with their disagreement over the *niṣāb* of gold. The majority of the jurists maintain that *zakāt* is to be levied on twenty *dīnārs* by weight as it would be in two hundred *dirhams*. This is the opinion of Mālik, al-Shāfiʿī, Abū Ḥanīfa, their disciples, Aḥmad, and a group of the jurists of the provinces. A group of jurists, including al-Ḥasan ibn Abī al-Ḥasan al-Baṣrī and most of the disciples of Dāwūd ibn ʿAlī, held that there is nothing to be paid on gold until it reaches an amount of forty *dīnārs*, and in that the amount due is one-fourth of a tenth – one *dīnār*. A third group said that there is no *zakāt* on gold until its market rate equals two hundred *dirhams*[196] or it has that value. If it reaches that value one-fourth of a tenth is due on it, whether its weight is twenty *dīnārs* or less or more. This applies to an amount that is less than forty *dīnārs*, but when it reaches an amount of forty *dīnārs* its own weight is to be taken into account and not its value in *dirhams* or its market rate or value.

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[195] *Waqṣ* is to be imagined in the *zakāt* on animals. For example, if one sheep is to be paid for five camels and someone has eight camels, that is, less than ten or two units of the *niṣāb*, it will be a case of *waqṣ*. The excess over one unit of the *niṣāb* is disregarded until the next unit of the *niṣāb* is complete. Here the author raises the question whether this could be applicable in the case of gold and silver.

[196] Note that the rate of gold is being worked out in silver *dirhams*.

The reason for their disagreement over the *niṣāb* of gold is that nothing has been established about it from the Prophet (God's peace and blessings be upon him), in the manner of the *niṣāb* of silver. The tradition related from al-Ḥasan ibn ʿUmāra through ʿAlī that the Prophet (God's peace and blessings be upon him) said, "Bring forth the *zakāt* on gold at [the rate of] one-half *dīnār* for every twenty *dīnārs*" is not, according to most, a tradition that can be acted upon, because of its being an isolated tradition narrated by al-Ḥasan ibn ʿUmāra alone. Those for whom this tradition was not authentic relied upon consensus, which is their agreement about the obligation of *zakāt* on forty *dīnārs*. Mālik, however, relied upon *ʿamal* (practice at Medina) and for that reason he said in *al-Muwaṭṭaʾ*: "The *sunna* over which there is no dispute among us is that *zakāt* is due on twenty *dīnārs* as it is due on two hundred *dirhams*". Those who determined that *zakāt* is due on what is less than forty did so on the basis of *dirhams*. As both gold and silver belonged to the same species, in their view, they deemed silver to be the basis, because a text has proved authentic for it. They, therefore, determined that (the value of) gold is to be dependent on that of silver by value and not on the basis of weight. This applies in the absence of consensus. In addition, in some traditions the words are, "There is no *ṣadaqa* in less than five *awqiya* (ounces) of *riqa*", and it is said that the term *riqa* applies to both gold and silver.

5.3.1.2. Issue 2

They disagreed over what is in excess of the value of the *niṣāb* (of gold and silver). The majority maintained that the weight in excess of two hundred *dirhams* is to be assessed in the same ratio, that is, one-fourth of a tenth. Those who upheld this opinion include al-Shāfiʿī, Abū Yūsuf and Muḥammad, the disciples of Abū Ḥanīfa, Aḥmad ibn Ḥanbal, and a group of jurists. Another group of jurists, mostly from Iraq, maintained that there is nothing due on what is in excess of two hundred *dirhams* until the excess reaches an amount of forty *dirhams*. If it does reach an amount of forty *dirhams*, one-fourth of a tenth is due on it, which is one *dirham*. This was the opinion of Abū Ḥanīfa, Zufar, and a group from among their disciples.

The reason for disagreement arises from their dispute about the authenticity of the tradition of al-Ḥasan ibn ʿUmāra, the conflict between the indirect indication of the text with it the tradition and also their vacillation between two bases in this context, each carrying a different *ḥukm*, and these bases are cattle and grains. Al-Ḥasan ibn ʿUmāra related his tradition from Abū Isḥāq from ʿĀṣim ibn Ḍumra from ʿAlī from the Prophet (God's peace and blessings be upon him), "I have waived the *ṣadaqa* on horses and slaves, but pay on gold and silver at (the rate of) one-fourth of a tenth from every two hundred *dirhams* being five *dirhams*, (and pay) one-half *dīnār* for every twenty *dīnārs*. There is nothing due on two hundred *dirhams* until a year has passed over them and then five *dirhams* are due on them, and what is in excess of this there is due a *dirham* for every forty *dirhams*, and for every four *dīnārs* in excess of the (first) twenty *dīnārs* is a *dirham* until the excess reaches forty *dīnārs*, and then for every forty *dīnārs* is a *dīnār* and for every twenty-four *dīnārs* is one-half *dīnār* and a *dirham*". The indirect indication of the text (*dalīl al-khiṭāb*) that is in conflict with it arises from the saying of the Prophet (God's peace and blessings be upon him), "There is no *ṣadaqa* on less than five *awqiya* of silver", as it means that what is in excess of this is subject to *ṣadaqa*. As to their vacillation between the two bases, which are cattle and grain, the text about *waqṣ* has been laid down for cattle, and they agreed that there is no *waqṣ* in grain. Those who held silver and gold to be similar to cattle said that *waqṣ* operates in it, while those who held them to be similar to grains said that there is no *waqṣ* in them.

5.3.1.3. Issue 3

The third issue deals with the adding of gold to silver for purposes of *zakāt*. According to Mālik, Abū Ḥanīfa, and a group of jurists *dirhams* may be added to *dīnārs*, and if the *niṣāb* is attained by combining them *zakāt* becomes due on it. Al-Shāfiʿī, Abū Thawr, and Dāwūd said that gold is not to be added to silver nor is silver to be added to gold.

The reason for their disagreement stems from whether *zakāt* is levied on each of these categories for a reason inherent in (each of) them or for an underlying reason that is common to all, and that is, as is maintained by the jurists, the attribute of their being sources of capital (currencies) and a means of valuating consumable things. Those who maintained that the consideration in each is the inherent substance, because of which the *niṣāb* for each is different, said that these are two separate species, as is the case with cows and sheep and, therefore, one is not to be added to the other. Those who maintained that the consideration in them is for the common attribute that we have mentioned, permitted the adding of one category to the other. It appears that the differences should be taken into account due to the variation in *aḥkām* insofar as the names are different and insofar as the commodities themselves are different, although the goal of making profit provides a common basis, and that is what was taken into account by Mālik (God bless him) in this topic, and also in the case of *ribā*.

Those who permitted adding of the categories together differed over the description of addition. Mālik held that they are to be combined on the basis of a determined currency (rate), and this is to be done by converting one *dīnār* into ten *dirhams*, as was held by him earlier. Thus, a person who has ten *dīnārs* and one hundred *dirhams* is under an obligation to pay *zakāt* on both, in his view. He permitted that any one of them may be converted into the other. Some other jurists, out of these, said that the addition is to be done on the basis of value at the time of *zakāt*. If, therefore, a person has one hundred *dirhams* and nine *mithqāls* having a value of one hundred *dirhams* he is under an obligation to pay *zakāt* on them. If the person has one hundred *dirhams* that are equal to eleven *mithqāls* and he also has nine *mithqāls*, then, he too is obliged to pay *zakāt* on them. Those who held this opinion include Abū Ḥanīfa, and a similar opinion was expressed by al-Thawrī, except that he preferred being careful in favour of the needy, that is, in the use of value or a determined rate (of conversion) for addition. Some of these jurists maintained that a category lesser in quantity should be (converted and) added to the one greater in quantity, and the category greater in quantity should not be added to the one lesser in quantity. Some other jurists said that it is always the *dīnārs* that are (converted and) added by value, whether they are less in number than the *dirhams* or more, and that the *dirhams* are not to be added to the *dīnārs*, as it is *dirhams* that are the basis and *dīnārs* are dependent on them, for there is no established tradition or consensus about *dīnārs* until they reach the number of forty. Some maintained that if the person possessed the *niṣāb* in one category, the other category is to be added to it whether it is less or more. They did not attempt to make a *niṣāb* through addition when neither reaches the *niṣāb* alone.

The reason for such entanglement was their desire to render the *niṣāb* of two separate things having different weights into a single *niṣāb*. All this is meaningless. Perhaps, those who desired to add one category to the other created a new *ḥukm* in the law where there is no *ḥukm*, for they came up with a *niṣāb* that is neither the *niṣāb* of gold nor that of silver. It is difficult, in practice relating to the imposition of liability and the issuance of injunctions, to lay down specific *aḥkām* for such probable cases. The *sharʿ*, therefore, remains silent on them and this silence leads to disagreement to such an extent. The Lawgiver had sent the Prophet (God's peace and blessings be upon him) for the removal of disputes.

5.3.1.4. Issue 4

According to Mālik and Abū Ḥanīfa, two partners are not under an obligation to pay *zakāt* individually until each one of them possesses the *niṣāb*. According to al-Shāfiʿī, combined wealth has the *ḥukm* of a single individual.

The reason for disagreement stems from the consensus upon the saying of the Prophet (God's peace and blessings be upon him), "There is no *ṣadaqa* on less that five *awqiya* (ounces) of silver". It is possible to understand from this that this is its *ḥukm* when there is one owner, and it is also possible to understand that this *ḥukm* applies to it when it is owned by one or more, except that as the purpose of the stipulation of *niṣāb* is relief from burden it is deemed necessary this *niṣāb* be for one owner. This is a better interpretation, Allāh knows best. Al-Shāfiʿī, it appears held it to be similar to the mixing of the two capitals,[197] but the effectiveness (in law) of mixing the capitals for purposes of *zakāt* is not agreed upon, as will be coming up later.

5.3.1.5. Issue 5

This relates to their disagreement about consideration of the *niṣāb* in minerals (in the form of ore) and the amount due on them. Mālik and al-Shāfiʿī did take the *niṣāb* into account in the case of minerals. The disagreement between the two is that Mālik did not stipulate the passage of one year for them, while al-Shāfiʿī did stipulate that, as we will discuss in the fourth chapter. Likewise, their views did not differ on the point that the amount due on them is one-fourth of a tenth. Abū Ḥanīfa did not stipulate a *niṣāb* in minerals nor the passage of a year. He said that the amount due is a fifth. The reason for disagreement is whether the term *rikāz* (treasure) includes minerals as well. The Prophet (God's peace and blessings be upon him) is reported to have said, "In the treasure-trove there is a fifth". Ashhab has related from Mālik that minerals found without effort are treated as *rikāz* and it is in these that there is a fifth. The reason for their disagreement over this derives from "the connotation of a word" (*dalālat al-lafẓ*), which is a basis for the common disputes that we have mentioned.

5.3.2. *Section 2: The* niṣāb *and the* zakāt *due on camels*

The Muslim jurists agreed that on every five camels there is a sheep, up to twenty-four. If there are twenty-five camels the *zakāt* due is one *bint makhāḍ* up to thirty-five camels, but if a *bint makhāḍ* is not available the *zakāt* due is one *ibn labūn* male. If the number of camels is thirty-six the *zakāt* due is one *bint labūn* up to forty-five camels. When the camels are forty-six the *zakāt* is on *ḥiqqa* up to sixty. If the camels are sixty-one the *zakāt* due is one *jadhaʿ* up to seventy-five camels. If the camels are seventy-six the *zakāt* due is two *bint labūn* up to ninety. When the camels are ninety-one the *zakāt* due is two *ḥiqqas* up to one hundred and twenty camels. All this is prescribed because it is established in the book of *ṣadaqa* laid down by the Prophet (God's peace and blessings be upon him), and which was followed after him by Abū Bakr and ʿUmar.

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[197] Al-Shāfiʿī holds the view that in a partnership the capital of two or more partners be mixed in a such a way that the capital of one partner cannot be distinguished from that of the other. This is normally the case in co-ownership. See the section on *sharika*.

They disagreed about it on certain points. These include: the issue of the number of camels over one hundred and twenty; the *ḥukm* in the case of lack of a camel of the required age when the person possesses one that is older than it or one that is younger; and the question whether *zakāt* is levied on very young camels, and if it is then what is due?

5.3.2.1. Issue 1

This relates to their disagreement about camels in excess of one hundred and twenty. Mālik said that if they exceed one hundred and twenty the collector has the choice of acquiring three *bint labūns* or two *ḥiqqas* up to one hundred and thirty camels, in which case there will be one *ḥiqqa* and two *bint labūns.* Ibn al-Qāsim, from among his disciples, said that he is to pay three *bint labūns* without a choice till the total is one hundred and eighty camels when the required payment is one *ḥiqqa* and two *bint labūns*. This was also al-Shāfiʿī's opinion. ʿAbd al-Malik ibn al-Mājishūn, one of the disciples of Mālik, said that the official collector is to take only two *ḥiqqas* without having a choice, up to one hundred and thirty camels.

The Kūfīs, Abū Ḥanīfa, his disciples, and al-Thawrī, said that if the camels are in excess of one hundred and twenty the assessment of what is due is to begin afresh. This means that there is one sheep due on every five camels in their view. If the total number of camels is one hundred and twenty-five, the *zakāt* due will be two *ḥiqqas* and a sheep, the two *ḥiqqas* being due on one hundred and twenty and the sheep on the five camels. If the total reaches one hundred and thirty there are two *ḥiqqas* and two sheep on them, and if it is one hundred and thirty-five the *zakāt* due is two *ḥiqqas* and three sheep up to one hundred and forty, in which case there will be four sheep and two *ḥiqqas* up to one hundred and forty-five. If the figure of one hundred and forty-five is reached the *zakāt* is two *ḥiqqas* and one *bint makhāḍ*, the two *ḥiqqas* being for one hundred and twenty camels and the *bint makhāḍ* for the twenty-five (excess) camels, as was the case in the initial assessment, and this up to one hundred and fifty camels. If the total reaches that figure there are three *ḥiqqas* due on it. If the figure exceeds one hundred and fifty the assessment is to revert to the initial ratios until the figure reaches two hundred camels, in which case the *zakāt* will be four *ḥiqqas*, when it is to revert to the initial assessment again. The jurists other than the Kūfians agreed that for whatever exceeds one hundred and thirty there is one *bint labūn* for every forty and one *ḥiqqa* for every fifty.

The reason for their disagreement in reverting the assessment to the original or not reverting it, arises from the conflict of traditions on the issue. It is established in the book of *ṣadaqa* that the Prophet (God's peace and blessings be upon him) said, "In a number exceeding one hundred and twenty, for every forty there is one *bint labūn* and for every fifty a *ḥiqqa*". It is related through Abū Bakr ibn ʿAmr ibn Ḥazm from his father from his grandfather from the Prophet (God's peace and blessings be upon him) that he caused the book of *ṣadaqa* to be written and it says, "If the camels are in excess of one hundred and twenty, the imposition of the obligation is to commence anew". The majority preferred the first tradition since it is more authentic. The Kūfians decided to prefer the tradition of ʿAmr ibn Ḥazm as this was proved authentic through the transmissions of ʿAlī and Ibn Masʿūd. They said that it is not proper that such a thing be anything but a precedent, for such a thing cannot be expressed on the basis of analogy (opinion).

The reason for disagreement between Mālik and his disciples on the one hand and al-Shāfiʿī on the other over what is in excess of one hundred and twenty up to one hundred and thirty is that they had no uniform method with which they could accommodate the forties and fifties. Those who maintained that what is between one hundred and twenty and up to the point where the calculation can be accommodated is *waqṣ*, said that there is nothing to be levied until the figure reaches one hundred and thirty (two forties plus one fifty), and this, they said, is according to the apparent meaning of the tradition. Al-Shāfiʿī and Ibn al-Qāsim held that there are three *bint labūns* in this case, as it is related from Ibn Shihāb that in the book of *ṣadaqa* it is stated that if the figure reaches one hundred and twenty-one the levy is three *bint labūns*, and if the figure reaches one hundred and thirty the levy is two *bint labūns* and one *ḥiqqa*. The reason for disagreement between Ibn al-Mājishūn and Ibn al-Qāsim stems from the conflict between the apparent meaning of an established tradition and an explanatory text that occurs in this tradition. Ibn al-Mājishūn preferred the apparent meaning, because of the agreement about its authenticity, while Ibn al-Qāsim and al-Shāfiʿī placed a construction upon the *mujmal* (obscure) meaning through the explanatory text. It appears that by granting an option to the official collector, Mālik tried to reconcile the two traditions, Allāh knows best.

5.3.2.2. Issue 2

This issue deals with the case when a camel of the right age is not available among the camels, but the assessee has camels of an age that is either higher or is lower. Mālik said that he is to be obliged to buy a camel of that age. A group of jurists said that he is to deliver the camel that he possesses along with a payment of twenty *dirhams* if the age of the camel that he has is less (than the prescribed age), or he may give two sheep. If the age of the camel that he has is greater, the collector of the *ṣadaqa* is to pay him either twenty *dirhams* or two sheep. This is established in the book of *ṣadaqa*, so there is no purpose in arguing over it. Perhaps this tradition did not reach Mālik. Al-Shāfiʿī and Abū Thawr based their opinions on this tradition. Abū Ḥanīfa said that the obligation is to pay the value, and this on the basis of his principle of assessing values for the purpose of *zakāt*. Another group of jurists said that he is to deliver the camel that he has and adjust the value of the difference.

5.3.2.3. Issue 3

The third issue is whether *zakāt* is levied on very young camels, and if it is due then what is the liability? A group of jurists said that *zakāt* is levied on them, while another group said that it is not.

The reason for their disagreement arises from whether the term used for the species includes very young camels. Those who maintained that there is no *zakāt* on them, and these are Abū Ḥanīfa and a group of jurists from Kūfa, argued on the basis of the tradition of Suwayd ibn Ghafla, who said, "The collector appointed by the Prophet (God's peace and blessings be upon him) came over to us and I sat with him when I heard him say, 'It is my mandate that I do not take one of the suckling baby camels and that I do not combine distinctive categories nor do I separate combined things.' He [Suwayd] said, 'A man came up to him with a camel with a mounting hump (*kawmāʾ*), but he refused to accept it'". Some of those who made *zakāt* obligatory on young camels said that he is to be obliged to buy a camel of the right age due on them, while others said he may take one out of them, which is closer to analogy. They disagreed in the same way over calves and kids.

5.3.3. *Section 3: The* niṣāb *for cows and the* zakāt *due on them*

The majority of the jurists maintain that for every thirty cows *zakāt* in the form of a one-year-old cow (*tabīʿ*) is due and for every forty cows a two-year-old cow (*musinna*). A group of jurists said that for every ten cows one sheep is due, and this rate applies to up to thirty for which a one-year-old cow is due. It is said that when the number reaches twenty-five there is one cow due on them up to seventy-five, and two cows are due when they exceed this number. If the number reaches one hundred and twenty, then, for every forty one cow is due, and this is related from Saʿīd ibn al-Musayyab. The jurists differed over the number between forty and sixty. Mālik, al-Shāfiʿī, Aḥmad, al-Thawrī, and a group of jurists held that there is nothing due on the cows that exceed forty until the number reaches sixty. If the number reaches sixty there are two one-year-old cows for them up to seventy. At seventy there is one two-year-old cow and one one-year-old cow up to eighty. At eighty there are two two-year-old cows up to ninety. At ninety there are three one-year-old cows up to one hundred. At hundred there are two one-year-old cows and one two-year-old cow and so on for whatever goes beyond that. Thus, for every thirty there is a one-year-old cow and for every forty a two-year-old cow.

The reason for their disagreement over the *niṣāb* stems from the fact that the tradition of Muᶜādh is not agreed upon for its authenticity, for which reason it has not been recorded by al-Bukhārī or Muslim. The reason for disagreement amongst the jurists of the provinces over *waqṣ* in cows is that it is reported in this tradition of Muᶜādh that he had suspended judgment in the case of *waqṣ* and had said that he would decide after asking the Prophet (God's peace and blessings be upon him). But when he had reached him he had found that he (God's peace and blessings be upon him) had died. As there was no text in this the *ḥukm* was sought by analogy. Those who constructed the analogy upon camels and sheep did not consider anything to be due in *waqṣ*, while in the case of those who maintained that the principle for *waqṣ* was the imposition of *zakāt*, unless exempted from it by an evidence, it was necessary that there be no operation of *waqṣ* in cows, as there is no evidence from consensus or from any other source.

5.3.4. *Section 4: The* niṣāb *for goats and the* zakāt *due on them*

They agreed under this topic that for sheep reared on (free) grazing one sheep is due if the number reaches forty sheep, up to one hundred and twenty. For the excess over one hundred and twenty there are two sheep up to a number of two hundred. If the number exceeds two hundred, three sheep are due up to three hundred, and if it exceeds three hundred, then, for every hundred sheep there is one sheep. This is the opinion of the majority, except al-Ḥasan ibn Ṣāliḥ, who said that if the number of sheep reaches three hundred and one the number of sheep due on them are four, and if the number is four hundred and one, five sheep are due on them. This opinion has been related from Manṣūr from Ibrāhīm. The authentic traditions related from the book of *ṣadaqa* support the opinion of the majority.

They agreed that goats are to be combined with sheep, but they differed about the category (species) from which the collector is to take *zakāt*. Mālik said that he is to take the *zakāt* from the category which has the greater number (of animals), and if they are equal the collector has a choice. Abū Ḥanīfa said that if the categories differ the collector is given a choice. Al-Shāfiᶜī said that he is to take average quality animals from the different categories because of an opinion related from ᶜUmar (God be pleased with him) that "we assess them for young lambs that are tended by the shepherd, but we do not take them, nor do we take sheep fattened for consumption, nor those that have given birth to offspring or those about to do so, nor the rams. We do take sheep that are six months and those that are one or two-year-old". This ensures a balance between choice and an average quality.

The jurists of the provinces agreed that male (billy) goats and animals that are very old or blind in one eye are not to be accepted for *ṣadaqa*, because this has been established from the book of *ṣadaqa*, unless the collector considers them to be in the interest of the needy. They disagreed about animals that are totally blind or have a defect whether they are to be included in the count of the owner's flock. Mālik and al-Shāfiʿī held that they are to be counted, while it is related from Abū Ḥanīfa that he did not hold that they be counted. The reason for disagreement stems from whether the unqualified term should be considered to include both the physically sound and those that are not so.

They disagreed under this topic on whether the offspring are to be counted with the mothers in order to complete the *niṣāb*, if the flock is falling short of the *niṣāb*. Mālik said that they are to be counted with them, while al-Shāfiʿī, Abū Ḥanīfa, and Abū Thawr said that they are not to be counted with the lambs, unless the mothers are completing the *niṣāb*. The reason for their disagreement is the saying of ʿUmar (God be pleased with him) when he ordered that they be counted with the lambs and nothing should be taken from them as *ṣadaqa*. A group of jurists understood that this is to be done when the mothers are completing the *niṣāb*. Another group of jurists understood this in unqualified terms. I believe that the Ẓāhirites do not impose *zakāt* on young lambs nor do they count them irrespective of the mothers completing the *niṣāb*, as the unqualified term for the species does not include them.

Most of the jurists maintained that co-ownership has an affect on the amount of *zakāt* due. Those who upheld this disagreed over whether it affects the *niṣāb*. Abū Ḥanīfa and his disciples did not consider co-ownership to have any effect, either on the amount due or on the amount of *niṣāb*. An explanation for this is that Mālik, al-Shāfiʿī, and the majority of the jurists of the provinces maintained that co-owners are to pay *zakāt* as a single owner. They disagreed about this on two points. First, whether the *niṣāb* of co-owners is to be treated as the *niṣāb* for one owner even if the share of each reaches the *niṣāb* separately, or are they to pay *zakāt* on the *niṣāb* for each owner separately if they own the *niṣāb* individually. Second, about the description of the co-ownership that is effective in this case.

The reason for their disagreement, first, over whether co-ownership is effective in the *niṣāb* and in the amount due, is their dispute over the meaning of what is established about the saying of the Prophet (God's peace and blessings be upon him) through the book of *ṣadaqa* that "distinguishable categories are not to be combined nor are combined categories to be distinguished under the apprehension of *zakāt*, and those composed of two mixed categories are to be settled jointly (or equally)". Each group interpreted the meaning of this tradition in accordance with their own assumptions.

Those who maintained that mixed categories were effective in the determination of the *niṣāb* and the amount due, or in the determination of the amount due alone, said that the words of the Prophet (God's peace and blessings be upon him), "those composed of two mixed categories are to be settled jointly (or equally)" and "distinguishable categories are not to be combined and combined categories are not to be distinguished" indicate clearly that co-ownership in combined property is like the ownership of a single individual. This tradition restricts the words of the Prophet (God's peace and blessings be upon him), "There is no *ṣadaqa* in less than five camels".[198] This applies either for purposes of *zakāt* alone, according to Mālik and his disciples, or both for purposes of the determination of *zakāt* and *niṣāb*, according to al-Shāfiʿī and his disciples. Those who did not uphold this view of co-ownership said that the partners are sometimes referred to as co-owners, and it is likely that the words of the Prophet (God's peace and blessings be upon him), "distinguishable categories are not to be combined and combined categories are not to be distinguished" amount to a proscription for the collector not to divide up the property of one individual in such a way that he becomes liable to excessive *zakāt*, as in the case of the individual who has one hundred and twenty sheep and whose property is divided up into units of forty thrice, or by combining his property with that of another so that the combined number yields more *zakāt*. They said that if these probabilities exist in this tradition, it is better not to restrict the established and agreed upon principles with it, that is, the rule that the *niṣāb* and the amount due are to be worked out on the basis of individual ownership. Those who upheld the view based on mixing said that the term "mixing" is better understood in terms of mixing itself rather than in the meaning of partnership, and if this is the case, then, the words of the Prophet (God's peace and blessings be upon him), "are to be settled jointly (or equally)" indicate that the duty owed by both has the *ḥukm* of a single individual, and also that these words, "are to be settled jointly (or equally)", imply that the mixing of two things does not imply two partners, as settlement between partners is not to be conceived here, because *zakāt* is being taken from the capital of the partnership. Thus, those who limited their view to this meaning and did not draw an analogy for the *niṣāb* said that co-owners are to be subjected to the *zakāt* of a single individual if each one of them possesses the *niṣāb*. Those who considered the *ḥukm* of the *niṣāb* to be dependent upon the *ḥukm* of the *zakāt* due said that their *niṣāb* is the *niṣāb* of a single individual, just as their *zakāt* is the *zakāt* of a single individual.

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[198] So that it applies to individual ownership of five or more camels, but not to joint ownership.

Each group interpreted the words of the Prophet (God's peace and blessings be upon him), "distinguishable categories are not to be combined and combined categories are not to be distinguished", in accordance with his own views. Mālik (God be pleased with him) said that the meaning of the words of the Prophet (God's peace and blessings be upon him), "combined categories are not to be distinguished", is that if there are two co-owners each with a share of one hundred and one sheep, their total liability would be three sheep, but if they separate each will pay one sheep. The meaning of his words, "distinguishable categories are not to be combined," he said, is that if there are three individuals each having forty sheep, they would pay one sheep if they combined their flocks. In his opinion, then, the proscription is directed toward those co-owners each of whom possesses the *niṣāb* independently. Al-Shāfiʿī, on the other hand, said that the meaning of the words of the Prophet (God's peace and blessings be upon him), "combined categories are not to be distinguished", is that if there are two persons who jointly own forty sheep, their separating their flocks would cause them not to be liable for *zakāt*, as the *niṣāb*, in his view, is that of the co-owners, which is in its *ḥukm* like that of an individual.

Those who upheld the view based on mixing differed as to what kind of mixing is effective in the determination of *zakāt*. Al-Shāfiʿī said that the condition of mixing is that they mix their flocks together so that they tend them jointly, gather the milk in one place, make them graze jointly, drink jointly, and that their offsprings are also mixed up together. There is no difference, in his view, as a whole between mixing (property) and partnership, and he, therefore, considers the *niṣāb* as belonging to each of the partners, as has preceded. In Mālik's view the co-owners are those who participate in terms of contribution, drinking, grazing, shepherding, and offspring. His disciples disagreed about the observance of some of these conditions or of all of them. The reason for their disagreement stems from the equivocality in the term "mixing", and for that reason a group of jurists did not uphold the effectiveness of mixing in the determination of *zakāt*. This was the opinion of Abū Muḥammad ibn Ḥazm al-Andalusī.

5:3.5. *Section 5: The* niṣāb *for crops (grains) and fruits and the* zakāt *due on them*

They agreed that the obligation of *zakāt* for crops of rain-fed land is one-tenth (*ʿushr*), while the *zakāt* for crops of irrigated land is one-half of one-tenth, as this has been established from the Prophet (God's peace and blessings be upon him).

They disagreed about the stipulation of a *niṣāb* for this category of *zakāt*-wealth. The majority decided to impose a *niṣāb* in it, which was held to be five *awsuq*. One *wasq* is equal to sixty *ṣāʿ* by consensus, and one *ṣāʿ* is equal to four *mudd*, in accordance with the *mudd* used by the Prophet (God's peace and blessings be upon him). The majority maintain that the *mudd* used by him is one and one-third rotl (*raṭl*), which is slightly more than the one used in Baghdād. This is what was conceded by Abū Yūsuf when he was confronted by Mālik on the basis of the opinion of the jurists of Iraq and the testimony of the jurists of Medina about it. Abū Ḥanīfa used to say about the *mudd* that it is equal to two rotls, and about the *ṣāʿ* that it is equal to eight rotls. Abū Ḥanīfa also said that there is no *niṣāb* for crops and fruits.

The reason for their disagreement arises from the conflict between the general meaning and the particular meaning. The general meaning is in the saying of the Prophet (God's peace and blessings be upon him), "That which is watered by the sky is liable to one-tenth, while that irrigated by the water-can [human effort] is liable to one-half of one-tenth". The particular meaning is found in the words of the Prophet (God's peace and blessings be upon him), "There is no *ṣadaqa* in what is less than five *awsuq*". Both traditions are authentic. Those who maintained that the general meaning is to be construed in terms of the particular said that there is a *niṣāb* and that is the renowned opinion. Some other jurists held that the general and the particular meanings conflict with each other here, as the one revealed prior or later in time is not known, for the particular may be abrogated by the general in their view and the general may be abrogated by the particular, and because anything that can be acted upon may be abrogated, which may be abrogation in part or abrogation in full. When these jurists preferred the general meaning they said that there is no *niṣāb*. The construction of the general in terms of the particular by the majority, in my view, belongs to the category of preferring the particular meaning over the general for that part in which they were in conflict, because the general meaning is apparent while the particular is explicit. So think over this as this is the cause which has been eliminated by the majority by saying that the general is to be construed in terms of the particular, whereas, in fact, this is not the case. The conflict between them does exist, unless the particular were to follow the general immediately, in which case it would amount to an exemption. There is, however, a weakness in the argument of Abū Ḥanīfa relating to (the absence of) the *niṣāb* on the basis of the general meaning, as the tradition here has been laid down as an explanatory text for the quantity due (and not as one imposing an initial rule).

They disagreed in this topic over *niṣāb* on three issues. The first issue is about adding some of the grains to the others for completing the *niṣāb*. The second issue is about the permissibility of calculating the *niṣāb* for grapes and dates by estimation. The third issue is whether the quantity of his fruit or crop consumed by the owner prior to harvesting and threshing is to be taken into account for the *niṣāb*.

5.3.5.1. Issue 1

They agreed that one category of good grain may be added[199] to a lower category of grain, and *zakāt* is to be taken from the whole in proportion to the quantity of each, that is, from the good as well as the bad quality grain. If fruit is of different quality, the *zakāt* is to be taken from the average quality.

They disagreed about the addition of lentil of different quality one to the other and about the addition of wheat and barley and wheat extract. Mālik said that lentil of different quality is to be seen as one category, as are wheat, barley, and wheat extract. Al-Shāfiʿī, Abū Ḥanīfa, Aḥmad, and a group of jurists said that lentil comprises different categories, in accordance with their names, and one category is not to be added to another for the calculation of the *niṣāb*. Similarly, wheat, barley, and wheat extract are three different categories, and one of these is not to be added to the other for the completion of the *niṣāb*.

The reason for disagreement is whether consideration is to be given to the common benefit that is to be derived or to the common names. Those who maintained that common names are to be taken into account said that they are different categories if their names differ. Those who maintained that the common benefit is to be taken into account said that as long the benefit to be derived is the same, they form one category, even if the names are different. Each group sought to affirm its rule by an empirical counting of the cases provided in the law, that is, one group argued for its opinion on the basis of things in which the law has taken into account the names of categories, while the other sought support from those in which the benefits have been given importance. It appears that the law bears testimony to the consideration of names more than it does for the common benefit for purposes of *zakāt*, though both considerations are present in the law, Allāh knows best.

5.3.5.2. Issue 2

This issue relates to the calculation of the *niṣāb* by estimation and accepting it without using a measure. The majority of the jurists uphold the permission of estimation in the case of dates and grapes, when they have begun to ripen, because of the necessity of releasing them for consumption to the owners when they are still moist (fresh). Dāwūd said that there is to be no estimation, except in the case of dates. Abū Ḥanīfa and his two disciples said that estimation is invalid and it is up to the owner of the wealth to render one-tenth of the yield, whether it is in excess of the estimated amount or less.

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[199] Addition here does not mean actual physical combination but merely in calculation.

The reason for their disagreement comes from their dispute about the permissibility of estimation because of the conflict between the principles and the traditions reported on the issue. The tradition laid down on this is the one relied upon by the majority, in which it is related "that the Messenger of Allāh (God's peace and blessings be upon him) used to send ʿAbd Allāh ibn Rawāḥa and others to Khaybar to estimate the yield of dates". The principles that oppose this are that relying on estimation belongs to the category of (the forbidden) *muzābana*, which is the sale of fruit on trees in exchange for other measured fruit, and also because it amounts to the sale of ripe dates with fresh dates with a delay, circumstances which introduce a proscription on account of excess and delay, both of which are the bases of *ribā*. When the jurists of Kūfa took this into account along with the fact that the estimation in the case of the people of Khaybar was not for the purpose of *zakāt* for they were not obliged to pay *zakāt*, said that it is possible that it was an estimate to know the quantity of dates that would be available to each group of people.

The Qāḍī (Ibn Rushd) said: The apparent implication of Mālik's tradition is that it (estimation) was for purposes of division, because of the report that ʿAbd Allāh ibn Rawāḥa, when he had finished estimating, said: "If you like this part is for me and if you like it is for you", that is, it was in the case of fruit not grains. The tradition of ʿĀʾisha, on the other hand, which has been related by Abū Dāwūd, states that the estimation was for purposes of the share that they were obliged to pay. The tradition is that she said, while mentioning the case of Khaybar, "that the Prophet (God's peace and blessings be upon him) used to send ʿAbd Allāh ibn Rawāḥa to the Jews of Khaybar, and he estimated the dates for them when they began to ripen and before they began to consume them". Estimation, however, has not been recorded by the two shaykhs, al-Bukhārī and Muslim. In whichever way estimation is established, it would be an exemption from these principles, and this if it is established that it was a *ḥukm* from the Prophet (God's peace and blessings be upon him) for the Muslims, for if the *ḥukm* is established for the Ahl al-Dhimma it does not raise the obligation of a *ḥukm* for the Muslims, except on the basis of an evidence, Allāh knows best. If the tradition of ʿAttāb is authentic, the *ḥukm* of estimation would be clear, Allāh knows best. The tradition of ʿAttāb ibn Usayd is that he said, "The Messenger of Allāh (God's peace and blessings be upon him) ordered me to estimate the grapes and to collect *zakāt* in the form of raisins, just as the *zakāt* of dates on trees is taken in the form of *tamr* (dried dates)". The tradition of ʿAttāb ibn Usayd has been objected to on the ground that one of the narrators in it is Saʿīd ibn al-Musayyab, and he could not (possibly) transmit from him. This was the reason that Dāwūd did not permit the estimation of grapes.

Those who imposed *zakāt* on olives differed about the permissibility of estimation of olives. The reason for their disagreement stems from their dispute about the analogy drawn for them from dates and grapes. The category in which *zakāt* is to be paid, in the case of fresh dates, is preserved dates (*tamr*) and not fresh dates. Similarly, the payment for grapes is in the form of raisins, not in grapes themselves. Likewise, the payment, in the view of those who uphold *zakāt* on olives, is to be made in olive oil and not in the fruit on the basis of the analogy with *tamr* and raisins. About those categories of grapes that cannot be dried and those olives that cannot be pressed Mālik has maintained that payment be taken in the form of the fruit.

5.3.5.3. Issue 3

Mālik and Abū Ḥanīfa said that the person who consumes from his fruit or from his crops before harvest is to be held accountable for the amount consumed for purposes of *zakāt*. Al-Shāfiʿī said that this is not to be included against him and the estimator is to set aside a part that may be consumed by the owner and his family.

The reason for disagreement arises from the conflict of a tradition with what is in the Qurʾān and also with analogy. The *sunna* in this is in what is related by Sahl ibn Abī Ḥathma "that the Prophet (God's peace and blessings be upon him) sent Abū Ḥathma as an estimator. A man later came and said, 'O Messenger of Allāh, Abū Ḥathma has left me an excess.' The Messenger of Allāh (God's peace and blessings be upon him) said, 'The son of your uncle believes that you have left him an excess?' He said, 'O Messenger of Allāh, I left him an amount that will be given out by his family, an amount from which he will feed the needy, and an amount that will be wasted by the wind.' He said, 'The son of your uncle has left you an excess and has done justice to you'". It has also been related that the Messenger of Allāh (God's peace and blessings be upon him) said, "When you make an estimate leave a third, and if you cannot do that, then, leave a fourth". It is related from Jābir that the Messenger of Allāh (God's peace and blessings be upon him) said, "Be lenient in estimation, as the wealth (orchard) contains the *ʿariyya*, the *ākila* (birds and insects consuming fruit), the *waṣiyya* (rights pertaining to bequests), the right of workers and the deputies, and the claims that are made on the fruit". The text of the Qurʾān that may appear to conflict with this tradition and analogy, are the words of the Exalted, "Eat ye of the fruit thereof when it fruiteth, and pay the due thereof upon the harvest day".[200] The analogy (from this) is that it is wealth that is liable to *zakāt* and the basis for this is the remaining wealth (after consumption).

These, then, are the well-known issues related to the amount that is due in *zakāt* and to the three categories that are liable to it, from which the payment is to be made in their own kind. They did not disagree that if *zakāt* is paid in the same kind it is valid, but they disagreed on whether it was permitted to make the payment with a substitute for the original by value.

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[200] Qurʾān 6 : 142.

Mālik and al-Shāfiʿī said that payment according to value is not permitted in *zakāt* as a substitute for that expressly stated in the texts. Abū Ḥanīfa said that it is permitted, irrespective of the owner's ability to make the payment in the expressly mentioned categories. The reason for their disagreement stems from the dispute as to whether *zakāt* is a form of worship or a right due to the needy. Those who maintained that it is a form of worship said that if the person makes the payment with something other than the substance of the category his act is not valid, because worship performed in a way different from the one prescribed is invalid. Those who maintained that it is a right of the needy saw no difference between the thing itself and its value. The Shāfiʿites said that even if the right of the needy is conceded the Lawgiver has suspended the claim upon the thing itself and which is satisfied by joint participation of the poor and the rich in the thing itself. The Ḥanafites say: "The things constituting the wealth have been specified as a convenience for the owners of wealth, as it is easy for each owner of wealth to make payment from the kind of wealth that he possesses". It is for this reason that in some of the traditions it is laid down that he (the Prophet) determined that the payment of *diya* (blood-money) be made in the form of credits for those who possess them, as will be coming up in the book of *ḥudūd*.

5.3.6. *Section 6: The* niṣāb *for* ʿurūḍ *(goods)*

The *niṣāb* for goods, according to the opinion of those who uphold it, is constituted by the goods acquired for sale especially what is held prior to the payment of *zakāt*. The *niṣāb* for them is based on the commodities as it is these that represent the value of consumable things and the capital. Likewise, the *ḥawl* (passage of a year) for goods, according to those who imposed *zakāt* on goods. Mālik said that if a person sells goods he is liable for *zakāt* once a year, as is the case with debts. This is for traders who record the timings for the purchase of their goods. The traders who do not record the timings for what they sell and buy, and who are referred to by the term *mudīr* (the active trader like the shopkeeper). The *ḥukm* in Mālik's view is that when a period of one year passes from the time of the commencement of their trade they should determine the value of the goods they hold (inventories). To this is added the value of the things they possess (assets) and their wealth in terms of loans they hope will be repaid (accounts receivable), that is, if they do not have similar debts that they owe (accounts payable), and this is different from his opinion about the *mudīr*. If the sum of all this that they possess reaches the *niṣāb* they are to pay *zakāt* on it, whether during the year they were able to convert a thing to liquid assets (cash) or whether such conversion amounted to the *niṣāb*. This is the narration of Ibn al-Mājishūn from Mālik. Ibn al-Qāsim has related from him that if he does not have liquid assets (cash) and he trades with goods (barter), there is nothing to be paid on the goods.

Thus, some of the jurists did not stipulate the existence of liquid assets in his possession, while some did stipulate it. Those who stipulated this considered a *niṣāb* for the goods, while those who did not stipulate it did not take the *niṣāb* into account. Al-Muzanī said that *zakāt* on goods is based on the things themselves (cost) not on their prices. The majority—al-Shāfiʿī, Abū Ḥanīfa, Aḥmad, al-Thawrī, al-Awzāʿī, and others—said that the *ḥukm* for the *mudīr* and others is the same, and that the person who purchases goods for the purpose of trade evaluates his goods after the passage of the *ḥawl* and pays *zakāt* on them accordingly. Some said that he is to pay *zakāt* on the basis of the price at which he purchased the goods (cost price) and not on their value (book value or market value).

The majority did not stipulate anything for the *mudīr* as the *ḥawl* has been stipulated for the things and not for their species. Mālik, however, compared the species to the things themselves so that the liability for *zakāt* is not removed entirely from the *mudīr*. This amounts to additional law, and it appears to be derived from the established law. Cases like this are referred to as *qiyās mursal*, which is a law that does not rely on an evidence that is expressly stated in the law, but is understood from the jurisprudential interests found in it. Mālik, may Allāh have mercy on him, used to consider interests (*maṣāliḥ*) even when they were not based on a specific text.

5.4. Chapter 4 The Time for the Payment of *Zakāt*

The majority stipulates for the obligation of *zakāt* on gold, silver, and cattle, the passage of the *ḥawl*, because this is established from the four caliphs, was known widely among the Companions, was practised widely, and because of their belief that its being so widely known and practised without any opposition is not possible, unless there was an earlier precedent (from the Prophet). It is related from Ibn ʿUmar from the Prophet (God's peace and blessings be upon him) in a (*marfūʿ*) tradition that he said, "There is no *zakāt* on wealth unless one *ḥawl* (year) has passed over it". This is agreed to unanimously by the jurists of the provinces. There is no disagreement about it in the first generation, except what is related from Ibn ʿAbbās and Muʿāwiya. The reason for the disagreement is that there is no established tradition about it.

In this topic they disagreed about eight well-known issues. The first issue is whether a *ḥawl* is to be stipulated for minerals, if we maintain that the amount due on them is one-fourth of a tenth. Second, the consideration of a *ḥawl* in the case of profits on capital. Third, the passage of a *ḥawl* on the additions to things that are liable to *zakāt*. Fourth, the consideration of the passage of a *ḥawl* on loans, if we maintain that *zakāt* is levied on them. Fifth, the consideration of a *ḥawl* for goods, if we maintain that there is *zakāt* on them. Sixth, the *ḥawl* on the benefits derived from cattle. Seventh, the *ḥawl* on the offspring of sheep, if we maintain that they are to be added to the mothers, either according to the opinion of those who stipulate that the mothers should complete the *niṣāb*, and these are al-Shāfiʿī and Abū Ḥanīfa; or according to the opinion of those who do not stipulate this, which is Mālik's opinion. Eighth, the permissibility of setting aside *zakāt* prior to the *ḥawl*.

5.4.1. Issue 1

This issue relates to minerals. Al-Shāfiʿī took into account the *ḥawl* as well as the *niṣāb* in minerals, while Mālik took into account the *niṣāb*, but not the *ḥawl*.

The reason for their disagreement arises from the vacillation of their resemblance between what is derived from the land and between owned gold and silver. Those who held them to be similar to what is derived from the land did not stipulate a *ḥawl* for them, while those who held them to be similar to gold and silver stipulated the *ḥawl*. The resemblance with gold and silver is clearer, Allāh knows best.

5.4.2. Issue 2

The jurists disagreed about the *ḥawl* for profit on capital holding three opinions. Al-Shāfiʿī held that its *ḥawl* is to be calculated from the day it accrues, irrespective of the capital itself amounting to the *niṣāb*. This is related from ʿUmar ibn ʿAbd al-ʿAzīz, who gave the instructions that the profits from trade should not be liable for *zakāt* until a *ḥawl* has passed. Mālik said that the *ḥawl* of the profits corresponds with the *ḥawl* of the capital, that is, when the year has passed for the capital the profit becomes subject to *zakāt* at the same time, whether the principal amounts to a *niṣāb* on its own or reaches the *niṣāb* by adding the profits to it. Abū ʿUbayd said that this was not followed by any of the other jurists, except his own disciples. One group of jurists made the distinction of whether the capital undergoing the *ḥawl* amounts to a *niṣāb*. They said that if it does amount to the *niṣāb* on its own the profit becomes subject to *zakāt* along with it, but if it does not amount to the *niṣāb*, *zakāt* is not levied on it (even if it amounts to the *niṣāb* by the addition of profits to it). Those who held this opinion include al-Awzāʿī, Abū Thawr, and Abū Ḥanīfa.

The reason for their disagreement arises from the vacillation of profit between the *ḥukm* of wealth derived as a benefit and the *ḥukm* of the capital. Those who held it to be similar to an accruing benefit said that it has to independently undergo a *ḥawl*, while those who held it to be similar to capital said that it takes the *ḥukm* of the capital, except that one of the conditions of such comparison is that *zakāt* should be due on the capital, and this does not happen unless it amounts to the *niṣāb*. It is for this reason that the analogy for profit over capital is considered weak in Mālik's school. It appears that what Mālik (God be pleased with him) relied upon is the similarity between profit from capital and the offspring of sheep, but the case of the offspring of sheep is also disputed. An opinion like that of the majority is also related from Mālik.

5.4.3. Issue 3

This issue deals with the *ḥawl* of additions (*fawāʾid*).[201] They agreed that if the wealth is less than the *niṣāb* and some addition other than the profit accrues to the owner thus completing the *niṣāb*, then, the *ḥawl* is to be commence independently for the total from the day of accrual. They disagreed over when the addition accrues to him when he already has wealth that is equal to the *niṣāb* on which the *ḥawl* is complete. Mālik said that the addition is to be liable for *zakāt* according to its own *ḥawl*, if it amounts to the *niṣāb*, and it is not to be added to the wealth on which *zakāt* is now due. The same opinion about additions is expressed by al-Shāfiʿī. Abū Ḥanīfa, his disciples, and al-Thawrī said that all additions are to be subjected to *zakāt* on the basis of the *ḥawl* of the capital, if that amounts to the *niṣāb*. The same is the case for profit in their view.

The reason for their disagreement is whether the fresh addition takes the *ḥukm* of wealth on which the addition has occurred or it takes the *ḥukm* of wealth that has not accrued upon other wealth. Those who maintained that its *ḥukm* is the *ḥukm* of the original wealth that is independent of other wealth, that is, wealth upon which *zakāt* is due, said that there is no *zakāt* on the addition. Those who determined for it the *ḥukm* of wealth on which *zakāt* is due and who consider it to be the same wealth because *zakāt* is due upon this wealth as it amounts to a *niṣāb*, considered its *ḥawl* in accordance with the *ḥawl* of wealth on which *zakāt* is due. The general meaning in the words of the Prophet (God's peace and blessings be upon him), "There is no *zakāt* on wealth unless one *ḥawl* has passed over it", implies that newly acquired wealth should not be added to the wealth in hand except on the basis of an evidence. It appears that Abū Ḥanīfa relied in this upon the analogy of liquid assets over cattle. One of his principles, on which he relies in this topic, is that it is not a condition for the *ḥawl* that all the constituent parts of the wealth should comprise the *niṣāb* throughout the year, and it is enough that the *niṣāb* can be found at both ends of the year, and the *ḥawl* in one of the parts of the wealth. Thus, in his view, if the wealth constituted the *niṣāb* at the beginning of the *ḥawl* after which parts of it were lost or destroyed making it less than the *niṣāb*, but at the end of the *ḥawl* there were additions to it that completed the *niṣāb*, *zakāt* would be levied upon it. This situation exists for him in this kind of wealth as the *ḥawl* has not been completed, yet it is in essence the same wealth in all its constituent parts; in fact, it is more but it had shed the *niṣāb* at different stages of the *ḥawl*.

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[201] It appears that this category would fall under the modern term known as "capital gains".

It is obvious that the *ḥawl*, which has been stipulated for *zakāt* on wealth, is for some determined wealth, irrespective of the increase or decrease in it, either by profit or by additions or by anything else, as the purpose of the *ḥawl* is to ensure that the wealth is a surplus that is beyond the (normal) needs. This is based on the assumption that what has remained throughout the *ḥawl* without change must be beyond the needs of the owner. On this account *zakāt* has been imposed on it, and *zakāt* is imposed only on surplus wealth. For those who maintain that the stipulation of the *ḥawl* is to determine the growth in wealth, it becomes obligatory to say that the gains, in addition to the profit, are to be merged with the capital and the completion of the *niṣāb* is to be taken into account at both ends of the *ḥawl*. Think over this for it is evident, Allāh knows best. It was for this reason that Mālik held the view that a person who had cattle that were liable to *zakāt* at the beginning of the *ḥawl* then sold them off and substituted for them at the end of the *ḥawl* other cattle of the same species, *zakāt* would be levied on them. It appears that he also took into account both ends of the *ḥawl* in accordance with the opinion of Abū Ḥanīfa. He also adopted the analogy, relied upon by Abū Ḥanīfa, for additions to liquid assets over cattle, as we have already stated.

5.4.4. Issue 4

This issue deals with the consideration of the *ḥawl* for loans (given to others),[202] if we maintain that *zakāt* is levied upon them. A group of jurists said that the *ḥawl* is to be considered for it from the time of its commencement (as a loan) imposing *zakāt* on it for its duration. If it is spread over one *ḥawl*, then, it is for one *ḥawl*, but if it is spread over a number of *ḥawls*, then, it is for such a number of *ḥawls*. This means that if it is a single *ḥawl* a single levy of *zakāt* is imposed, but if it is spread over several years the *zakāt* is levied for such number of years. A group of jurists said that it is to be subjected to *zakāt* for a single year, even if the loan stays outstanding for a number of years with the person who owes the debt. A group of jurists said that the *ḥawl* is to be postponed because of it. Those who said that the *ḥawl* is to be postponed because of the debt from the day the loan was made, did not uphold the imposition of *zakāt* on a loan, while those who maintained that *zakāt* is to be levied upon it for the number of years it stayed outstanding decided on the basis of the resemblance of a loan with wealth in hand. For those who said that *zakāt* is to be levied on it for a single year even if it stays outstanding for a number of years, I do not know of their reliance at the present moment, because as long as it remains a loan they may either say that *zakāt* is levied on it or they may say that it is not, and if they say that there is no *zakāt* on it then there is no point in discussing it; rather we start all over again. If there is *zakāt* on it, then, the *ḥawl* is either stipulated for it or it is not. If we stipulate it, it becomes obligatory to take into account the number of years, unless it is said that each time the *ḥawl* is completed and he is not able to pay *zakāt* for it (due to non-payment by the debtor), this obligatory right against him is dropped for that year. As *zakāt* is imposed with two conditions, the presence of the substance of the wealth and the completion of the *ḥawl*, then in this case only the *zakāt* due for the last year remains. This is held to by Mālik to be similar to goods acquired for trade. In his view, *zakāt* is not to be imposed on them until the person sells them off, even if they remained with him for a number of years.

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[202] This passage deals with loans made out to others. It becomes easy to understand by first distinguishing between debts and credits, or accounts receivable. The discussion relating to debts owed to others has preceded in the earlier part of this section, that is, the book on *zakāt*, where the issue was whether debts prevent the imposition of *zakāt*. Here the discussion is about loans given to others, and which are due to be repaid. The person on whom *zakāt* is to be levied is the creditor. The question is when will *zakāt* be imposed? How many past years are relevant to the calculation? The author discussed the problem briefly in the previous discussion and mentioned that there are a number of details in Mālik's school. The details are provided here.

There is another factor in it that resembles the case of cattle that are not visited by the collector for years. When he finally arrives and finds that they have decreased in number, he is to impose *zakāt* on the remainder on the basis of what he finds there, according to Mālik's opinion. The reason is that as the *ḥawl* passed and the owner was not able to set aside the *zakāt*, the coming of the collector being a condition with Mālik for setting it aside after the passage of the *ḥawl*, the claim against him for that *ḥawl* lapsed and he is to be assessed for the previous years, whether the amount due is more or less. This is something that contradicts analogy, and Mālik relied upon *ʿamal* for it. Al-Shāfiʿī, on the other hand, considers such an owner to be liable, as the coming of the collector is not a condition for the obligation. Related to this is the fact that some jurists maintain that it is not obligatory for the owner to set aside *zakāt* on his wealth, unless he can deliver it to the *imām*. In case of the absence of the *imām* or of an *ʿādil imām*—if the owner believes that *ʿadāla* is one of the conditions for the *imām*—if the wealth is destroyed after the *ḥawl* has passed and prior to his ability to deliver the *zakāt*, the owner is not liable for anything.

Loans for (purposes of) *zakāt* are divided, in Mālik's view, on the basis of these three situations, that is, some of the debts according to him are liable for *zakāt* for a single year, like the loans in trade; for some debts the *ḥawl* is postponed, like the loans of inheritance; and the third case relates to the loans of the *mudīr*.[203] A complete discussion of his views on loans is beyond our purposes.

5.4.5. Issue 5

This relates to the *ḥawl* for goods and its discussion has preceded under the topic of the *niṣāb* for goods.

5.4.6. Issue 6

This issue relates to gains in cattle. The opinion of Mālik in this case is the opposite of what it is in the case of liquid assets. The reason is that he bases the gains on the capital,[204] if that capital amounts to a *niṣāb*, just as Abū Ḥanīfa does it in the cases of *dirhams* and gains in cattle. Abū Ḥanīfa's opinion on gains is that there is a common *ḥukm*, that is, it is based upon the capital if it amounts to a *niṣāb*, whether the gain is in sheep or in liquid assets. The profits and increase in offspring, in his view, are like gains. For Mālik profits and offspring have a common *ḥukm*, but he distinguishes between the gains in liquid assets and those in cattle. For al-Shāfiʿī profits and gains have a common *ḥukm* through the consideration of an independent *ḥawl* for them, and also the gains in cattle and offspring have a common *ḥukm* through the consideration of their *ḥawl* along with the capital if that amounts to the *niṣāb*.

This is the summary of the opinions of these three (leading) jurists. It appears that Mālik distinguished between cattle and liquid assets following ʿUmar, otherwise the analogy is the same for both cases, that is, profit being similar to (a growth in) offspring and gains (on capital) being similar to gains (in stock). The tradition of ʿUmar here is that he ordered them to count the young lambs (in the *niṣāb*), but not to take anything from them as *zakāt*. The tradition has preceded in the section on *niṣāb*.

5.4.7. Issue 7

This issue is about the consideration of a *ḥawl* in the case of the offspring of sheep. Mālik said that it is the same *ḥawl* that applies to the mothers, irrespective of their constituting a *niṣāb*, as was his opinion about profits on liquid assets. Al-Shāfiʿī, Abū Ḥanīfa, and Abū Thawr maintained that the *hawl* of the offspring is not the same as that for the mothers, unless the mothers constitute a *niṣāb*. The reason for their disagreement is the same reason for their disagreement about profits.

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[203] The word in the original is *mudabbar*; however, it appears that it should be *mudīr*, the retail trader mentioned in the previous discussions.

[204] The word capital is being used here to mean both monetary capital in the case of liquid assets or the original stock in the case of cattle.

5.4.8. Issue 8

This issue is about the payment of *zakāt* prior to the completion of the *ḥawl*. Mālik disallowed this, while Abū Ḥanīfa and al-Shāfiʿī permitted it. The reason for their disagreement is whether *zakāt* is a form of worship or a duty owed to the needy. Those who said that it is a form of worship, and they compared it to prayer, did not permit paying it prior to the time set for it. Those who held it to be similar to delayed obligatory duties permitted paying it prior to the end of the period like voluntary donations. Al-Shāfiʿī argued for his opinion on the basis of the tradition of ʿAlī "that the Prophet (God's peace and blessings be upon him) borrowed the *ṣadaqa* of al-ʿAbbās prior to its time".

5.5. **Chapter 5 The Persons to whom *Zakāt* is Due**

The discussion of this topic is covered in three sections. The first is about the number of categories for whom *zakāt* is due. The second is their description that requires such a duty. The third is about the amount due to them.

5.5.1. *Section 1: The number of categories to whom* zakāt *is due*

The number of categories for whom *zakāt* is due is eight, and they have been mentioned in the Qurʾān in the words of the Exalted, "The alms are only for the poor and the needy, and those who collect them, and those whose hearts are (to be) reconciled, and to free the captives and the debtors, and for the cause of Allāh, and (for) the wayfarers; a duty imposed by Allāh. Allāh is Knower, Wise".[205]

They disagreed about their number on two issues.

5.5.1.1. Issue 1

First, whether it is permissible that the entire *ṣadaqa* (*zakāt*) be spent on one category out of these categories, or whether they are partners in the *ṣadaqa* and it is not permitted to single out one category for it. Mālik and Abū Ḥanīfa held that it is allowed to the *imām* to spend it on one category or on more than one category, if he thinks that there is need for it. Al-Shāfiʿī said that this is not permitted and that he is to spend it on the eight categories mentioned in the words of Allāh.

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[205] Qurʾān 9 : 61.

The reason for their disagreement arises from the conflict between the literal meaning and the implication (of the words of Allah). The literal meaning requires that it be divided among all of them. The implication requires that he should place greater emphasis on the needy (at the time), as the purpose of *zakāt* is the elimination of want. Thus, the enumeration of these categories in the verse that has been laid down, in the view of these jurists, is because of distinguishing the categories, that is, the persons entitled to the *zakāt* and not their partnership in it. The first view is obvious by way of the literal meaning, while this (latter) implication is clearer in terms of the implication. One of the supporting evidences for al-Shāfiʿī is what is related by Abū Dāwūd from al-Ṣudāʾī that a man asked the Prophet (God's peace and blessings be upon him) that he be given from the *ṣadaqa*. The Messenger of Allāh (God's peace and blessings be upon him) said to him, "Allāh did not leave the *ṣadaqāt* to the *ḥukm* of a prophet or of anyone else, but He has laid down a *ḥukm* Himself. He has divided the persons entitled into eight categories, so if you are in one of these categories I will give you your right".

5.5.1.2. Issue 2

Does the right of the *muʾallafat qulūbuhum* still subsist up to this day? Mālik said that there are no such persons today. Al-Shāfiʿī and Abū Ḥanīfa maintained that the right of the *muʾallafat qulūbuhum* does subsist till today if the *imām* considers it to be so, and they are the people who are to be induced and encouraged to abide by Islam.

The reason for their disagreement is whether this was a right specific to the Prophet (God's peace and blessings be upon him) or it was available generally and to the rest of the *umma*. The apparent meaning is that it is a general right, but is it permitted to the *imām* to exercise it under all circumstances or only under certain circumstances and not in others, that is, in a state of weakness and not in that of strength. It is for this reason that Mālik said that there is no need for them today due to the strength of Islam. This, as we have said, is recourse on his part to jurisprudential interests (*maṣāliḥ*).

5.5.2. *Section 2: The qualifications for entitlement to* zakāt

The foremost qualification, because of which they are entitled to *ṣadaqa*, or the opposite attribute, because of which they are excluded from it, is poverty, which is the opposite of affluence, on the basis of the words of the Exalted, "The alms are only for the poor and the needy".[206] They disagreed about the kind of affluence in which *ṣadaqa* is permissible and that in which it is not.

With respect to affluence in which *ṣadaqa* is not permitted, the majority of the jurists maintained that it is not permitted for all the wealthy persons, except the five that have been mentioned by the Prophet (God's peace and blessings be upon him) in his saying, "*Ṣadaqa* is not permitted to a wealthy person, except five types: the warrior fighting in the path of Allāh; the worker who collects it; a debtor; (the person who buys it with his money;)[207] and a person who has a poor neighbour to whom he gives charity and the poor man gives a gift to this rich man". Ibn al-Qāsim has related that it is not permitted to the warrior or the collector to take from the *ṣadaqa* at all. Those who permitted it to the collector, even if he is wealthy also permitted it for the *qāḍīs* and other persons who work for the public benefit of the Muslims. Those who did not permit this did so on the analogy that it is not permitted to the wealthy at all.

The reason for their disagreement is whether the underlying cause giving rise to *ṣadaqa* for the mentioned categories is merely need or it is need as well as public benefit. Those who took into account only the persons in need, who have been mentioned in the verse, said that the cause is need alone. Those who maintained that the underlying cause is need as well as public benefit took into account the benefit in the case of the worker and need in the case of the remaining enumerated categories.

With respect to the amount of wealth that precludes the entitlement to *ṣadaqa*, al-Shāfiʿī said that the limit preventing *ṣadaqa* is the minimum to which the name can be applied. Abū Ḥanīfa held that a wealthy person is one who owns the *niṣāb*, as it is these persons whom the Prophet (God's peace and blessings be upon him) termed as wealthy in his words addressed to Muʿādh in his tradition, "Inform them that Allāh has made *ṣadaqa* obligatory for them, which is to be taken from the wealthy amongst them and is to be given to their poor". As the rich here were those who owned the *niṣāb* it follows that the poor should be their opposites. Mālik said that there is no limit in this and it is a matter referred to *ijtihād*.

The reason for their disagreement is whether affluence, which is an obstacle to receiving *zakāt*, is based on a legal or a literal meaning. Those who maintained that it has a legal meaning said that the existence of the *niṣāb* proves wealth. Those who maintained that it is based on the literal meaning said that it is the minimum amount to which the term is applied. Those who maintained that it is the minimum amount to which the term is applied, and who also held that it is limited at all times and for all individuals, fixed such a limit for this, while those who maintained that it is not limited and that it differs with circumstances, needs, persons, locations, and times left it undetermined and to be a subject of *ijtihād*. Abū Dāwūd has recorded a tradition from the Prophet (God's peace and blessings be upon him) about wealth where it is (determined as) the ownership of fifty *dirhams*, and there is another tradition where it is determined as possession of one *awqiya*, which comes to forty *dirhams*. I believe that one group based their opinion on these traditions.

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[206] Qurʾān 9 : 61.

[207] The sentence in parentheses is missing from the original text.

They disagreed in this topic about the description of the poor and the needy and about the distinction between them. A group of jurists said that a poor person (*faqīr*) is better off than the needy (*miskīn*), and this was upheld by the disciples of Mālik from Baghdād. Another group said that the needy person is in a better condition than the poor. This was the opinion of Abū Ḥanīfa, his disciples, and al-Shāfiʿī in one of his two opinions. In another opinion al-Shāfiʿī said that both terms indicate the same meaning, and this was the opinion of Ibn al-Qāsim. This is a literal view even though there is no legal connotation. It appears more likely, on an empirical examination of the language, that both terms indicate slightly different meanings.

They disagreed about the term *fī al-riqāb*. Mālik said that these are slaves who are to be set free by the *imām*, ensuring that their loyalty is to the Muslims. Al-Shāfiʿī and Abū Ḥanīfa said that these are the *mukātab* slaves. The wayfarer is one who in their view is a traveller performing a religious duty, but his provision has been exhausted and he has nothing to spend. Some of the jurists have stipulated that the traveller should be in close proximity to the source of the *ṣadaqa*. With respect to striving in the way of Allāh, Mālik said that this applies to the occasions of *jihād* or being stationed to guard the Muslim frontier. This was also Abū Ḥanīfa's opinion. Other jurists said that this category includes (needy) pilgrims and those undertaking *ʿumra*. Al-Shāfiʿī said that he is a fighter who is close to the source of the *ṣadaqa*. The proximity to the source of *zakāt* was stipulated because most of them did not permit that the *ṣadaqa* be transferred from one place to another, except on the basis of necessity.

5.5.3. *Section 3: The amount of the entitlement*

With respect to the amount that is to be given to each category, the debtor is to be given the amount that he owes if his debt was incurred for a legitimate cause, not for extravagance, in fact, because of necessity. Likewise, the traveller is to be given an amount that will enable him to get home. It appears that for the warrior, in the view of those who consider the wayfarer to be a warrior, it is an amount that will take him to the battle front. They disagreed about the amount of *ṣadaqa* that is to be given to a single needy person. Mālik did not put a limit on this and left the matter to *ijtihād*. This was also al-Shāfiʿī's opinion, who said that it does not matter if the person is given an amount equal to the *niṣāb* or less than the *niṣāb*. Abū Ḥanīfa disapproved of giving a person an amount equal to the *niṣāb*. Al-Thawrī said that no one is to be given more than fifty *dirhams*. Al-Layth said that he is to be given an amount with which he can employ a servant, in case the person has a family and the *zakāt* is enough. Most of them agreed that it is not proper to give the person a grant with which he becomes a person for whom *ṣadaqa* is not permissible, for by virtue of the amount received by him of this wealth, that is, over and above the amount on the basis of which he is entitled to *ṣadaqa*, he moves into the first grade of affluence and it becomes prohibited for him. They disagreed over this issue in accordance with their dispute over the limit of the amount (of the first degree of affluence). This issue, it appears, is structured on the first grade of affluence. There is no dispute among the jurists about the collector of *zakāt* that he takes from it (an amount) in proportion to the work that he does.

This is what we sought to establish in this book, and if we should recall something that is relevant to our purpose, we will incorporate it, God willing.

VI

THE BOOK OF *ZAKĀT AL-FIṬR*

The discussion in this book is covered in sections. The first is about the identification of the *ḥukm* of *zakāt al-fiṭr*. The second is about the identification of the person on whom it is obligatory. The third relates to the amount that is due and in what kinds of commodities. The fourth is about the time when it is due. The fifth is about the person entitled to receive it.

6.1. *Section 1: The identification of its* ḥukm

The majority of the jurists maintain that *zakāt al-fiṭr* is an obligation. Some of the later jurists in Mālik's school held that it is a *sunna*, and this was also the opinion of the jurists of Iraq. One group of jurists said that it stands abrogated by the injunction of *zakāt* (on wealth).

The reason for their disagreement arises from the conflict of the traditions on the issue. This is so as in the authentic tradition of ʿAbd Allāh ibn ʿUmar, in which he says, "The Messenger of Allāh (God's peace and blessings be upon him) declared *zakāt al-fiṭr* as prescribed for the people at the end of Ramaḍān, one *ṣāʿ* of dates or one *ṣāʿ* of barley for each freeman or slave, male or female, from among the Muslims". The apparent implication of this is an obligation in accordance with the opinion of those who follow the opinion of a Companion in comprehending it as an obligation, or it implies a recommendation in the command of the Prophet (God's peace and blessings be upon him) as his exact words have not been stated for us. It is also established that the Messenger of Allāh (God's peace and blessings be upon him) in the well-known tradition about the Bedouin mentioned *zakāt*; the man asked: "Is there another obligation on me besides this?" The Messenger of Allāh (God's peace and blessings be upon him) replied, "No! unless you pay voluntarily". The majority maintained that this *zakāt* is included in the prescribed *zakāt* (that is, it takes the same *ḥukm* of obligation), while others held that it is not. They argued on the basis of what is related from Qays ibn Saʿd ibn ʿUbāda that he said, "The Messenger of Allāh (God's peace and blessings be upon him) used to order us to pay it prior to the revelation of the verse of *zakāt*. When the verse of *zakāt* was revealed he did not command us to pay it nor did he prohibit us from doing so, and we still pay it".

6.2. *Section 2: The person on whom it is obligatory and the persons on whose behalf it is to be paid*

They agreed unanimously that the Muslims are the addressees in the command, whether male or female, minor or major, slave or freeman, because of the preceding tradition of Ibn ʿUmar, except the deviation by al-Layth, who exempted the residents of the capital from the obligation to pay *zakāt al-fiṭr*, and restricted it to the residents of the villages, but he has no evidence for this. Another deviation is found in the opinion of those who do not make it obligatory on behalf of the orphans. As to the persons on whose behalf it is obligatory, they agreed that it is obligatory on each person who is able to pay it on his own behalf, for it is a *zakāt* on the person and not on wealth. It is also obligatory on the person to pay it on behalf of his minor children if they do not own independent wealth, and also for slaves if they do not own any wealth. They differed over what is besides this.

The summary of Mālik's opinion is that a person is obliged to pay *zakāt al-fiṭr* on behalf of all persons whose maintenance is obligatory on him. Al-Shāfiʿī agreed with him on this, but they differ with reference to their dispute over whom a man is obliged to maintain if he is in difficult straits. Abū Ḥanīfa opposed him with respect to a wife and said that she is to pay for herself. Abū Thawr opposed them in the case of a slave who owns wealth. He said that if he has wealth he is to pay for himself, and his master is not to pay on his behalf. This was also upheld by the Ẓāhirites. The majority maintain that a man is not obliged to pay on behalf of his minor children if they have their own wealth sufficient for *zakāt al-fiṭr*. This was the opinion of al-Shāfiʿī, Abū Ḥanīfa, and Mālik. Al-Ḥasan said that the liability is upon the father, and if he pays it out of the wealth of his son (child) he is to compensate it.

Affluence is not a condition for this kind of *zakāt*, according to most of the jurists, and there is no *niṣāb*, but they only stipulated that this *zakāt* be a surplus over his need for food for himself and for his family. Abū Ḥanīfa and his disciples said that it is not obligatory on a person entitled to claim *ṣadaqa*, as it is not possible that a person should be liable for it as well as entitled to it. This is evident, Allāh knows best.

The majority maintain that this *zakāt* is not dependent on the prerequisite of being a *mukallaf* (that is, a person responsible for the performance of worship), as is the case with other forms of worship. The obligation, therefore, applies to minors and slaves (and to the insane person). (It is to be paid on their behalf by their guardian or maintainer.) Those who understood from this that the underlying cause of the *ḥukm* is *wilāya* said that the *walī* is under an obligation to pay the *ṣadaqa* (*zakāt al-fiṭr*) for all those who are under his guardianship. Those who understood the cause to be maintenance said that it is the maintainer who is to pay the *zakāt al-fiṭr* for all those whom he is obliged to maintain under the law. This disagreement arose because they agreed over the minor and the slave, and it is these two cases that point out that this *zakāt* is not linked to the person of the *mukallaf* alone, but is owed on behalf of others if guardianship and the obligation to maintain exist. Mālik, then, maintained that the underlying cause is the obligation to maintain, while Abū Ḥanīfa held that the cause here is *wilāya*, and for that reason they differed over the wife. It is related as a *marfūʿ* tradition that: "Pay the *zakāt al-fiṭr* on behalf of all those whose burden of maintenance has been placed upon you". It is, however, not well-known.

They disagreed over the case of slaves on a number of issues. The first, as we have mentioned, is the obligation of his *zakāt* on his master if he (the slave) has wealth. This is based on the point of whether he can or cannot own something. The second case is about the slave who is a disbeliever, whether he (the master) should pay *zakāt* on his behalf. Mālik, al-Shāfiʿī, and Aḥmad said that there is no obligation of *zakāt* on the master for his disbelieving slave. The Kūfīs said that he is liable for *zakāt* on his behalf. The reason for their disagreement stems from their dispute over the addition on the issue laid down in the tradition of Ibn ʿUmar. This relates to his words "the Muslims", over which Nāfiʿ has been opposed, as Ibn ʿUmar being the narrator of the tradition also held the opinion that *zakāt* is to be paid on behalf of disbelieving slaves. There is another reason for the disagreement and that is whether the obligation of *zakāt* on the master for his slave is due to the fact that the slave is a *mukallaf* or whether he is property. Those who maintained that it is due to his being a *mukallaf* stipulated that being a believer is a condition, while those who said that it is due to his being property did not stipulate it. These latter jurists said that this is indicated by the consensus of the jurists that if the slave is freed and the master has not paid *zakāt al-fiṭr* on his behalf, it is not obligatory for him to pay as in the case in expiation. The third issue is about the *mukātab*. Mālik and Abū Thawr said that the master is to pay *zakāt al-fiṭr* on his behalf. Al-Shāfiʿī, Abū Ḥanīfa, and Aḥmad said that he is not obliged to pay on his behalf. The reason for the disagreement emanates from the vacillation of the case of the *mukātab* between a freeman and slave. The fourth is the case of slaves acquired for trade. Mālik, al-Shāfiʿī, and Aḥmad held that the master is obliged to pay *zakāt al-fiṭr* on their behalf, while Abū Ḥanīfa and others besides him said that there is no *ṣadaqa* payable for slaves owned for purposes of trade. The reason for the disagreement arises from the conflict of analogy with the general implication (in the tradition). This is so as the general implication of the word slave (used in the preceding tradition) implies the obligation of *zakāt* for slaves owned for trade as well as others. In Abū Ḥanīfa's view this general implication is restricted by analogy, and that is due to the convergence of two kinds of *zakāt* in a single type of wealth. They disagreed, likewise, in the case of slaves owned by slaves and the cases under this topic are many.

6.3. *Section 3: The categories (of wealth) from which it is obligatory*

From what kind of wealth is it due? A group of jurists held that it is due either in wheat, or dates, or barley, or in *aqiṭ* (cheese made from sour milk), and that this is a choice of the person on whom it is obligatory. Another group of jurists held that it is obligatory upon him in the staple food of the land, or in the food of the *mukallaf* if he does not possess the dominant staple food. This is what ʿAbd al-Wahhāb has related as the opinion of the School (Mālik's).

The reason for their disagreement stems from their dispute over the meaning of the tradition of Abū Saʿīd al-Khudrī, who said, "We used to pay *zakāt al-fiṭr* during the period of the Messenger of Allāh (God's peace and blessings be upon him) as a *ṣāʿ* of food or a *ṣāʿ* of barley or a *ṣāʿ* of *aqiṭ* or a *ṣāʿ* of dried dates". Those who understood a choice from this said that any of these things he pays in is sufficient. Those who understood from it that the variety in payment is not a basis of permissibility, but is the consideration of the food of the person paying or of the staple food of the land, upheld the second opinion.

How much is obligatory? The jurists agreed that the *zakāt al-fiṭr* paid in the form of dried dates or barley is not to be less than one *ṣāʿ*, because that has been established in the tradition of Ibn ʿUmar. They disagreed about the quantity the person may pay in wheat. Mālik and al-Shāfiʿī said that less than one *ṣāʿ* would not be sufficient, while Abū Ḥanīfa and his disciples said that one-half *ṣāʿ* is sufficient.

The reason for their disagreement stems from the conflict of traditions. It is related in the tradition of Abū Saʿīd al-Khudrī, who said, "We used to pay *zakāt al-fiṭr* during the period of the Messenger of Allāh (God's peace and blessings be upon him) as a *ṣāʿ* of food or a *ṣāʿ* of barley or a *ṣāʿ* of *aqit* or a *ṣāʿ* of dried dates or a *ṣāʿ* of raisins". The apparent meaning is that by food he meant wheat. Al-Zuhrī has also related from Abū Saʿīd from his father that the Messenger of Allāh (God's peace and blessings be upon him) said, "For the *ṣadaqa* of *fiṭr* is one *ṣāʿ* of wheat shared by two persons or a *ṣāʿ* of barley or one of dates for each person". It is recorded by Abū Dāwūd. It is related from Ibn al-Musayyab that he said, "The *ṣadaqa* of *fiṭr* in the period of the Messenger of Allāh (God's peace and blessings be upon him) was one-half *ṣā*ʿ of wheat or one *ṣā*ʿ of barley or one *ṣā*ʿ of dried dates". Those who adopted these traditions said that the obligation is for one-half *ṣā*ʿ of wheat, while those who adopted the apparent meaning of the tradition of Abū Saʿīd made an analogy for wheat upon barley and held them to be similar for the obligation.

6.4. *Section 4: When is* zakāt al-fiṭr *due?*

When does *zakāt al-fiṭr* become (immediately)[208] due? They agreed that it becomes obligatory at the end of Ramaḍān, because of the tradition of Ibn ʿUmar that "The Messenger of Allāh (God's peace and blessings be upon him) declared *zakāt al-fiṭr* as prescribed for the people at the end of Ramaḍān". They disagreed over the determination of a specific time. Mālik, in a narration from him by Ibn al-Qāsim, makes it obligatory with the breaking of the dawn on the day of *fiṭr*. Ashhab has related from him that he considers it obligatory at sunset on the last day of Ramaḍān. The first opinion was also held by Abū Ḥanīfa and the second by al-Shāfiʿī. The reason for their disagreement is whether it is a worship associated with the day of *ʿīd* or with the passing of the month of Ramaḍān,[209] as the night of *ʿīd* is not part of Ramaḍān. The application of this dispute is to be seen in the case of a child born before morning on the day of *ʿīd*, but after sunset (of the last day of Ramaḍān). Is *zakāt al-fiṭr* obligatory on behalf of this child?[210]

6.5. *Section 5: Avenues of expenditure*

To whom is it to be paid? They agreed that it is to paid to the poor, because of the saying of the Prophet (God's peace and blessings be upon him), "Make them free from want on this day". They disagreed whether it is permissible for the poor of the Ahl al-Dhimma. The majority maintain that it is not permitted for them, while Abū Ḥanīfa said that it is permissible.

The reason for their disagreement is whether the basis for its entitlement is poverty alone, or it is poverty as well as being a Muslim. Those who maintained that it is poverty as well as being Muslim did not permit it for the *dhimmiyūn*, while those who maintained that it is poverty alone permitted it for them. One group, however, stipulated for the Ahl al-Dhimma that they be monks.

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[208] Otherwise, its payment may be voluntarily advanced any time during the month of Ramaḍān, which is good for the poor who may have to prepare food for consumption.

[209] This happens at sunset on the last day of Ramaḍān.

[210] It is not according to the first ruling, but it is according to the second opinion.

The Muslim jurists agreed unanimously, however, that the *zakāt* on wealth is not permitted for the Ahl al-Dhimma, because of the saying of the Prophet (God's peace and blessings be upon him): "It is a *ṣadaqa* acquired from their rich and bestowed on their poor".

VII

THE BOOK OF *ṢIYĀM* (FASTING)

This book is divided into two books. The first is about obligatory fasting and the other about recommended fasting. The study of obligatory fasting is divided into two parts. The first is about fasting and the other about breaking the fast. The first part, fasting, is divided into two chapters. The first is about the kinds of obligatory fasts and the other is about the identification of its elements (*arkān*). The part that includes the study of breaking the fast is divided into the identification of things which break (annul) the fast and the *aḥkām* related to persons who break it.

7.1. BOOK I: OBLIGATORY FASTS

We begin with the first book in this (main) book.

7.1.1. Part 1: Fasting (*Ṣawm*)

We begin with the first chapter that covers the identification of the kinds of fasting.

7.1.1.1. Chapter 1 The Kinds of Obligatory Fasts

We Say: Fasting prescribed by law is obligatory and recommended. Obligatory fasting is of three kinds. The first is obligatory during a fixed time, and this is fasting during the month of Ramaḍān itself. The second is prescribed due to a reason, and this is fasting for expiation (*kaffāra*). The third is fasting that a person imposes on himself; this is fasting after a vow (*nadhr*). The discussion in this book about the kinds of obligatory fasting is related to fasting during the month of Ramaḍān alone. Fasting for expiation will be discussed on those occasions where expiation is an obligatory consequence. Similarly, fasting due to a vow will be discussed in the Book of Vows.

Fasting during the month of Ramaḍān is obligatory on the basis of the Qurʾān, the *sunna*, and consensus. In the Qurʾān the basis are the words of the Exalted, "O ye who believe! Fasting is prescribed for you, even as it was prescribed for those before you, that ye may ward off [evil]".[211] In the *sunna* it is the saying of the Prophet (God's peace and blessings be upon him), "Islam is structured on five things"—and he mentioned "fasting"; and also his words to the Bedouin, "And the fast of the month of Ramaḍān". He asked, "Am I obliged for something else besides (all) this". He replied, "No! Unless it is voluntary". Consensus is found as there is no disagreement that has been attributed to any of the *imāms* over this.

The person on whom it is obligatory without a choice is the believer who is a major and a sane person, who is not on a journey, is in sound health, and is free of a relieving factor, which is menstruation for women. There is no dispute over this because of the words of the Exalted, "And whosoever of you is present [living through the month], let him fast the month".[212]

7.1.1.2. Chapter 2 The (Integral) Elements (*Arkān*) of Fasts

There are three elements. Two of them are agreed upon, and these are duration and abstinence from acts breaking the fast, while the third is disputed, which is formulation of the intention.

7.1.1.2.1. The first element: duration

The first element, which is duration, is divided into two kinds. The first is the period of obligation, which is the month of Ramaḍān, while the other is the period of abstinence from acts that break the fast, and this covers day-time of the the days of this month, thus, excluding the nights. To each of these periods are related fundamental issues over which they disagreed. We begin with those that relate to the period of the obligation. The first of these is the determination of the two ends of this period. The second relates to the identification of the method by which a knowledge of the limiting signs is attained with respect to each individual and to the various horizons.

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[211] Qurʾān 2 : 183.

[212] Qurʾān 2 : 185. Statement in parentheses added to Pickthall's translation.

With respect to the two ends of the period (of obligatory fasting), the jurists agreed that the Arabic month spans over twenty-nine days that are sometimes thirty, and that the criterion for the determination of the month of Ramaḍān is the sighting of the new moon, because of the saying of the Prophet (God's peace and blessings be upon him), "Fast with its [the moon's] sighting and break it with its sighting". By sighting here is meant the first appearance of the new moon after the declining of the sun. They disagreed about the *ḥukm* when there are factors that conceal sighting and make it impossible. They also disputed the proper time for sighting the new moon. As to their disagreement when the moon is concealed (in clouds), the majority maintain that the *ḥukm* in such a case is to complete the period of the preceding month (Shaʿbān), thirty days. If the moon is concealed at the (probable) beginning of the month, the month before it is to be counted as having thirty days. Thus, the first day of the Ramaḍān would be the next day. If the moon is concealed at the end of the month (of Ramaḍān), the people will fast for thirty days. Ibn ʿUmar held a different opinion, that is, if the concealed moon is that of the beginning of the month of Ramaḍān, the next day which is called the Day of Doubt is to to be observed as a fast. It is related from some of the predecessors (early jurists) that if the moon is concealed recourse is to be had to astronomical calculation, and this is the opinion of Muṭarrif ibn al-Shikhkhīr, one of the leading Tābiʿūn. In a narration by Ibn Surayj from al-Shāfiʿī he said that if a person is proficient in astronomy, and according to his calculation the new moon could be sighted had it not been for the obstruction he may (should) commence fasting and his fast would be valid.

The reason for their disagreement arises from the lack of detail (*ijmāl*) in the saying of the Prophet (God's peace and blessings be upon him), "Fast on sighting it and break the fast on sighting it. If it is concealed, make an assessment about it (*fa ʾqdurū lahu*)". The majority maintained that this means "complete the period of thirty days". One group of jurists said that the meaning of *taqdīr* here is to fix its time by reckoning. Some of them even said that the believer should wake up fasting, which is the opinion of Ibn ʿUmar, as we have mentioned. This, however, is a remote interpretation. The majority decided upon their interpretation due to the authentic tradition of Ibn ʿAbbās that the Prophet (God's peace and blessings be upon him) said, "If it is concealed from you, then, complete the count of thirty days". The former (tradition) lacks detail (they said) and this is its explanation, thus, it is necessary to construe the unelaborated through its explanation. This is a method over which there is no dispute among the experts on *uṣūl*, as there is in fact no conflict at all between the *mujmal* and the *mufassar*. The opinion of the majority on this point is more convincing, Allāh knows best.

In their disagreement about the legitimate time of sighting, they first agreed that if it is sighted in the evening the month begins on the next day (starting after sunset). They disagreed when it was sighted during the daytime on the last day of Shaʿbān, that is, the first time of its sighting. The opinion of the majority is that if the first sighting of the moon is during the day, it is the moon of the next day, just like its sighting in the evening. This opinion was held by Mālik, al-Shāfiʿī, Abū Ḥanīfa, and the majority of their disciples. Abū Yūsuf, the disciple of Abū Ḥanīfa, al-Thawrī, and Ibn Ḥabīb one of the disciples of Mālik held that if the moon is sighted before the declining of the sun it belongs to the previous night, but if it is sighted after the declining of the sun it belongs to the coming night.

The reason for their disagreement is the relinquishment of experience, where experience provides a way out, and having recourse instead to reports on the issue. There is no tradition on this issue from the Prophet (God's peace and blessings be upon him) to which recourse can be had. There are, however, two traditions from ʿUmar (God be pleased with him). One of them is general and the other is explanatory. One group relied upon the general report, while the other relied upon the explanatory. The report with the general implication is related by al-Aʿmash from Abū Wāʾil, the brother of Ibn Salama, who said, "A letter from ʿUmar came to us, when we were at Khaniqayn that the crescent moon appears in different sizes. Sometimes it looks large and it may look small. (The letter said:) 'If you sight the moon during day-time, do not stop fasting till two men testify that they have seen the new moon during the (previous) evening'". The tradition with the particular implication is what is related by al-Thawrī from him that a report reached ʿUmar that some people had sighted the new moon after the declining of the sun and had broken their fast. He wrote to them reprimanding them for it and said: "If you sight the moon during the day before the declining of the sun, break your fast, but if you see it after the declining of the sun do not break it".

The Qāḍī (Ibn Rushd) said: "What is dictated by analogy and experience is that the moon cannot be seen when the sun has not gone down, unless it is far away from it, for at that time it is greater than the arc of vision, though it varies growing greater or lesser, but it is unlikely, Allāh knows best, to be so large as to be seen when the sun has not gone down yet. The best reliance in this matter is on experience, as we have said. There is no difference here whether it is before the declining of the sun or after it, and the thing to be considered is the disappearance of the sun".

As far as their disagreement about the legitimate knowledge of sighting is concerned, there are two methods for it. One of these is based upon the senses (perception) and the other upon reports. The jurists agreed that a person, who alone sights the moon, is under an obligation to fast, except for ʿAṭāʾ ibn Abī Rabāḥ, who said that he is not to fast unless another person besides him has sighted it too. They disagreed about whether he can stop fasting on the basis of his own sighting. Mālik, Abū Ḥanīfa, and Aḥmad held that he is not to cease fasting. Al-Shāfiʿī said that he is to stop fasting, and this was also the opinion of Abū Thawr. This dispute has no meaning, as the Prophet (God's peace and blessings be upon him) made fasting and breaking the fast dependent upon sighting, and sighting is by perception. Had there been no consensus about fasting on the basis of a report of sighting, because of the apparent meaning of this tradition, the imposition of an obligation of fasting on the basis of reports would be far-fetched. Those who made a distinction between the moon of fasting and that of terminating the fast did so for the prevention of improper claims that may be made falsely by the devious, who may cease fasting illegitimately, claiming they have seen the moon when in actual fact they have not. Al-Shāfiʿī, therefore, said that if he fears accusations he should abstain from eating and drinking and consider himself as having ceased fasting. Mālik deviated from this and said that the person who sights the moon alone and breaks his fast is liable to *qaḍāʾ* as well as expiation. Abū Ḥanīfa said that he is only liable for *qaḍāʾ*.

They disagreed regarding certain questions related to the report of moon sighting. First, over the number of reporters whose reports must be accepted, and then about their qualifications. Mālik said that it is not permitted to commence fasting or to cease fasting on the testimony of less than two trustworthy men. Al-Shāfiʿī, in a narration by al-Muzanī, said that fasting is to commence on the testimony of one man about sighting, but fasting is not to be stopped with the testimony of less than two men. Abū Ḥanīfa said that if the sky is overcast the testimony of one person is accepted, but if it is clear in a large city only the testimony of a large number of persons is acceptable. It is also related from him that he would accept the testimony of two morally upright persons when the sky was clear. It is related from Mālik that he would not accept the testimony of two witnesses when the sky was overcast. They agreed that for breaking the fast not less than two witnesses are acceptable, except for Abū Thawr who did not make a distinction between fasting and breaking the fast, unlike al-Shāfiʿī.

The reason for their disagreement stems from the conflict of traditions on the subject, and the vacillation of a tradition between falling under the category of testimony and the category conveying no stipulated number (for witnesses). The traditions include what has been related by Abū Dāwūd from ʿAbd al-Raḥmān ibn Zayd ibn al-Khaṭṭāb that he addressed the people on a Day of Doubt and said, "I used to mix with the Companions of the Messenger of Allāh (God's peace and blessings be upon him) and asked them, and all of them related to me that the Messenger of Allāh (God's peace and blessings be upon him) said, 'Commence fasting on sighting it and cease fasting on sighting it. If it is concealed from you, then, complete a period of thirty (days). If two witnesses render testimony (of sighting the moon), commence fasting or cease fasting'". They also include the tradition of Ibn ʿAbbās that he said, "A Bedouin came up to the Prophet (God's peace and blessings be upon him) and said, 'I sighted the moon tonight.' He said, 'Do you testify that there is no god but Allāh and that Muḥammad is his servant and messenger?' He replied, 'Yes'. He (the Prophet) said, 'Bilāl, announce to the people that they are to fast tomorrow'". This is recorded by al-Tirmidhī, who stated that there is a dispute about its *isnād* as a group has reported it as *mursal*. There is also the tradition of Ribʿī ibn Khirāsh (Ḥirāsh?) that is recorded by Abū Dāwūd from Ribʿī ibn Khirāsh from one of the Companions of the Prophet (God's peace and blessings be upon him), who said, "The people were fasting on the last day of Ramaḍān, when two Bedouins stood up and testified to the Prophet (God's peace and blessings be upon him) that they had sighted the moon the previous evening. The Messenger of Allāh (God's peace and blessings be upon him) ordered the people to break the fast and to go to the place of [*ʿīd*] prayer".

The jurists adopted the methods of preference or the method of reconciliation for these traditions. Al-Shāfiʿī reconciled the traditions of Ibn ʿAbbās and Ribʿī ibn Khirāsh through their apparent meanings and, thus, deemed the commencement of fasting obligatory on the testimony of one person and its cessation on the testimony of two. Mālik preferred the tradition of ʿAbd al-Raḥmān ibn Zayd on the basis of analogy, that is, holding it to be similar to testimony in other claims. It appears that Abū Thawr did not see a conflict between the traditions of Ibn ʿAbbās and that of Ribʿī ibn Khirāsh. This is so as he (the Prophet) decided on the testimony of two witnesses according to the tradition of Ribʿī ibn Khirāsh, and in the tradition of Ibn ʿAbbās he decided on the the testimony of one witness. This (Abū Thawr said) indicates the permissibility of both, and not that there is a conflict. Nor is there an indication that the decision in the first was specific to the commencement of fasting and that in the second to its cessation, for such an opinion would be based on the assumption of a conflict. The same appears to be true for the conflict between the traditions of ʿAbd al-Raḥmān ibn Zayd and Ibn ʿAbbās, unless the conflict is claimed on the basis of the indirect indication of the text, which is weak as the text opposes it. Thus, we see that the opinion of Abū Thawr, despite its deviation (from the majority view), is more evident, although comparing sighting to narration is closer than comparing sighting to testifying. The reason is that in testimony the stipulation of a number (for witnesses) may either be guidance by revelation, and thus it cannot be subjected to intellectual interpretation as it is not permitted to draw an analogy from it, or it may be said that the stipulation of number is due to the litigation that accompanies claims and the doubt that is associated with the testimony of a person by the litigants. Thus, a multiplicity of witnesses is stipulated so that the conviction becomes predominant and the inclination toward the claims of one litigant is strengthened. The number did not go beyond two so that adducing evidence does not become difficult thereby vitiating claims. There is no accompanying doubt due to an opponent in the case of the sighting of the moon that should necessitate its clarification through an increase in number.

It appears that al-Shāfiʿī made a distinction between the moon of fasting and the moon of cessation of fasting on the basis of the suspicion that is associated with people in the sighting of the moon of cessation of fasting, but is not present in the case of the moon of fasting. The opinion of Abū Bakr ibn al-Mundhir is the same as the opinion of Abū Thawr, and I believe it is also that of the Ẓāhirites. Abū Bakr ibn al-Mundhir argued on the basis of this tradition for the occurrence of a consensus for the obligation of breaking the fast and abstaining from eating on the testimony of one person. It therefore becomes necessary that the matter be the same for entering into the month and moving out of it, as both are signs separating the period of non-fasting from the period of fasting.

If we say that sighting is established for those who have not sighted it on the basis of a report, then, can this be extended from one land to the other, I mean, is it obligatory upon the people in one region, if they have not sighted the moon, to adopt the sighting in another land, or is sighting necessary for every land? There is disagreement over this. Ibn al-Qāsim and the Egyptian jurists (who follow Mālik) have related from Mālik that if it is established for the people of one town that the people in another have sighted the moon, they are under an obligation of *qaḍāʾ* for the day observed by others and missed by them. This was also the opinion of al-Shāfiʿī and Aḥmad. The Medinites have related from Mālik that sighting on the basis of a report is not binding upon people not living in the land in which sighting occurred, unless the *imām* requires the people to do so. This was the opinion of Ibn al-Mājishūn and of al-Mughīra from among the disciples of Mālik. They agreed that this is not to be taken into account for lands distant from each other, like al-Andalus and al-Ḥijāz.

The reason for this disagreement comes from the conflict of traditions and reasoning. The reasoning is that if the timing of the rising of the sun and the stars in different lands does not differ very much, it is necessary that one should follow the other, as by reason they have the same horizon. If it does differ much, however, then it is not binding upon one region to follow the other. The tradition is what is related by Muslim from Kurayb that Umm al-Faḍl bint al-Ḥārith sent him to Muʿāwiya in Syria. He said, "I reached Syria and did what she had required. The moon of Ramaḍān came upon me while I was in Syria, and I sighted it on the night before Friday. Near the end of the month I moved to Medina where ʿAbd Allāh ibn ʿAbbās questioned me and then mentioned the moon, saying, 'When did you sight the moon (in Syria)?' I said, 'We saw it on the night before Friday.' He asked, 'Did you, yourself, see it?' I said, 'Yes, and so did the people. They fasted and Muʿāwiya fasted too'. He said, 'But we sighted it on the night before Saturday, and we continue to fast till we either complete thirty days or sight it'. I said, 'Do you not consider Muʿāwiya's fasting as sufficient?' He replied, 'No! This is what the Prophet (God's peace and blessings be upon him) ordered us to do'". The apparent meaning in this tradition implies that each land, near or distant, must sight the moon. Investigation, however, reveals a difference between distant and near lands, especially those that are at a great distance in terms of longitude and latitude. If the report (about sighting) reaches the level of *tawātur* there is no need to support it with testimony. These, then, are the issues related to the duration of the obligation.

On the issues related to the duration of abstinence they agreed that it is terminated by the setting of the sun, because of the words of the Exalted, "Then strictly observe the fast till nightfall".[213] They disagreed about the time of its commencement. The majority said that it is at the appearance of the second dawn, the white line (horizon), the appearance of the true morning twilight, because it is established from the Messenger of Allāh (God's peace and blessings be upon him), who defined it as the spreading white line (horizon), and also because of the words of the Exalted, "Eat and drink until the white thread becometh distinct to you from the black thread of the dawn".[214] One group deviated saying that it is the red dawn that appears after the white and it is a replica of the red dusk (the evening twilight). This is related from Ḥudhayfa and Ibn Masʿūd.

The reason for disagreement emanates from the conflict of traditions on the issue and the equivocality of the term "dawn", that is, it is applied to mean either the white or the red. The traditions on the basis of which they argued include the tradition of Zarr from Abū Ḥudhayfa, who said, "I had meals with the Prophet (God's peace and blessings be upon him) before daybreak, and had I liked I could have said it was daytime, yet the sun had not risen". Abū Dāwūd had recorded from Qays ibn Ṭalq from his father that the Prophet (God's peace and blessings be upon him) said, "Eat and drink, and let not the rising white light intimidate you. Eat and drink, until you see the red light spreading across [the horizon]". Abū Dāwūd stated that this tradition was narrated by the people of Yamāma alone, and this is deviation, for the words of the Exalted, "Eat and drink until the white thread becometh distinct to you",[215] are explicit, or almost explicit, in this. Those who held that it is the spreading white line of the dawn, and these are the majority, who are on firmer ground, disagreed about the exact limit for abstention from such things as eating (and drinking). A group of jurists said that it is the breaking of the dawn in itself. Another group said that it is its awareness for the person looking at it. If he does not become aware of it, then, observance of abstention is not obligatory, even if it is already daybreak. The significance of the distinction is that if the person discovers that it was daybreak before he became aware of it, then, according to those for whom the limit is the break of the dawn itself, he is liable for *qaḍāʾ*. Those who consider the limit to be the person's own awareness of it, hold that *qaḍāʾ* is not obligatory for him.

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[213] Qurʾān 2 : 187.

[214] Qurʾān 2 : 187.

The disagreement over this is caused by the possible interpretations of the words of the Exalted, "Eat and drink until the white thread becometh distinct to you from the black thread of the dawn".[216] Is abstinence to commence when the distinction becomes evident to the person or as soon as it actually happens? Arabs employ the term figuratively for the occurrence of a phenomenon to denote another that follows it. It was thus as if it was said, "Eat and drink until the white thread becomes distinct to *you* from the black thread". If it becomes evident in itself it becomes evident to us, thus, attributing its becoming evident to us is the reason for the dispute, because it may have become evident and distinct in itself and still not be evident to us. The apparent meaning necessitates the linking of abstinence to actual knowledge, while analogy associates it with the actual fact. I mean, analogy drawn from the *ḥukm* of the sunset prayer and from all the other religious obligations attached to time-limits, like the *ẓuhr* prayer starting at the declining of the sun, as well as others. The consideration in all of these is attached to the actual realities themselves, not to their knowledge. The well-known opinion from Mālik, which is also held by the majority, is that engagement in acts like eating may go up the beginning of daybreak (dawn). It is said, however, that abstinence should be prior to dawn. The evidence for the first view is what is related in the *Ṣaḥīḥ* of al-Bukhārī, and I believe in some versions of the tradition, that the Prophet (God's peace and blessings be upon him) said, "Eat and drink until Ibn Umm Maktūm makes the call [for the dawn prayer], for he does not make the call unless it is the break of the dawn".[217] This is explicit on the point of dispute, or almost explicit, and conforms with the words of the Exalted, "Eat and drink until the white thread becometh distinct to you from the black thread of the dawn".[218] Those who maintained that abstinence is to commence prior to the dawn did so as a precaution and for the prevention of means (to violation). This is a more conservative opinion, but the other is more in line with analogy, Allāh knows best.

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[215] Qurʾān 2 : 187.

[216] Qurʾān 2 : 187.

[217] The background is that Bilāl used to recite the dawn *adhān* earlier to wake up the believers.

[218] Qurʾān 2 : 187.

7.1.2.2. The second element: Abstinence

They agreed that abstinence from food, drink, and sexual intercourse is obligatory, on the person fasting, during the period of the fast due to the words of the Exalted, "So hold intercourse with them and seek that which Allāh hath ordained for you, and eat and drink until the white thread becometh distinct to you from the black thread of the dawn".[219] They differed in this over issues some of which are not expressly stated in the law while others are. Those that are not expressly stated include the question of things entering the stomach but are not food, that of things entering the stomach from other than the passage for food and drink, like enema, and the problem of things entering some parts of the body other than the stomach, like those entering the brain but not reaching the digestive tract.

The reason for their disagreement over these things stems from the analogy drawn from food for those that are not food. This is so as things expressly mentioned are food. Those who thought that the purpose of fasting has a rational meaning did not link non-food with food. Those who maintained that it is a worship that does not have a rational meaning and that the aim of fasting is abstinence alone from things that reach the stomach held food and non-food to be the same (for this purpose). The summary of Mālik's opinions is that it is obligatory to abstain from things that reach the gullet through any opening, whether they are food or non-food.

With respect to things other than food and drink that break the fast, all of them agreed, except for Mālik, that a person who kisses and ejaculates has broken the fast, but one who passes pre-seminal fluid does not. They disagreed over kissing by the person fasting. Some of them permitted this. Some disapproved (frowned upon) it for a young man but permitted it for the elderly. Some prohibited it absolutely. Those who granted an exemption for it did so because of what is related of the traditions of ʿĀʾisha and Umm Salama "that the Prophet (God's peace and blessings be upon him) used to kiss when he was fasting". Those who disapproved of it did so as kissing may lead to sexual intercourse. One group deviated and said that a kiss breaks the fast. They argued for this on the basis of what is related from Maymūna ibn Saʿd, who said, "The Messenger of Allāh (God's peace and blessings be upon him) was asked about kissing by one fasting. He said, 'Both are to break the fast'".

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[219] Qurʾān 2 : 187.

Al-Ṭaḥāwī recorded this tradition but declared it as weak. Those acts, that occur as a result of an overpowering emotion or forgetfulness, their discussion will be taken up under the discussion of things breaking the fast and their *aḥkām*.

The things that are expressly mentioned and over which they disagreed are cupping and vomiting. There are three opinions about cupping. A group of jurists said that cupping breaks the fast and abstaining from it is obligatory. This was the opinion of Aḥmad, Dāwūd, al-Awzāʿī, and Isḥāq Ibn Rāhwayh. Another group of jurists said that it is disapproved (deprecated) for the person fasting, but it does not break the fast. This was the opinion of Mālik, al-Shāfiʿī, and al-Thawrī. A third group said that it is neither frowned upon nor does it annul the fast. This was the opinion of Abū Ḥanīfa and his disciples.

The reason for their disagreement comes from the conflict of traditions that have been reported on the issue. There are two traditions on the issue. The first is related through Thawbān and through Rāfiʿ ibn Khadīj that the Prophet (God's peace and blessings be upon him) said, "The person cupping and the one being cupped have broken the fast". This tradition of Thawbān was considered authentic by Aḥmad. The second is the tradition of ʿIkrima from Ibn ʿAbbās "that the Messenger of Allāh (God's peace and blessings be upon him) was cupped when he was fasting". This tradition of Ibn ʿAbbās is authentic.

The jurists, in their treatment of these traditions, adopted three methods. The first is the method of preference. The second is the method of reconciliation. The third is the giving up of the conflicting traditions and having recourse to the original rule of no liability, as the abrogated text cannot be distinguished from the abrogating text. Those who adopted the method of preference argued on the basis of the tradition of Thawbān, as it imposes a *ḥukm* while the tradition of Ibn ʿAbbās removes it, and that imposing it is to be preferred over one removing it. If the *ḥukm* is established in a manner that it is obligatory to act upon it, it cannot be removed except by way of an obligation of not acting upon it. The tradition of Thawbān necessitates that it be acted upon. The tradition of Ibn ʿAbbās has two probabilities; namely, it is the abrogated or the abrogating tradition. This invokes doubt and doubt does not necessitate action nor does it remove a conviction necessitating action. This is in accordance with the method of those who do consider doubt to be operative against conviction. Those who sought to reconcile the two traditions interpreted the proscribing tradition to mean disapproval and the tradition depicting cupping to imply the removal of prohibition. Those who dropped the traditions due to conflict upheld the permissibility of cupping for the person fasting.

With respect to vomiting, the majority of the jurists maintained that one who vomits involuntarily has not broken his fast, except Rabīʿa who said that he has. The majority, except Ṭāwūs, also maintain that the person who vomits voluntarily has broken his fast. The reason for their disagreement stems from the assumed conflict between the traditions that are laid down on the issue, and also their dispute about the authenticity of these traditions. There are two traditions on the topic. The first is the tradition of Abū al-Dardāʾ "that the Messenger of Allāh (God's peace and blessings be upon him) vomited and broke his fast". Maʿdān said, "I met Thawbān in the mosque of Damascus and said to him that Abū al-Dardāʾ told me 'that the Messenger of Allāh (God's peace and blessings be upon him) vomited and broke his fast.' He said, 'He spoke the truth, and I poured out water for his ablution'". This tradition of Thawbān has been declared authentic by al-Tirmidhī. The other tradition is from Abū Hurayra and is recorded by al-Tirmidhī and Abū Dāwūd. It says that the Prophet (God's peace and blessings be upon him) said, "One who is overcome by vomiting when he is fasting is not under an obligation for *qaḍāʾ*, but one who causes himself to vomit is under the obligation for *qaḍāʾ*". This has also been related as *mawqūf*[220] from Ibn ʿUmar. Those for whom both traditions did not prove to be authentic said that there is no breaking of the fast at all in this case. Those who adopted the apparent meaning of the tradition of Thawbān and preferred it over the tradition of Abū Hurayra upheld the obligation of (*qaḍāʾ* for) breaking the fast after vomiting without qualifications, that is, they did not distinguish between deliberate and non-deliberate vomiting. Those who reconciled the two traditions maintained that the tradition of Thawbān lacks detail, while the tradition of Abū Hurayra is explanatory, and it is necessary to construe the concise tradition through the explanatory. They, therefore, distinguished between vomiting and self-induced vomiting, and this is the opinion of the majority.

7.1.1.2.3. The third element: intention

The discussion of intention is undertaken from different aspects. These include whether it is a condition for the validity of this worship, and if it is a condition, then, what kind of determination is considered valid? Further, whether its renewal every day of Ramaḍān is obligatory or is the intention expressed on the first day sufficient? If the subject makes the resolve, what is the time of this resolve that makes the fast valid, so that if it is not expressed at such time it is nullified? Does failure to form the intention necessitate breaking the fast, and what if the person does not break the fast? The jurists differed on each of these questions.

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[220] The tradition is attributed to a Companion, but his disciple through whom the tradition is supposed to be narrated is dropped from the *isnād*.

The opinion of the majority of the jurists is that intention is a condition for the validity of the fast, but Zufar deviated and said that the month of Ramaḍān does not require intention, unless the person happens to have reason to be relieved from the obligation of fasting, such as being on a journey, but wishes to fast. The reason for their disagreement stems from their notion about the nature of fasting whether it is a worship having a rational meaning or it has no such meaning. Those who maintained that it is a worship having no rational purpose made intention obligatory, while those who maintained that it is a worship with rational purpose said that the purpose is attained even if the person does not form an intention. The confining of this reasoning by Zufar to only some kinds of fasting presents some weakness. It appears that he formed his opinion on the grounds that it is not permitted to cease fasting during the days of Ramaḍān and that any fast kept during these days of the month fulfils this form of prescribed fasting, and this is something specific to these days.

With respect to their dispute over the specification of the kind of fasts through the formulation of a valid intention, Mālik said that it is necessary to identify the fast of Ramaḍān in the intention, and it is not sufficient in Ramaḍān to have a general intention to fast, nor an intention specifying another fast. Abū Ḥanīfa (held the opposite view, and) said that if the person forms an absolute (unqualified) intention, or an intention specifying another fast other than the fast of Ramaḍān it is valid and the fast turns into a fast of Ramaḍān. This is so, unless the person is on a journey for, in his view, if the traveller during Ramaḍān makes an intention for fasts other than the fast of Ramaḍān his intention will apply to the intended fast. The reason is that while travelling he is not under an obligation to observe the fast of Ramaḍān. His two (renowned) disciples did not distinguish between one travelling and the resident. They said that each fast intended during Ramaḍān is converted into a fast of Ramaḍān.

The reason for their disagreement stems from the dispute as to whether it is sufficient for the fasts of Ramaḍān that the category of fasting be identified generally or that it has to be specified. Both forms (of intention) exist in the law. An example of the general intention is the intention of ablution in which it is sufficient to intend the removal of impurities. The worshipper may then perform any kind of worship whose validity depends on ablution (prayers, *ṭawāf*, carrying a copy of the Qur'ān, etc.). Thus, ablution is not specific to one kind of worship. This is different from the intention for prayer, in which it is necessary to specify the particular prayer that is about to be performed. It is, therefore, necessary to specify the prayer as *ʿaṣr*, if it is *ʿaṣr*, and *ẓuhr* if it is *ẓuhr*. All this is well-known to the jurists. Fasting, therefore, vacillates between these two general rules in the view of these jurists. Those who associated it to one genus said that it is sufficient to make a resolve for fasting alone. Those who associated it with the second genus stipulated the specification of the fast.

They also disagree over the issue that if he makes an intention, during the days of Ramaḍān, for another kind of fast whether this is converted (to the fast of Ramaḍān). The reason for this is that some kinds of worship are converted due to the fact that the time in which it occurs is specific for the worship to which they are converted. There are some kinds of worship that are not converted, and this applies to most forms of worship. Those, however, that are converted include *ḥajj*, by agreement. They said that if a person on whom *ḥajj* is obligatory commences it as a voluntary form of worship during the *ḥajj* season, the voluntary form is converted to the obligatory form. They did not say this for prayer or other forms of worship. Those who held fasting to be similar to *ḥajj* said that it is converted, while those who held it to be similar to other forms said that it is not.

In their disagreement over the time of forming the intention, Mālik said that fasting is not valid except by an intention formed before the break of the dawn, and this applies to all kinds of fasting. Al-Shāfiʿī said that intention formed after dawn is valid in supererogatory fasting, but it is not in obligatory fasts. Abū Ḥanīfa held that intention formed after dawn is sufficient for all kinds of fasting whose obligation is linked to a particular time, like those of Ramaḍān, those linked to specific days or dates after a vow, and also those that are supererogatory, but it is not for the fasts that exist as a liability.

The reason for their disagreement arises from the conflict of traditions on the issue. The first of these traditions is the one recorded by al-Bukhārī from Ḥafṣa that the Prophet (God's peace and blessings be upon him) said, "One who does not form the intention to fast during the night has no fast". It has also been related as *mawqūf* by Mālik. Abū ʿUmar said that there is some discrepancy in the *isnād* of Ḥafṣa's tradition. The second is recorded by Muslim from ʿĀʾisha, who said, "The Messenger of Allāh (God's peace and blessings be upon him) said to me one day, 'ʿĀʾisha, do you have something (to eat)?' I said, 'O Messenger of Allāh, we have nothing'. He said, 'Then I am fasting'". In the tradition of Muʿāwiya, he said on the pulpit, "O people of Medina, where are your learned men? I heard the Messenger of Allāh (God's peace and blessings be upon him) saying, 'Today it is the day of ʿĀshūrāʾ and its fast has not been prescribed for us. I am fasting, so those of you who wish to fast may do so and those who like may continue to eat'".

Those who adopted the method of preference relied on Ḥafṣa's tradition, while those who adopted the method of reconciliation distinguished between supererogatory and obligatory fasting, that is, they construed the tradition of Ḥafṣa as implying obligatory fasts and the traditions of ʿĀʾisha and Muʿāwiya as implying supererogatory fasts. Abū Ḥanīfa made a distinction between universal obligation and an obligation that is a liability, as the universal obligation has a determined time that takes the place of intention for specification, while the fast that is a liability has no fixed time; thus, he made it obligatory that it be specified with an intention.

The majority of the jurists maintain that freedom from *janāba* is not a condition for the validity of the fast, because of what is established from the traditions of ʿĀʾisha and Umm Salama, the two wives of the Prophet (God's peace and blessings be upon him), who said, "The Messenger of Allāh (God's peace and blessings be upon him) used to arise in the morning during Ramaḍān in a state of major impurity from sexual intercourse, not a wet dream, and then kept the fast". An evidence for this is that a wet dream during the day does not invalidate the fast. It is, however, related from Ibrāhīm al-Nakhaʿī, ʿUrwa ibn Zubayr, and Ṭāwūs that if the person does this intentionally (induces ejaculation) the fast is invalidated.

The reason for their disagreement comes from what is related from Abū Hurayra, who used to say, "One who arises in the morning during Ramaḍān in a state of major impurity has broken his fast". Mālik has related that a menstruating woman who reaches the period of purity before dawn, but delays bathing is not to fast on that day. The opinions of these jurists are deviant and rejected by the well-known and established *sunan*.

7.1.1.3. Chapter 3 Breaking the Fast and Not Fasting and the *Aḥkām*

This chapter discusses breaking the fast (and not fasting) and its *aḥkām*. Those who may break the fast (or not fast) are, in the law, of three kinds: a category in which it is permitted, by consensus, to fast or not to fast; a category in which it is obligatory not to fast, along with the accompanying disagreement among Muslim jurists; and a category in which it is forbidden not to fast. For each of these there are related *aḥkām*.

Those to whom both things are permitted are the the sick person, by agreement, the traveller, with disagreement, the pregnant woman, the wet-nurse, and the old person. This division is agreed upon in its entirety, except the traveller whose problem is examined from various aspects. These include the point: that if he fasts, whether his fast is considered to be valid. If it is valid, whether it is better for the traveller to fast or not to fast, or whether he has a choice between the two. Whether breaking the fast is permitted to him for a limited type of journey or for any journey to which the term "journey" is applied in usage. When may the traveller stop fasting? When does he begin fasting (again)? If he initiates a journey during Ramaḍān, does he have the right to break the fast after the passage of a portion of the month? Finally, if he does not fast, what is the *ḥukm* for him? The case of the sick person involves the discussion of the identification of the sickness which entitles him not to fast, and also the *ḥukm* while not fasting.

7.1.1.3.1. Issue 1

This relates to the question of the sick person and the traveller if they fast, whether their fast is considered valid as an obligatory fast. The jurists disagreed over this. The majority maintain that if they fast their fast is in order and valid. The Ẓāhirites maintain that their fasts are not valid and their obligation is to perform *qaḍā*ʾ on other days (not in Ramaḍān).

The reason for the disagreement is based on the interpretation of the words of the Exalted, "And whosoever of you is sick or on a journey, (let him fast the same) number of other days",[221] whether they are to be read as they are so that no implied word is assumed, or whether they are to be construed metaphorically and an implied word is to be read into them so as to read, "and he does not fast then (let him fast the same) number of other days". This kind of absence of words in speech is known to the experts of the language as *laḥn al-khiṭāb* (style of Arabic). Those who read the verse as it is and not metaphorically said that the obligation for the traveller is to fast the same number of other days, because of the words of the Exalted, "number of other days". Those who assumed the implied words "and he does not fast" said that his obligation is a number of other days if he does not fast. Both groups support their interpretation on the basis of traditions that testify to the correctness of their understanding, though the principle is to read a text as it is, unless another evidence indicates that it be read in its metaphorical meaning.

The majority argue for their opinion on the basis of the established tradition of Anas, who said, "We travelled with the Messenger of Allāh (God's peace and blessings be upon him) during Ramaḍān and he did not find fault with the person fasting in preference to the person not fasting nor did he find fault with the person not fasting in preference to the one fasting". It is also established from him that he said, "The Companions of the Messenger of Allāh (God's peace and blessings be upon him) used to travel together with some of them fasting when others were not". The Ẓāhirites argue for their opinion on the basis of what is established from Ibn ʿAbbās "that the Messenger of Allāh (God's peace and blessings be upon him) travelled to Mecca in the year of its conquest during Ramaḍān. He continued to fast up to al-Kadīd after which he stopped fasting and so did the people", and they used to act upon the most recent of the commands of the Messenger of Allāh (God's peace and blessings be upon him). They said that this indicates the abrogation of fasting (during travel). Abū ʿUmar said that the argument against the Ẓāhirites is their consensus that if the sick person keeps the fast his fast is considered to be valid.

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[221] Qurʾān 2 : 185.

7.1.1.3.2. Issue 2

This relates to the question whether fasting is better than not fasting (during travel). If we say, according to the opinion of the majority, that the traveller is entitled not to fast, then we must add that the jurists had three different opinions (within this general agreement). Some of them held that fasting has greater merit. Those who held this opinion include Mālik and Abū Ḥanīfa. Some maintained that not fasting is better. Those who held this opinion include Aḥmad and a group of jurists. Some maintained that this was a matter of choice, none is better.

The reason for their disagreement arises from the conflict of an interpretation with the apparent meaning of some transmitted texts, and the conflict of some transmitted texts with other transmitted texts. This is so as the understandable meaning of the permission of not fasting for a person is an exemption intended to remove hardship for him, and when an exemption is provided it is meritorious to relinquish the exemption. This is testified to by the tradition of Ḥamza ibn ʿAmr al-Aslamī, recorded by Muslim, that he said, "O Messenger of Allāh, I find in myself the strength to fast during a journey, would I then be sinning?" The Messenger of Allāh (God's peace and blessings be upon him) said, "It is an exemption from Allāh, so he who acts upon it does good, but there is no sin on the person who wishes to fast". The saying of the Messenger of Allāh (God's peace and blessings be upon him), however, that "It is not an act of piety to fast during a journey", along with the fact that one of his last acts was not to fast, gives the impression that it is better not to fast. Not fasting, though, is not the *ḥukm*, but a permissible act, and it was difficult for the majority to deem the permissible act as being better than the prescribed. Those who gave a choice in the matter did so because of the tradition of ʿĀʾisha, who said, "Ḥamza ibn ʿAmr al-Aslamī asked the Messenger of Allāh (God's peace and blessings be upon him) about fasting during a journey and he said, 'Fast if you like, and if you like do not'". It is recorded by Muslim.

7.1.1.3.3. Issue 3

Whether the permissibility of not fasting for the traveller is limited to journeys of a minimum determined distance. The jurists disagreed about it. The majority said that he may not fast in a journey for which prayer is to be curtailed, and that varies in accordance with their disagreement on that issue.

A group of jurists maintained that he may cease fasting in every journey to which the term "journey" is applied. These are the Ẓāhirites.

The reason for their disagreement stems from the conflict of the apparent meaning of the text with an interpretation. The apparent meaning is that the person may not fast in any journey to which the term is applicable, because of the words of the Exalted, "And whosoever of you is sick or on a journey, (let him fast the same) number of other days".[222] Yet, the understandable meaning of the permission of not fasting during a journey is (relief from) hardship. As hardship is not to be found in every journey it becomes necessary that not fasting be permitted in that journey that entails hardship, and because the Companions were apparently agreed upon a limit for this, it follows that an analogy be drawn upon the limit for the curtailment of prayer.

7.1.1.3.4. Issue 4

They also disagreed about the sickness during which not fasting is permitted. A group of jurists said that it is a sickness in which hardship and duress become associated with the fast. This was Mālik's opinion. Another group of jurists said that it is an overwhelming sickness. This was Aḥmad's opinion. A third group of jurists said that if the term "sick" could be applied to such a person he is not to fast. The reason for their disagreement is the very reason that is assigned for the limit of the journey.

7.1.1.3.5. Issue 5

When does the traveller stop fasting and when does he fast? A group of jurists said that he is to cease fasting the very day that he begins his journey. This was the opinion of al-Shaʿbī, al-Ḥasan, and Aḥmad. Another group said that he is not to cease fasting the day he commences his journey. This was upheld by the jurists of the provinces. A group of jurists considered it desirable for the person who knows that he will reach a city on the first day of his journey should enter it while fasting. Some of them were more strict in this than others, but all of them did not impose expiation on a person who entered when he was not fasting. They disagreed about the person who entered a city when only part of the day had past. Mālik and al-Shāfiʿī said that he is to continue eating and drinking. Abū Ḥanīfa and his disciples said that he is to abstain from eating, just as the menstruating woman, in their view, refrains from eating when she enters the period of purity.

The reason for their disagreement about the time at which the traveller is to stop fasting arises from the conflict of traditions with reasoning. It is established through the tradition of Ibn ʿAbbās "that the Messenger of Allāh (God's peace and blessings be upon him) kept the fast until he reached al-Kadīd when he stopped fasting and so did the people with him". The apparent meaning of this tradition is that he stopped fasting after he had formed the intention for fasting. In the case of the people, however, there is no doubt that they broke the fast after they had formed the intention for it the previous night. Implying the same is the tradition of Jābir ibn ʿAbd Allāh "that the Messenger of Allāh (God's peace and blessings be upon him) travelled to Mecca in the year of its conquest. He continued to travel up to Karāʿ al-Ghamīm, where he asked for the drinking bowl, when the people were fasting, and raised it so the people could see him. He then drank from it. It was later said to him that some of the people continued to fast. He said, 'They are the disobedient. They are the disobedient'". Abū Dāwūd has recorded from Abū Buṣra al-Ghifārī that he had barely gone beyond the houses when he asked for the dining sheet. Jaʿfar, the narrator of the tradition, said, "I said to him, 'Do you not see the houses?' He replied, 'Do you shy away from the *sunna* of the Messenger of Allāh (God's peace and blessings be upon him)'". Jaʿfar said, "He then ate". The reasoning here is that as the traveller is permitted only to form the intention for his fast on the previous night it is not permitted that he annul his fast, because he formed the intention on the basis of the words of the Exalted, "O ye who believe! Obey Allāh and obey the messenger and render not your actions vain".

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[222] Qurʾān 2 : 185.

The reason for their disagreement about abstaining from eating, or not abstaining, on the part of the person entering a city during the day is their dispute about its similarity with the person not fasting on the Day of Doubt (and who abstains) when it is proved to him that it is the first day of Ramaḍān. Those who held this case to be similar to it said that he is to abstain from eating (to fast), while those who did not hold it to be similar said that he is not to abstain as that case is based on a lack of knowledge while this is based upon a cause permitting or giving rise to eating. The Ḥanafites said that both are causes giving rise to abstinence from eating following the permission to eat.

7.1.1.3.6. Issue 6

This relates to the question of whether it is permitted for a person fasting during Ramaḍān to begin a journey and then stop fasting while travelling. The majority maintain that he is permitted to do so. It is related from some, and these are ʿUbayda al-Salmānī, Suwayd ibn Ghafla, and Ibn Majāz, that if he has been fasting during Ramaḍān and begins a journey in it he is not permitted to cease fasting.

The reason for their disagreement arises from their dispute over the meaning of the words of the Exalted, "And whosoever is present let him fast the month".[223] This can be interpreted to mean that one who is present (resident) for part of the month is under an obligation to fast for the whole month. It is also possible to understand from it that the person who has witnessed part of the month (as a resident) should fast for that part, as the meaning by agreement is that the person who has witnessed the whole month should fast for the whole month, it should also mean that one who has witnessed part of the month (as a resident) should fast for that part. The opinion of the majority is supported by the fact that the Prophet began his journey during Ramaḍān.

The *ḥukm* for the traveller if he ceases to fast (during Ramaḍān) is *qaḍāʾ*, by agreement, and the same holds for the sick person, because of the words of the Exalted, "(Let him fast the same) number of other days".[224] The exceptions are persons who are sick due to fainting or insanity, but the jurists disagreed about the two cases. The jurists of the provinces maintain the obligation of *qaḍāʾ* for the person who faints, but differ about the insane. In Mālik's opinion he is under an obligation for *qaḍāʾ*, but it is weak because of the words of the Prophet (God's peace and blessings be upon him), "The pen (liability) has been lifted in the case of three persons . . ., and the insane person until he recovers". Those who imposed the obligation on both disagreed about the existence of fainting and insanity as vitiating factors for fasting. One group said that they do vitiate fasting, while another group said that they do not. A third group of jurists made a distinction between the fainting spell occurring before dawn or after dawn. One group said that if it occurs after the passage of the greater part of the day the person's fast is valid, but if it occurs in the first part of the day he is to fast as *qaḍāʾ*, and this is Mālik's opinion.

All this is weak, as fainting and insanity are causes because of which liability (*taklīf*) is removed, especially in the case of insanity. When the liability is removed the person cannot be described as one fasting or not fasting. How, then, can it be said about an attribute removing liability altogether that it invalidates the fast, for it would amount to saying about a dead person or one all of whose acts are invalid that his fast and his acts have been nullified.

7.1.1.3.7. Sub-issues related to *qaḍāʾ*

There are certain sub-issues related to the *qaḍāʾ* of the traveller and the sick person including the questions: do they perform consecutively? What is required from them as *qaḍāʾ*? What is their duty if they delay, without excuse, the performance of *qaḍāʾ* until the next Ramaḍān? If they die without performing the required *qaḍāʾ*, does the guardian (*walī*) fast on their behalf?

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[223] Qurʾān 2 : 185.
[224] Qurʾān 2 : 185.

Some of the jurists made it obligatory that *qaḍā'* be performed consecutively like *adā'*, while others did not. Some of these jurists gave the person a choice, with some considering consecutive performance to be desirable, but the greater majority stands for the relinquishment of the obligation of consecutive performance.

The reason for their disagreement arises from the conflict of the apparent meaning of the text with analogy. Analogy, in this case, requires that *qaḍā'* performance be the same as *adā'*, the basis for this being prayer and *ḥajj*. The apparent meaning of the words of the Exalted, "(Let him fast the same) number of other days",[225] implies that the obligation exists for the same number alone and not for consecutive performance. It is related from ʿĀ'isha that she said, "The verse was revealed as 'consecutive number of days', but the word 'consecutive' was dropped".

With respect to delaying *qaḍā'* until the next Ramaḍān has started, a group of jurists said that the obligation upon such a person is *qaḍā'* after the new Ramaḍān as well as expiation (*kaffāra*). This was the opinion of Mālik, al-Shāfiʿī, and Aḥmad. Another group of jurists said that there is no obligation of expiation upon him. This was the opinion of al-Ḥasan al-Baṣrī and of Ibrāhīm al-Nakhaʿī.

The reason for their disagreement is whether analogy can be used for extending one expiation to another? Those who did not permit analogy for expiation said that he is only liable for *qaḍā'*. Those who permitted analogy in expiation said that he is obliged to make expiation on the analogy of the person who breaks his fast intentionally as both violate the sanctity of the fast. This person does it by relinquishing *qaḍā* at its proper time whereas the other does it by eating during a day on which eating is not permitted. Analogy here would be well grounded had it been established explicitly by the Lawgiver that there is a determined time for *qaḍā'*, because the timings for *ʿadā'* have been determined by the Lawgiver. One group of jurists deviated saying that if the illness of the person continues up to the next Ramaḍān there is no *qaḍā'* for him. This opposes the text.

A group of jurists said that if the person dies having missed an obligatory fast, no one else is to fast on his behalf. Another group of jurists said that his *walī* is to fast on his behalf. Those who did not make fasting obligatory on the guardian said that he is to feed (the needy) on his behalf. This was al-Shāfiʿī's opinion. Some said that there is no obligation for fasting or for feeding unless the person leaves a testament to the effect. This was Mālik's opinion. Abū Ḥanīfa said that the guardian is to fast. If he is not able to do this he is to feed (the needy). One group of jurists made a distinction between (fasting due to) a vow (*nadhr*) and the regular obligatory fasting, saying that his guardian is to fast on his behalf for a vow, but not for obligatory fasting.

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[225] Qur'ān 2 : 185.

The reason for their disagreement stems from the conflict of analogy with traditions. It is established from the Prophet (God's peace and blessings be upon him) through a tradition from ʿĀʾisha that he said, "If a person dies when he owed a duty to fast, his *walī* is to fast on his behalf". It is related by Muslim. It is also established from him (God's peace and blessings be upon him) through the tradition of Ibn ʿAbbās, who said, "A man came up to the Prophet (God's peace and blessings be upon him) and said, 'O Messenger of Allāh, my mother has died owing the fast for a month. Should I, then, fast on her behalf?' He said, 'Had there been a debt against your mother would you have paid that on her behalf?' He replied, 'Yes'. He said, 'The debt of Allāh has a prior claim for payment'". Those who maintained that the principles oppose this, because as no one prays for another or performs ablution for another then no one is to fast for another, said there is no obligation of fasting for the guardian. Those who adopted the text for this said that he is obliged to fast. Those who did not employ the text for this confined it to the case of (a fast due to) a vow. Those who constructed an analogy from this (vow) said that he is to fast on his behalf for Ramaḍān (missed).

Those who imposed the feeding of the needy decided on the basis of the verse, "(Fast) a certain number of days; and (for) him who is sick among you, or on a journey, (the same) number of other days; and for those who can afford it there is ransom: the feeding of a man in need".[226] Those who granted a choice in this reconciled the verse and the tradition.

These, then, are the *aḥkām* of the traveller and the sick person to whom it is permitted not to fast or to fast.

7.1.1.3.8. Sub-issues relating to the pregnant woman, the wet-nurse, and old persons

The remainder of this chapter is devoted to the discussion of the wet-nurse, the pregnant woman, and the old person. There are two well known issues related to this. The first is if the pregnant woman and wet-nurse do not fast, what is their duty? The jurists have four opinions on this issue. The first is that both feed the needy and there is no *qaḍāʾ* for them. This is related from Ibn ʿUmar and ibn ʿAbbās. The second opinion, which is the counterpart of the first, is that they only perform *qaḍāʾ* and they are not obliged for feeding the needy, and this is the opinion of Abū Ḥanīfa, his disciples, Abū ʿUbayd, and Abū Thawr. The third opinion is that they perform *qaḍā'* as well as feed the needy. This was al-Shāfiʿī's opinion. The fourth opinion is that the pregnant woman performs *qaḍā'* but does not feed the needy, while the wet-nurse performs *qaḍā'* as well as feeds the needy.

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[226] Qurʾān 2 : 184.

The reason for their disagreement derives from the vacillation of their cases between resemblance with those for whom fasting is difficult and between the sick person. Those who regarded them to be similar to the sick person said that they are only to perform *qaḍā'*. Those who regarded them to be similar to those for whom fasting is exhausting said that they are only obliged to feed the needy; this view rests on the evidence of the recitation, recited by some, of the verse, "And those for whom it is overwhelming is ransom: feeding the needy (*masākīn*)".[227] Those who considered both factors for them, it appears, formed their opinion on the basis of both resemblances. Thus, they said that they are obliged for *qaḍā'* insofar as they resemble the sick person, and they are obliged for ransom insofar as they resemble those for whom fasting is difficult. Holding them similar to a person of sound health who does not fast, however, is weak as there is no permission for the healthy person not to fast. Those who made a distinction between the pregnant woman and the wet-nurse associated the pregnant woman with the sick person, and they rendered the *ḥukm* of the wet-nurse to be a combination of the *ḥukm* of the sick person and the *ḥukm* of the person for whom fasting is difficult, or they held her to be similar to the person in sound health. Those who singled out one *ḥukm* for them have a better opinion, Allāh knows best, as compared to those who combined the two, just as those who singled out the *ḥukm* of *qaḍā'* for them have a better opinion than those who singled out the *ḥukm* of feeding for them, as the reading of the verse on the basis of which they assigned it is not *mutawātir* (and is variant). So ponder over it, for it is evident.

The jurists agreed that the old man and woman who are not able to fast may not fast, but they disagreed about their obligation if they do not. A group of jurists said that they are under an obligation to feed the needy, while another group said that they are not. The first view was held by al-Shāfiʿī and Abū Ḥanīfa, and the second was held by Mālik, except that he considered it (feeding) desirable. The majority of those who uphold feeding say that it is an amount of one *mudd* for each day. It is, however, said that even if they dole out handfuls, as Anas used to do, it is considered sufficient for them.

The reason for their disagreement derives from the variant recitation that we mentioned, that is, "And those for whom it is overwhelming is ransom: feeding the needy (*masākīn*)".[228] Those who considered acting upon a verse, which is not established in the *muṣḥaf*, as obligatory when it has been transmitted as an individual narration by *ʿadl* narrators, said that the old man (*shaykh*) is covered by it. Those who did not consider this to be obligatory maintained that the *ḥukm* of the old person is that of a sick person whose illness continues up to his death.

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[227] A variant reading in place of Qur'ān 2 : 184.

[228] A variant reading in place of Qur'ān 2 : 184.

These are the *aḥkām* of the category of persons to whom it is permitted not to fast, that is, the well-known *aḥkām* that are either explicitly stated in the law or are related to those that are stated with respect to persons who are allowed not to fast.

7.1.1.3.9. Violation of the fast

The examination of the category of persons to whom it is permitted not to continue the fast if they have broken their fast is taken up with reference to breaking the fast through sexual intercourse or through some other way, and with reference to an act that is agreed upon or that which is disputed, that is, an act based on doubt and one that is not. Each of these two cases occurs either due to forgetfulness or due to intention or due to choice or due to duress.

The majority of the jurists maintained that a person who breaks his fast through intentional sexual intercourse is under an obligation of *qaḍāʾ* as well as expiation, because of what is established through the tradition of Abū Hurayra, who said, "A man came up to the Messenger of Allāh (God's peace and blessings be upon him) and said, 'I am ruined, O Messenger of Allāh'. He said, 'And what has ruined you?' He said, 'I had sexual intercourse with my wife during Ramaḍān.' He said, 'Do you have a slave that you can set free?' He replied, 'No'. He said, 'Are you able to fast for two months consecutively?' He replied, 'No'. He said, 'Do you have food with which you can feed sixty needy persons?' He replied, 'No'. He then waited. The Prophet (God's peace and blessings be upon him) received as a gift a *faraq* [fifteen *ṣāʿs*, sixty *mudds*] of dates and said to him, 'Give these as alms'. The man said, 'To someone who is poorer than I? There is no household between the boundaries of the town more in need of it than ours'. The Prophet (God's peace and blessings be upon him) smiled so that his canine teeth were noticeable, and said, 'Go, feed it to your family'". They differed over this on several points including: whether breaking a fast intentionally by eating or drinking carries the same *ḥukm* as that for breaking the fast through sexual intercourse involving *qaḍāʾ* and expiation? If the person has sexual intercourse out of forgetfulness, what is his obligation? What is the obligation for the woman if she was not forced into it? Is expiation obligatory in the listed order or is it a matter of choice? What is the amount that is to be given to each needy person, if he makes expiation by feeding the needy? Does expiation recur with the recurrence of sexual intercourse? If feeding is deferred when he is in difficult straits, does it become binding when his situation improves?

One group of jurists deviated (from the majority opinion) and did not impose anything on a person breaking his fast intentionally through sexual intercourse, except *qaḍā*ʾ. They maintained this either because this tradition did not reach them or because (they thought that) the matter did not amount to a determined decision in this tradition, for had it been so the person would be under an obligation to fast when he was not able to manumit a slave or to feed the needy, and this indeed was a must, according to the apparent meaning of this tradition, if he was in sound health. Further, had this been a determined ruling the Prophet (God's peace and blessings be upon him) would have informed him that fasting was obligatory on him once he could afford it. Likewise, another group deviated and said that there is no liability for this offence except expiation alone, as *qaḍā*ʾ has not been mentioned in the tradition, and the *qaḍā*ʾ mentioned in the Qurʾān applies to persons to whom breaking the fast is allowed, or to those to whom fasting is not permitted. We may recall here the disagreement over this, which we have already stated. As there is no text for the obligation of *qaḍā*ʾ on the person who breaks his fast intentionally, the dispute surrounding the *qaḍā*ʾ of such a person was linked with the *qaḍā*ʾ of a person who intentionally relinquishes prayer until its prescribed time is over. The dispute over these two issues is deviant. The well-known dispute, however, is over the issues we have listed.

7.1.1.3.9.1. Sub-issue 1

Is expiation obligatory for intentionally breaking the fast by eating or drinking? Mālik, his disciples, Abū Ḥanīfa, his disciples, al-Thawrī, and a group of jurists maintained that the person who intentionally breaks his fast by eating or drinking is liable to *qaḍā*ʾ and expiation mentioned in this tradition. Al-Shāfiʿī, Aḥmad, and the Ẓāhirites held that liability for expiation arises in the case of breaking the fast through sexual intercourse alone.

The reason for their disagreement arises from their dispute over drawing an analogy between the person breaking the fast through sexual intercourse and one breaking it by eating and drinking. Those who maintained that they have a common basis, which is the violation of the sanctity of the fast, determined that the *ḥukm* should be the same for them both. Those who maintained that though expiation is a punishment for the violation of sanctity, it is more suitable by its intensity for the person breaking the fast through sexual intercourse as compared to others, and (thus, they said that) because the purpose of punishment is deterrence a greater punishment is laid down for the act for which there is a more powerful desire. This act, they said, is more powerful than other offences, though the degrees of the offences are close and the aim of the imposition of expiation is to make people abide by the laws and be pious and upright, as in the words of the Exalted, "O ye who believe! Fasting is prescribed for you, even as it was prescribed for those before you, that ye may ward off (evil)". This enhanced form of expiation, they said, is therefore specific to sexual intercourse. These views are expressed by those who uphold analogy in this case.[229] The opinion of those who do not uphold analogy here is obvious, they do not extend the *ḥukm* for (violation through) sexual intercourse to eating and drinking.

The report by Mālik in *al-Muwaṭṭaʾ*, that a person broke his fast during Ramaḍān and the Prophet (God's peace and blessings be upon him) ordered him to make the listed expiation, is not persuasive as the statement of the narrator that the person "broke his fast" is *mujmal* (unelaborated), and the *mujmal* does not have a general implication that can be adopted. It does, however, give an opinion as the narrator reported expiation to be a consequence for breaking the fast. Had this not been the case he would not have mentioned these words, and he would have mentioned one of the ways in which the fast is broken.

7.1.1.3.9.2. Sub-issue 2

When the person fasting has sexual intercourse out of forgetfulness, al-Shāfiʿī and Abū Ḥanīfa maintain that there is no *qaḍāʾ* for the person nor is there any expiation. Mālik said that he is liable for *qaḍāʾ*, but there is no expiation. Aḥmad and the Ẓāhirites maintained that he is liable for both *qaḍāʾ* and expiation.

The reason for their disagreement over *qaḍāʾ* of the person acting out of forgetfulness stems from the conflict of the apparent meaning of the tradition with analogy. The analogy holds one forgetting prayer to be similar to the person forgetting his fast. Those who held him to be similar to one forgetting prayer held him liable for *qaḍāʾ* as the person forgetting prayer has been held liable by the text. The tradition conflicting with the apparent implication of this analogy is what has been recorded by al-Bukhārī and Muslim from Abū Hurayra, who said, "The Messenger of Allāh (God's peace and blessings be upon him) said, 'One who forgets while fasting and eats or drinks should complete his fast, for indeed it is Allāh who has given him to eat and made him drink'". This tradition is supported by the general implication of the saying of the Prophet (God's peace and blessings be upon him), "Liability for mistake, forgetfulness, and what they did under duress has been lifted from my *umma*".

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[229] The Ẓāhirites have been mentioned among these jurists, but they reject analogy altogether. Logically, their opinion should be the one that follows.

Within this topic their disagreement about whether there is *qaḍāʾ* for the person who (mistakenly) believes that the sun has gone down and breaks his fast, but the sun appears thereafter. The reason is that such a person has made a mistake, and the *ḥukm* of one making a mistake is the same as that for one forgetting. In whatever way we express it, the effectiveness of forgetfulness in dropping (the obligation) of *qaḍāʾ* is evident, Allāh knows best. The argument is that if we were to maintain the principle that *qaḍāʾ* is not binding on the person forgetting until an evidence indicates this, it becomes necessary to hold that forgetfulness in fasting is not liable to *qaḍāʾ* as there is no evidence to indicate this, as against the situation in prayer. If, on the other hand, we were to hold that the principle is that *qaḍāʾ* is obligatory until an evidence indicates its removal from the liability of the person forgetting, then, we can say that an evidence has indicated its removal from the liability of the person forgetting in the tradition of Abū Hurayra. Unless one were to maintain that the evidence which exempted the case of the person forgetting the fast from the rule of forgetfulness for the other forms of worship, where all liability is removed by the text from one relinquishing it, is analogy to the case of fasting constructed upon the case of prayer. The imposition of obligation of *qaḍāʾ* by means of analogy, however, is weak. And *qaḍāʾ* in the opinion of the majority is obligatory through a renewed command.

The opinion of those who imposed *qaḍāʾ* as well as expiation upon the person committing sexual intercourse in forgetfulness is weak. The effectiveness of forgetfulness in the waiving of punishments is evident in the law, and expiation is a kind of punishment. What led them to decide this is their reliance upon the unelaborated (*mujmal*) text transmitted in the tradition; I mean, it was not mentioned in that text whether the person committed the act intentionally and not out of forgetfulness. Yet, those who imposed expiation on the hunter of prey (in the prohibited months) in forgetfulness did not maintain this principle of theirs along with the fact that the text relates to the person acting intentionally. It was more becoming for the Ẓāhirites to adopt the tradition that was authentic by agreement, which imposes expiation upon the person acting intentionally until an evidence indicated its applicability to forgetfulness, or they should have adopted the general implication of the saying of the Prophet (God's peace and blessings be upon him), "Liability for mistake, forgetfulness, and what they did under duress has been lifted from my *umma*", until an evidence indicated the restriction. Both groups did not abide by their principle, and in the unelaborated implication transmitted in the tradition about the Bedouin there is no persuasive force. Those experts of *uṣūl* who maintained that the lack of detail from the Lawgiver in varying circumstances stands in the position of a general implication arising from sayings is weak. The Lawgiver has not laid down any rule at all that is not elaborated, and lack of elaboration belongs to us.

7.1.1.3.9.3. Sub-issue 3

This issue is about their disagreement over the obligation of expiation upon the woman who has been coaxed into having sexual intercourse (while fasting). Abū Ḥanīfa and his disciples, and Mālik and his disciples made expiation obligatory for her. Al-Shāfiʿī and Dāwūd said that there is no expiation for her.

The reason for the disagreement stems from the conflict of the apparent meaning of the tradition with analogy, because the Prophet (God's peace and blessings be upon him) did not order the woman in the tradition to make expiation. The analogy is that she is like the man as both are under the liability.

7.1.1.3.9.4. Sub-issue 4

Is there an order for the making of the expiation, as in the case of *ẓihār* (injurious assimilation), or is there a choice? By order I mean that the subject is not to move from one obligation to the other unless he is unable to perform the previous one; and by choice I mean that he is permitted to make a choice of one without being unable to perform the other. They disagreed about this. Al-Shāfiʿī, Abū Ḥanīfa, al-Thawrī, and all the Kūfīs said that there is an order. Thus, the person is to manumit a slave first, and if he is unable to do this he is to fast, and if he is unable to do that then he is to feed the needy. Mālik said that it is based on choice. Ibn al-Qāsim has related from him that he considered feeding the needy more desirable than manumission and fasting.

The reason for their disagreement in imposing an order derives from the conflict of the apparent meanings of the traditions and the various analogies. The apparent meaning of the tradition about the Bedouin implies an order, as the Prophet (God's peace and blessings be upon him) asked him about his ability to perform acts in a definite order. The apparent meaning of what is related by Mālik that "A man broke his fast during Ramaḍān and the Messenger of Allāh (God's peace and blessings be upon him) ordered him to set free a slave, or to fast for two consecutive months, or to feed sixty needy persons", indicates a choice, as the word *ʿaw* (or), in the usage of the Arabs implies a choice, even though this occurred in the words of the narrator, one of the Companions, who were best acquainted with the context and the implications of the words.

The conflicting analogies, on the other hand, are based on holding it to be similar, once, with the expiation in *ẓihār* and, another time, with the expiation for an oath, though it resembles more the expiation for *ẓihār* rather than that for an oath, and also by deriving an order from the statement of the narrator.

The desirability of commencing with feeding the needy, in Mālik's view, is in conflict with the apparent meaning of the traditions. He decided this on the basis of analogy as he saw that feeding of the needy had been mentioned as a substitute for fasting on a number of occasions in the law, and that it is more compatible with it than the others on the evidence of the variant recitation, "And those for whom it is overwhelming is ransom: feeding the needy".[230] It was for the same reason that he, and a group of jurists, deemed it desirable for a person who has died with a pending duty to fast that expiation through feeding be made on his behalf. This appears to belong to the category of preferring analogy, which is supported by principles, over a tradition that is not supported by the principles.

7.1.1.3.9.5. Sub-issue 5

This relates to their disagreement over the quantity of food to be given to the needy. Mālik, al-Shāfiʿī, and their disciples said that he is to give one *mudd* of food to each needy person in accordance with the *mudd* used by the Prophet (God's peace and blessings be upon him). Abū Ḥanīfa and his disciples held that less than two *mudds*, in accordance with the *mudd* used by the Prophet (God's peace and blessings be upon him) would not be sufficient, and this comes to one-half *ṣāʿ* for each needy person.

The reason for their disagreement arises from the conflict of analogy with a tradition. The analogy is based upon the similarity of this ransom with that in the case of not shaving the head (at the close of the pilgrimage) due to an ailment, which is expressly stated. The tradition is what is related in different versions of the traditions about expiation that a *faraq* (a large measure) comprised of fifteen *ṣāʿs*. Its comprising fifteen *ṣāʿs*, however, does not indicate its obligation for each needy person in this case, except through a very weak indication, but it does indicate that the substitute for fasting in this expiation is this amount.

7.1.1.3.9.6. Sub-issue 6

This is about the recurrence of expiation with a recurrence of the violation of the fast. They agreed that a person who has sexual intercourse during Ramaḍān and makes an expiation, and then has sexual intercourse on another day has to make another expiation. They agreed that the person who commits sexual intercourse a number of times on the same day is only obliged to make a single expiation. They disagreed about the case of a person who has intercourse on one day during Ramaḍān and does not make the expiation until he has intercourse on another day. Mālik, al-Shāfiʿī, and a group of jurists said that he is to make an expiation for each of these day. Abū Ḥanīfa and his disciples said that he is to make a single expiation as long as he has not made an expiation for the first intercourse.

The reason for the disagreement stems from the similarity of these expiations with those in the *ḥudūd*. Those who held them to be similar to the

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[230] A variant reading in place of Qurʾān 2 : 184.

ḥudūd said that one expiation is sufficient in this on account of a number of acts, just as the person committing unlawful sexual intercourse is subjected to one penalty of stripes even if he has committed the act a thousand times (before that) when he has not been subjected to *ḥadd* for any of those occasions. Those who did not consider them to be similar to the *ḥudūd* determined a separate *ḥukm* for each of the days in which the fast has been violated, and therefore imposed one expiation for each day. They maintained that the distinction is based upon expiation being a way of attaining nearness to Allāh, while the *ḥudūd* are a form of pure deterrence.

7.1.1.3.9.7. Sub-issue 7

Does a person, who committed the offence of copulation during the fast of Ramaḍān and could not afford the cost of expiation at the time, have to offer it when his financial condition improves? Al-Awzāʿī said that he owes nothing if he was hard up at the time of the offence. Al-Shāfiʿī hesitated over this question.

The reason for their disagreement is that it is a *ḥukm* not expressly stated in the law, and it is, therefore, likely to be similar to debts, in which case the obligation reverts if his financial position improves, and it is equally likely to say that if this had been obligatory the Prophet (God's peace and blessings be upon him) would have explained it.

These, then, are the *aḥkām* of the cases in which the jurists agreed that the fast was broken by deliberate action. In disputed cases those who held that the fast had been broken differed as to whether *qaḍā'* alone should be imposed, or *qaḍā'* as well as expiation. Examples for these are: cupping, vomiting, swallowing a stone, and the traveller breaking his fast on departing the first day, in the opinion of those who maintain that he should not do so.

Mālik made *qaḍā'* and expiation obligatory on such a traveller, but he was opposed in this by the remaining jurists of the provinces and the majority of his disciples. Those who considered *qaḍā'* and expiation obligatory in the case of deliberate vomiting include Abū Thawr and al-Awzāʿī, but the remaining jurists who maintain that vomiting breaks the fast impose only *qaḍā'* for it. The jurist who imposed *qaḍā'* and expiation in the case of cupping, from among those who maintained that cupping breaks the fast, is ʿAṭā' alone.

The reason for this disagreement derives from the existence of similarity of disputed factors breaking the fast with undisputed factors breaking it, and with acts that do not break it by agreement. Those who granted predominance to one of these resemblances made obligatory the *ḥukm* assigned to it. These two kinds of resemblances that are to be found in them are what gave rise to the disagreement, I mean, whether the person is considered to have broken the fast or he is not considered to have done so. As breaking the fast is doubtful, expiation is not obligatory according to the majority, only *qaḍā'* is obligatory.

On account of this, Abū Ḥanīfa felt that the person who breaks the fast intentionally and then something occurs on that day permitting the breaking of the fast for that person, there is no expiation for him. This is like the case of a woman who breaks the fast intentionally and then starts menstruating during the rest of the day. Another example is when a person in sound health breaks the fast intentionally and then falls ill. A third is when a resident breaks his fast and then goes on a journey. Thus, those who considered the ultimate development that legitimized breaking of his fast said that there is no expiation for him. The reason is that to each of these persons it was revealed by the eventual development that breaking his fast on that day was permitted to him. Those who paid more attention to the violation of the law imposed expiation upon this person, as at the time when he broke the fast he did not have knowledge of the permissibility arising afterwards. This is the opinion of Mālik and al-Shāfiʿī.

Within this topic is the imposition of *qaḍāʾ* alone by Mālik upon a person who broke his fast when he was still doubtful about the dawn, and also the imposition of *qaḍāʾ* and expiation upon the person who breaks the fast when he is doubtful about sunset, in accordance with the distinction between them that has preceded.

The majority agreed that there is no expiation for breaking the fast on a day of *qaḍāʾ* for Ramaḍān, because it does not possess the same sanctity as that of *adāʾ*, that is, of Ramaḍān. The exception was Qatāda, who imposed *qaḍāʾ* as well as expiation in this case. It is related by Ibn al-Qāsim and Ibn Wahb that such a person is under an obligation to fast for two days on the analogy of an invalid *ḥajj*.

They agreed that one of the *sunan* of fasting is the delay of the meal before dawn, and haste in the breaking of the fast, because of the saying of the Prophet (God's peace and blessings be upon him), "The people will continue to enjoy blessings (of Allāh) as long as they hasten the breaking of the fast and delay the meal before dawn". He also said, "Have the meal before dawn for it bears a blessing". The Prophet (God's peace and blessings be upon him) said that "The difference between our fast and that of the People of the Book is having the pre-dawn meal".

The majority of the jurists also maintain that one of the *sunan* of Ramaḍān and one of its desirable practices is the restraining of the tongue from uttering obscenities and nonsense, because of the saying of the Prophet (God's peace and blessings be upon him), "The fast is a shield, so when one of you arises in the morning with a fast he should not utter obscenities and foolish things. If another person hurls abuses at him he should say: I am fasting". The Ẓāhirites held that uttering obscenities breaks the fast. This, however, is a deviant opinion.

These then are the well-known issues related to obligatory fasting. The discussion of recommended fasting remains, and that is the second part of this book.

7.2. BOOK II: RECOMMENDED FASTS

The discussion of recommended fasting is about the three elements and about the *ḥukm* of breaking the fast. The days on which recommended fasting is undertaken, which is the first element, are divided into three types: desirable days, prohibited days, days about which there is silence. Some of these are disputed and some are agreed upon. The fasts that are considered desirable and are agreed upon are the fasts of the *ʿĀshūrā*. Those that are disputed are the fast on the day of *ʿArafa*, six days of Shawwāl, and the *ghurar* in each month, and these are the thirteenth, fourteenth, and the fifteenth.

The fast of the day of *ʿĀshūrā* is established, because "The Messenger of Allāh (God's peace and blessings be upon him) kept a fast on this day and ordered that it be observed as a fast", and he said about it "that one who wakes up without fasting should complete the rest of the day fasting". They disagreed whether it is the ninth or tenth day (of Muḥarram). The reason for their disagreement is the conflict of traditions. Muslim recorded from Ibn ʿAbbās that he said, "When you see the moon of Muḥarram, then, count the days and wake up on the ninth day fasting". I asked him (the narrator from Ibn ʿAbbās), "This was the way that Muḥammad, the Messenger of Allāh (God's peace and blessings be upon him) kept the fast?" He said, "Yes". It is also related that "When the Messenger of Allāh (God's peace and blessings be upon him) kept a fast on the day of *ʿĀshūrā* and ordered that it be observed as a fast, they said, 'O Messenger of Allāh, it is a day that is held sacred by the Jews and the Christians'. The Messenger of Allāh (God's peace and blessings be upon him) said, 'Next year, by the will of Allāh, we shall fast on the ninth day.' He said before ʿĀshūrā of the next year arrived, the Messenger of Allāh (God's peace and blessings be upon him) passed away".

Their disagreement about the day of *ʿarafa* is based upon the reason that the Prophet (God's peace and blessings be upon him) did not fast on the day of *ʿarafa*, but he is also reported to have said about it: "The fast of the day of *ʿarafa* absolves [the sins of] the previous year and of the one to come". The jurists disagreed because of this. Al-Shāfiʿī decided upon not fasting for pilgrims on this day and fasting for the others by way of reconciliation between the two traditions. Abū Dāwūd has recorded that the Messenger of Allāh (God's peace and blessings be upon him) proscribed the fast of *ʿArafa* at *ʿArafa*.

About the six days of Shawwāl it is established that the Messenger of Allāh (God's peace and blessings be upon him) said, "One fasting during Ramaḍān and then following it up with six days of Shawwāl is like fasting through Time (perpetual fasting)". Mālik, however, considered this to be disapproved, either because people might associate with Ramaḍān what is not a part of it, or either because the tradition had not reached him or it did not prove to be authentic for him, which is more likely. Likewise, Mālik considered as disapproved the pursuit of the fasts of the *ghurar*, despite the tradition laid down in it, for fear that the unlettered might consider them to be obligatory. It is established "that the Messenger of Allāh (God's peace and blessings be upon him) used to fast each month for three undetermined days, and that he said to ʿAbd Allāh ibn ʿAmr ibn al-ʿĀṣ, because of his excessive fasting, 'Are three days in each month not sufficient for you?'" He said, "I said, 'O Messenger of Allāh, I am able to fast more than that'. He said, 'Five?' I said, 'O Messenger of Allāh, I am able to fast more than that.' He said, 'Seven?' I said, 'O Messenger of Allāh, I am able to fast more than that.' He said, 'Nine?' I said, 'O Messenger of Allāh, I am able to fast more than that.' He said, 'Eleven?' I said, 'O Messenger of Allāh, I am able to fast more than that'. The Prophet (God's peace and blessings be upon him) then said, 'There is no fast beyond the fast of Dāwūd. Fasting one day and not fasting the other is fasting to the brink of Time (perpetual)'". Abū Dāwūd has recorded that "he used to fast on Mondays and Thursdays". It is established that he never observed fasting for the whole month, except for Ramaḍān, and that most of his fasts were during the month of Shaʿbān.

The proscribed days also include those that are agreed upon and those that are disputed. Those agreed upon are the day of *fiṭr* and the day of *aḍḥā*, because of the established proscription about them. Those disputed are the days of *tashrīq*, the Day of Doubt, Friday, Saturday, the second half of Shaʿbān, and perpetual fasting.

The Ẓāhirites did not permit fasting on the days of *tashrīq*, while another group of jurists permitted this. A third group considered this as disapproved, and this is the opinion of Mālik, except that he permitted fasting during these days for the person for whom the obligation arose out of *ḥajj*, and this is for one performing *tamattuʿ*. These days are the three days following the day of the sacrifice.

The reason for their disagreement derives from the vacillation of the saying of the Prophet (God's peace and blessings be upon him) that "these are the days of eating and drinking" between being construed as an obligation and a recommendation. Those who interpreted this to imply an obligation said that fasting is prohibited (during these days), while those who interpreted it to mean a recommendation said that fasting is disapproved. It appears that those who interpreted it as a recommendation decided this by giving it prominence over the principle of (initial) interpretation as (always) implying obligation, because they saw that if they construed it as an obligation it would be opposed by the authentic tradition of Abū Saʿīd al-Khudrī through the indication of its text. In this tradition he said, "I heard the Messenger of Allāh (God's peace and blessings be upon him) saying, 'Fasting is not valid on two days, the day of *fiṭr* after Ramaḍān and the day of sacrifice'". The indication of the text implies that fasting is valid on days other than these two days, otherwise specifying them would be futile, having no purpose.

A group of jurists did not disapprove of fasting on a Friday. These include Mālik, his disciples, and a group of jurists. Another group disapproved of fasting on this day, unless a fast was kept before it or after it. The reason for their disagreement stems from the conflict of traditions over this. One of these is the tradition of Ibn Masʿūd "that the Prophet (God's peace and blessings be upon him) used to fast on three days of each month". He said: "I have not seen him not fasting on a Friday". This is an authentic tradition. There is also the tradition of Jābir "that a questioner asked Jābir, 'I have heard that the Messenger of Allāh (God's peace and blessings be upon him) prohibited that Friday be singled out for fasting.' He replied, 'Yes, by the Lord of this House'". It is recorded by Muslim. Included in these is also the tradition of Abū Hurayra, who said, "The Messenger of Allāh (God's peace and blessings be upon him) said, 'None of you should fast on a Friday, unless he fasts before it or after it'". This too is recorded by Muslim. Those who adopted the apparent meaning of the tradition of Ibn Masʿūd permitted fasting on a Friday without qualifications. Those who adopted the apparent meaning of Jābir's tradition disapproved it absolutely. Those who followed Abū Hurayra's tradition reconciled the two tradition, that is, Jābir's tradition and that of Ibn Masʿūd.

The majority of the jurists uphold the prohibition of fasting on the Day of Doubt considering it a part of Ramaḍān on the apparent meaning of the traditions that link fasting to the sighting, or with the completion of the number of the days of Shaʿbān (thirty), except what we have related from Ibn ʿUmar. They disagreed about pursuing voluntary fasting on this day. Some of the jurists disapproved this on the apparent meaning of the tradition of ʿAmmār, "He who fasts on the Day of Doubt has defied Abū al-Qāsim". Those who permitted it did so on the report "that the Prophet (God's peace and blessings be upon him) kept the fasts for the whole of Shaʿbān", and also because of the report that the Prophet (God's peace and blessings be upon him) said, "Do not advance Ramaḍān by a day or by two days, unless that is the day on which one of you is accustomed to fasting, in which case he may do so".[231] Al-Layth ibn Saʿd used to say that if the person fasts on the assumption that it is a day of Ramaḍān and then it is established that it is Ramaḍān his fast is considered to be valid. This provides an evidence that intention to fast becomes effective after dawn, as the intention of a voluntary fast is converted to that of an obligatory fast.

The reason for their disagreement about fasting on Saturday arises from their dispute about the authenticity of the report from the Prophet (God's peace and blessings be upon him) that he said, "Do not fast on a Saturday, except (the occasion) when it is obligatory for you". It is recorded by Abū Dāwūd. They said that this tradition has been abrogated by the tradition of Juwayriya bint al-Ḥārith "that the Prophet (God's peace and blessings be upon him) came up to her on a Friday, when she was fasting, and said, 'Did you fast yesterday?' She said, 'No'. He said, 'Do you wish to fast tomorrow?' She said, 'No'. He said, 'Then break your fast' ".

The proscription for fasting perpetually was laid down, but Mālik saw no harm in this, and he could have thought that the proscription was based on the apprehension of weakness or illness.

Fasting during the second half of Shaʿbān was disapproved by one group of jurists and permitted by another. Those who disapproved it did so on the basis of the report that the Prophet (God's peace and blessings be upon him) said, "There is no fast after the middle of Shaʿbān up to Ramaḍān". Those who permitted it did so on the basis of the report from Umm Salama, who said, "I have not seen the Messenger of Allāh (God's peace and blessings be upon him) fasting for two consecutive months, except for Shaʿbān and Ramaḍān", and also on the basis of what is related from Ibn ʿUmar, who said, "The Messenger of Allāh (God's peace and blessings be upon him) used to combine Shaʿbān with Ramaḍān". These traditions have been recorded by al-Ṭaḥāwī.

The second element (of fasts) relates to intention and I do not know of anyone who did not stipulate intention for voluntary fasting, but they did differ over the time of forming the intention in accordance with what has preceded.

The third element is abstinence from things that break the fast, and that is exactly the same as abstinence in obligatory fasting. The disagreement that exists there is carried over here.

With respect to the *ḥukm* of breaking the fast in voluntary fasting they agreed that a person who commences a voluntary fast and then cuts it off due to a legitimate reason is not liable to *qaḍāʾ*. They disagreed when he cuts it off intentionally and without an excuse. Mālik and Abū Ḥanīfa imposed *qaḍāʾ*

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[231] This is like someone accustomed to fasting on some specific day, like Monday and Thursday each week, and the Day of Doubt falls on one of them.

upon him. Al-Shāfiʿī and a group of jurists said that there is no *qaḍāʾ* for him.

The reason for their disagreement stems from the conflict of traditions about this. Mālik has related that Ḥafṣa and ʿĀʾisha, the two wives of the Prophet (God's peace and blessings be upon him) kept a voluntary fast together. A gift of food was brought to them and they broke their fast. The Messenger of Allāh (God's peace and blessings be upon him) said, "Fast another day in its place". This is opposed by the tradition of Umm Hānī, who said:[232] "On the day of the conquest, the conquest of Mecca, Fāṭima came and sat to the left of the Messenger of Allāh (God's peace and blessings be upon him) when Umm Hānī was to his right. She said: A maid came with a utensil containing a beverage. She gave it to him and he drank from it. He then gave it to Umm Hānī who also drank from it. She said: O Messenger of Allāh, I have broken my fast, for I was fasting. The Prophet (God's peace and blessings be upon him) said to her: Were you observing *qaḍā* for something? She said: No. He said: Then it does not harm you, if it was voluntary". Al-Shāfiʿī argued, for a similar implication, on the basis of the tradition of ʿĀʾisha. She said, "The Messenger of Allāh (God's peace and blessings be upon him) entered upon me and I said to him, 'I have hidden something for you'. He said, 'I had intended to fast, but bring it over'". The traditions of ʿĀʾisha and Ḥafṣa are not *musnad*.

Their disagreement over this issue has another reason. It is the vacillation of the voluntary fast between its resemblance with voluntary prayer and with voluntary *ḥajj*. This is so as they agreed that the person who commences *ḥajj* or *ʿumra* on a voluntary basis and then moves out of it is liable for *qaḍāʾ*. They also agreed that the person who leaves a voluntary prayer is not liable for *qaḍāʾ* as far as I know. Those who made an analogy for fasting on the basis of prayer thought that it resembles prayer more closely than it does *ḥajj*, as *ḥajj* has a specific *ḥukm* in this case, which is that it is binding upon one who has invalidated it to continue moving in it up to the end.

If the person breaks a voluntary fast out of forgetfulness, the majority hold that there is no *qaḍāʾ* for him. Ibn ʿUlayya said that he is liable to *qaḍāʾ* on the analogy of *ḥajj*. Perhaps, Mālik construed the tradition of Umm Hānī to apply to forgetfulness. The tradition of Umm Hānī has been recorded by Abū Dāwūd. Likewise, he recorded the tradition of ʿĀʾisha with almost similar words that we have stated. He recorded the tradition of ʿĀʾisha and Ḥafṣa in the exact same words.

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[232] It appears from the text that the words are of some other narrator. Quotation marks avoided.

VIII

THE BOOK OF *IʿTIKĀF* (SECLUSION IN A MOSQUE)

Iʿtikāf is recommended in the law and is obligatory after a vow. There is no dispute about this, except what is related from Mālik that he disapproved undertaking it under the apprehension that its conditions would not be met. It has greater merit in Ramaḍān than at other times, especially during its last ten days, as that was when the last *iʿtikāf* of the Prophet (God's peace and blessings be upon him) took place. It generally consists of specific tasks, at a specific location, at a particular time, with special conditions, and with specific kinds of abstention.

There are two opinions about the acts that are specific to it. It is said that prayer, remembrance of Allāh [by heart and by tongue], and the recitation of the Qurʾān are the only acts required for piety and nearness to Allāh. This is the opinion of Ibn al-Qāsim. It is also said that it includes all the acts required for seeking nearness to Allāh and for piety and that are specific to the hereafter. This is the opinion of Ibn Wahb. In accordance with this opinion the worshipper may attend funerals, visit the sick, and be engaged in studies, but not in accordance with the first opinion. This is also the opinion of al-Thawrī, while the first is the opinion of al-Shāfiʿī and Abū Ḥanīfa.

The reason for their disagreement is that this is something not expressed in the law, that is, there are no legal definitions laid down for it. Those who understood *iʿtikāf* to mean the dedication of the self to acts that are specific to mosques said that only prayer and recitation are permitted to the *muʿtakif* (person retiring to the mosque). Those who understood it to mean the devotion of the self to all acts seeking spiritual nearness permitted him to engage in other acts that we have mentioned. It is related from ʿAlī (God be pleased with him) that he said, "The person who retires to a mosque is not to indulge in obscenities or exchange abuses, he is to attend the Friday congregation prayer as well as funerals, he is to communicate with his family members if the need arises, but he is to do this while standing and not seated". This has been mentioned by ʿAbd al-Razzāq. The opposite of this has been related from ʿĀʾisha, which is that the *sunna* for the *muʿtakif* is not to attend funerals or visit the sick. This is also one of the factors that led to a disagreement over its meaning.

They disagreed about the locations at which *iʿtikāf* is to be practised. One group of jurists said that there is no *iʿtikāf*, except in three mosques: the House of Allāh (al-Masjid al-Ḥarām, Mecca), the mosque at Jerusalem, and the mosque of the Prophet (God's peace and blessings be upon him) at Medina. This was the opinion of Ḥudhayfa and Saʿīd ibn al-Musayyab. Others maintained that *iʿtikāf* is unrestricted, and can be undertaken in all mosques. This was the opinion of al-Shāfiʿī, Abū Ḥanīfa, and al-Thawrī, and it is the well-known opinion from Mālik. Some other jurists said that there is no *iʿtikāf* except in a mosque where the Friday congregational prayers are held. This is a narration by Ibn ʿAbd al-Ḥakam from Mālik. All of them agreed, however, that a condition for *iʿtikāf* is that it be undertaken in a mosque, except what is related from Ibn Lubāba that it is valid in places other than the mosque. They also agreed that intercourse with women is prohibited for the *muʿtakif* if he retires to a mosque. Abū Ḥanīfa, however, maintained that a woman is to undertake *iʿtikāf* in the place of worship in her house.

The reason for their disagreement over the stipulation of a mosque or the dropping of this stipulation stem from the probabilities of interpretation in the words of the Exalted, "And touch them not while you are undertaking *iʿtikāf* in the mosques",[233] as to whether there is an indication of the text here. Those who maintained that there is an indication of the text said that there is no *iʿtikāf*, except in a mosque, and a condition of the *iʿtikāf* is the avoidance of intercourse. Those who maintained that there is no (indirect) indication of the text said that the meaning here is that *iʿtikāf* is permitted in places other than the mosque where there is no restriction upon intercourse, because if one were to say, "Do not give such and such person anything while he is inside the house", the (indirect) implication of the text would be that he be given the thing if he is outside the house. It is, however, a deviant opinion, and the majority held that mosques have been associated with *iʿtikāf* as that is one of its conditions.

The reason for their disagreement about restricting or not restricting it to some mosques arises from the conflict of the general meaning with analogy that restricts it. Those who preferred the general implication said that it is valid in all mosques according to the apparent meaning of the verse. Those who subjected it to restriction through analogy specifying some mosques included in the general meaning, stipulated that it be in a mosque where Friday prayers are held so that the *muʿtakif's* devotion is not interrupted by going out for the Friday prayer, or that it should be one of the three mosques to which journeying is a pious act, like the mosque of the Prophet (God's peace and blessings be upon him) where his *iʿtikāf* was undertaken.[234] They did not extend it by analogy to the remaining mosques because they are not equal in terms of their sanctity.

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[233] Qurʾān 2 : 187. Pickthall's translation has not been followed in this case.

The reason for their disagreement over the *iʿtikāf* undertaken by a woman also arises from the conflict of analogy with a tradition. It is established that Ḥafṣā, ʿĀʾisha, and Zaynab (bint Jaṣh) the wives of the Prophet (God's peace and blessings be upon him) sought permission from the Messenger of Allāh (God's peace and blessings be upon him) for *iʿtikāf* in the mosque, he permitted them after which they set up their curtained spaces in it. This tradition is an evidence for the permissibility of a woman's *iʿtikāf* in the mosque. The analogy that conflicts with this is the one constructed from prayer. As the prayer of a woman in her residence [or house] is better than her prayer in the mosque, as is laid down in a report, it is necessary that her *iʿtikāf* be preferable in her room. They said that it is permitted for a woman to undertake *iʿtikāf* in a mosque only with her husband in the manner that has been described about the *iʿtikāf* of the wives of the Prophet (God's peace and blessings be upon him) with him, just as a wife is to travel only with her husband and not alone. It appears to be a kind of reconciliation between the tradition and analogy.

There is no limit, in their view, for the maximum amount of time to be assigned for *iʿtikāf*, even though all of them consider it as having greater merit during the last ten days of Ramaḍān. Thus, perpetual *iʿtikāf* is permitted, either without qualifications by those who do not consider fasting to be one of its conditions, or for days other than those in which fasting is not allowed in the view of those who consider fasting to be one of its conditions.

They disagreed over the minimum time-limit for it. Likewise, they disagreed about the time when the *muʿtakif* commences his *iʿtikāf* and about the time when he terminates it. There is no limit for the minimum duration of the *iʿtikāf* in the view of al-Shāfiʿī, Abū Ḥanīfa, and the majority of the jurists. There are different views from Mālik. It is said it is three days, and it is said that it is one day and a night. Ibn al-Qāsim has related from him that the minimum is ten days. His disciples from Baghdād said that ten days is desirable, but the minimum is one day and one night.

The reason for their disagreement stems from the conflict of analogy with a tradition. The analogy is that those who considered fasting to be one of its conditions said that *iʿtikāf* is not permitted during the night, and if it is not permitted during the night, then, it cannot be for less than a day and a night, for the forming of intention for the fast has to be during the night. The tradition opposing it is recorded by al-Bukhārī that "Umar, may Allāh be pleased with him, made a vow for undertaking *iʿtikāf* for a night. The Messenger of Allāh (God's peace and blessings be upon him) ordered him to abide by his vow". Reasoning in the face of an opinion based upon an established tradition is meaningless.

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[234] The other two are al-Masjid al-Ḥarām at Mecca and the mosque at Jerusalem.

With respect to their disagreement about the time when the *muʿtakif* is to commence his *iʿtikāf*, if he has made a vow for a determined number of days or for one day, Mālik, al-Shāfiʿī, and Abū Ḥanīfa agreed that the person who has made a vow for an *iʿtikāf* of one month must enter the mosque before sunset. About the person who has made a vow for one day al-Shāfiʿī said that the person who intends to undertake *iʿtikāf* for one day should enter the mosque before dawn and should come out after sunset. Mālik's opinion is exactly the same whether it is for one day and for one month. Zufar and al-Layth said that he is to enter before dawn; but whether for one day or one month for them it is the same. Abū Thawr made a distinction between vows made for the night and those for the day. He said: "If he makes a vow that he will undertake *iʿtikāf* for ten days, he should enter before dawn, but if he makes a vow for ten nights he should enter before sunset". Al-Awzāʿī said that he should commence the *iʿtikāf* after the morning prayer.

The reason for their disagreement emanates from the conflict of analogies, some with the others, and the conflict of a tradition with all of them. This is so as those who thought that a month begins with a night, and they took into consideration the nights, said that he is to begin before the disappearance of the sun. Those who did not take the nights into account said that he is to enter before dawn. Those who said that the term *yawm* is applied to mean both night and day together made it obligatory that if the vow is for a *yawm* he should enter prior to sunset. Those who maintained that this term is applied to mean day made the entry before dawn obligatory. Those who said that the term *yawm* is applicable to the day and the term *layl* to night made a distinction between vows made for the night and those made for the day. The truth is that the term *yawm* in the usage of the Arabs is sometimes applied to day alone and sometimes to the day and the night together, but it appears that its primary application is specific for the day, and its implication for the night is consequential.

The tradition that opposes all these analogies is what is recorded by al-Bukhārī and other compilers of the *ṣaḥīḥ* traditions from ʿĀʾisha, who said, "The Messenger of Allāh (God's peace and blessings be upon him) used to undertake *iʿtikāf* during Ramaḍān, and after observing the morning prayer he would enter the place where is undertook *iʿtikāf*".

About the time of coming out from *iʿtikāf*, Mālik held that the person who was undertaking *iʿtikāf* in the last ten days of Ramaḍān should come out of the mosque for the *ʿīd* prayer, and this was desirable, but if he came out after sunset (on the last day) his act is valid. Al-Shāfiʿī and Abū Ḥanīfa said that he is to come out after sunset. Saḥnūn and Ibn al-Mājishūn said that if he goes to his house first prior to the *ʿīd* prayer his *iʿtikāf* becomes invalid. The reason for disagreement is whether the remaining night is included in the ten days.

The conditions for *iʿtikāf* are three: intention, fasting, and avoidance of mixing with women. I do not know of any disagreement in the case of intention. They disagreed about fasting. Mālik, Abū Ḥanīfa, and a group of jurists said that there is no *iʿtikāf* without fasting, while al-Shāfiʿī said that *iʿtikāf* is permitted without fasting. An opinion similar to Mālik's was expressed by Ibn ʿUmar and Ibn ʿAbbās, with some dispute, from among the Companions, and one similar to al-Shāfiʿī's was expressed by Ibn Masʿūd and ʿAlī. The reason for their disagreement is "that the *iʿtikāf* of the Messenger of Allāh (God's peace and blessings be upon him) occurred during Ramaḍān". Those who maintained that the fasting accompanying his *iʿtikāf* is a condition for the *iʿtikāf*, even though the fasting was not observed because of the *iʿtikāf*, said that fasting is a must with *iʿtikāf*. Those who maintained that this was a mere coincidence and it does not mean that it was the aim of the Prophet (God's peace and blessings be upon him) in his *iʿtikāf* said that fasting is not a condition for it. There is another reason for this, which is its association with fasting in the same verse. Al-Shāfiʿī argued on the basis of the tradition of ʿUmar that has preceded where the Prophet (God's peace and blessings be upon him) ordered him to undertake *iʿtikāf* for a night, and the night is not the time for *siyām*. The Mālikites argued on the basis of what is related by ʿAbd al-Raḥmān ibn Isḥāq from ʿUrwa from ʿĀʾisha that she said, "The *sunna* for the *muʿtakif* is that he should not be interrupted by such things as visiting the sick and attending a funeral. He is not to touch a woman nor have intercourse with her nor go out for anything that is not extremely necessary, and there is no *iʿtikāf* without fasting and no *iʿtikāf* except in a congregational mosque". Abū ʿUmar ibn ʿAbd al-Barr said: "No one has used the words the 'the *sunna*' in the tradition of ʿĀʾisha, except ʿAbd al-Raḥmān ibn Isḥāq, and such a narration is not valid in their view, unless it is related by al-Zuhrī. If that is the case it is no longer valid to hold it similar to a *musnad*".

They agreed about the third condition, which is about the prohibition of sexual intercourse, that if the *muʿtakif* has intercourse intentionally his *iʿtikāf* is invalidated, except what is related from Ibn Lubāba in the case of locations other than the mosque. They disagreed about the situation when he has intercourse out of forgetfulness. They also disagreed about the effect on *iʿtikāf* resulting from of acts other than intercourse, like kissing or touching. Mālik held that all this invalidates the *iʿtikāf*. Abū Ḥanīfa said that there is no invalidity through *mubāshara*, unless he ejaculates. Al-Shāfiʿī had two opinions: the first is the same as the opinion of Mālik, and the second like that of Abū Ḥanīfa.

The reason for their disagreement is whether the word vacillating between its actual and figurative application has a general implication. This is one kind of the equivocal word. Those who maintained that it does have a general implication said that the term *mubāshara* (touching) in the words of the Exalted, "And touch them not while you are undertaking *iʿtikāf* in the mosques",[235] is applied to mean sexual intercourse or what is less than that. Those who maintained that it does not have a general implication, which is the better known and usual application, said that it sometimes indicates sexual intercourse and at other times what is less than that. If we were to say that it indicates sexual intercourse by consensus all other indications would be invalidated, because a single term cannot denote its actual application and the figurative meaning at the same time. Those who deemed ejaculation to be the same as intercourse did so as it is covered by the meaning, while those who did the opposite of this did so as the term in its actual application does not indicate this.

They disagreed about the liability of the person who does have intercourse (during *iʿtikāf*). The majority said that he is not liable for anything, while a group of jurists said that he is liable for expiation. Some of the latter jurists said that it is the expiation offered by one having had sexual intercourse during Ramaḍān. This was the opinion of al-Ḥasan. One group said that he is to give two *dīnārs* as alms. This was the opinion of Mujāhid. Another group said that he is to manumit a slave, and if he does not have a slave that he is to sacrifice a she-camel, if he does not have one he should make alms to the amount of twenty *ṣāʿs* of dried dates. The basis for the dispute is whether analogy is permitted in cases of expiation. The better opinion is that it is not permitted.

They disagreed about a vow made for an undetermined *iʿtikāf*, whether it should be consecutive (without interruption). Mālik and Abū Ḥanīfa said that it is a condition for it, while al-Shāfiʿī said that it is not. The reason for their disagreement stems from the analogy drawn for it from a vow for undetermined fasting.

They agreed that the acts proscribed for *iʿtikāf* are all those that are besides the integral acts of *iʿtikāf*, and that it is not permitted to him to go out of the mosque except for answering the call of nature or for those that have the same intent and that are required due to necessity. This is because of what is established from the tradition of ʿĀʾisha, who said, "The Messenger of Allāh (God's peace and blessings be upon him) when he performed *iʿtikāf* would move his head near me and I used to comb it [his hair], and he did not enter the house unless it was to answer the call of nature". They disagreed about the length of the period which invalidates *iʿtikāf*, if the person came out without a (permitted) need. Al-Shāfiʿī said that his *iʿtikāf* is terminated as soon as he steps out. Some made an exemption for one hour, while others made it for a day.

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[235] Qurʾān 2 : 187. Pickthall's translation has not been followed in this case.

They disagreed about whether he should enter a room other than a room in his mosque (for sleeping). Some made an exemption for him in this, and these are the majority—Mālik, al-Shāfiʿī, and Abū Ḥanīfa—while others held that this invalidates his *iʿtikāf*. Mālik permitted him to buy and sell and to supervise a marriage, but others opposed him in this. The reason for their disagreement arises from the fact that there is no determination on these things except *ijtihād* and a comparison of things that they agreed upon with those they disputed.

They also disagreed over whether it is permitted to the *muʿtakif* to stipulate an act that is prevented by the *iʿtikāf* in order that his stipulation may benefit him in making it permissible, like the stipulation of attending a funeral or some other thing. The majority of the jurists maintain that such stipulation is of no avail, and if he commits that act his *iʿtikāf* is nullified. Al-Shāfiʿī said that his stipulation does benefit him. The reason for their disagreement comes from the similarity between *iʿtikāf* and *ḥajj*, as both are kinds of worship that prevent the undertaking of many permissible acts. Stipulations in *ḥajj* were decided upon, by those who upheld them, on the basis of the tradition of Ḍabāʿa that the Messenger of Allāh (God's peace and blessings be upon him) said to her, "Form the *niyya* of *ḥajj* and stipulate to free yourself from the *ḥajj* restrictions where you encountered me". But the (operation of the) principle is disputed in *ḥajj*. Thus, there is weakness in this analogy in the view of the opposing contender.

They disagreed when the person stipulates continuity in the vow or when continuity itself is binding. In an unqualified vow, for those who uphold it, what are the things by which the *iʿtikāf* is interrupted and is either renewed or is continued, for example, illness. Some of them said that if illness cuts off the *iʿtikāf* the *muʿtakif* can resume it (from the point of interruption). This is the opinion of Mālik, Abū Ḥanīfa, and al-Shāfiʿī. Some of them said that he is to start the *iʿtikāf* from the beginning, and this is the opinion of al-Thawrī. There is no disagreement, as fas as I know, that a menstruating woman continues (from the point of interruption). They disagreed on whether she is to move out of the mosque. Similarly, they disagreed on when the *muʿtakif* suffers a fit of insanity or faints, whether he is to continue (later) or to start again on recovering. The reason for their disagreement on this topic is that there is nothing determined on it through transmission. Thus, disputes arise on the basis of their comparisons between what they agreed upon and what they disputed, that is, what they agreed upon in this worship or in those kinds of worship in which continuing after interruption is stipulated like the fast of one attaining the period of purity and others like it.

The majority maintain that if a voluntary *iʿtikāf* is cut off without an excuse *qaḍāʾ* is obligatory in it, because of the tradition "that the Messenger of Allāh (God's peace and blessings be upon him) intended to observe *iʿtikāf* in the last ten days of Ramaḍān, but he did not, and, therefore, observed *iʿtikāf* in ten days of Shawwāl". In the case of an obligatory *iʿtikāf* due to a vow, there is no dispute about its *qaḍāʾ*, as far as I think.

The majority maintain that the *iʿtikāf* of a person who commits a grave sin is cut off.

This is all that we sought to establish about the principles and rules of this subject, Allāh is the Grantor of success and support, and prayers and blessings upon our master Muḥammad, his family, and his companions.

IX

THE BOOK OF *ḤAJJ* (PILGRIMAGE TO MECCA)

The discussion in this book is related to three categories. The first category comprises things that form the preliminaries of this worship, and whose identification is necessary for practising this worship. The second category is about things that constitute the elements (*arkān*), and these are prescriptions to be acted upon themselves and things that are to be relinquished. The third category is about things that relate to associated matters, and these are the *aḥkām* for the acts. In fact, each worship can be found to be constituted by these three categories.

9.1. The First Category

This category comprises two things: the identification of the obligations and the conditions, and the person for whom it is obligatory and when.

There is no dispute about its obligation, because of the words of the Exalted, "And pilgrimage to the House is a duty unto Allāh for mankind, for him who can find a way thither".[236] The conditions of the obligation are of two kinds: conditions of validity and the conditions of obligation. There is no dispute among the jurists that the conditions of validity include (professing the faith of) Islam, as pilgrimage by a person who is not a Muslim is not valid. They disagreed about its validity when performed by a minor (*ṣabī*). Mālik and al-Shāfiʿī maintained that it is permissible (and valid), while Abū Ḥanīfa prohibited it.

The reason for the disagreement stems from the conflict of a tradition with the principles. Those who permitted it acted on the basis of the well known tradition of Ibn ʿAbbās, which is recorded by al-Bukhārī and Muslim, and it contains the words, "A woman raised a young boy toward the Prophet (God's peace and blessings be upon him) and said, 'Is there *ḥajj* for him, O Messenger of Allāh?' He said, 'Yes, and there is reward for you'". Those who disallowed this relied on the principle that worship is not valid if performed by one lacking discretion.

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[236] Qurʾān 3 : 97.

Mālik's disciples also differed about the validity of its performance on behalf of an infant. There is no dispute about the validity of its performance by one whose performance of prayer is valid, which corresponds to what the Prophet (God's peace and blessings be upon him) said, "From seven to ten".

The conditions of obligation include being a Muslim, in accordance with the opinion that the disbelievers are addressed by the laws of Islam.[237] There is no dispute about the stipulation of ability (both physical and financial) for this, because of the words of the Exalted, "For him who can find a way thither".[238] Though there is a disagreement over the details of this (ability) it is generally considered to be of two kinds: direct and by delegation. In direct ability there is no disagreement among the jurists that its conditions are bodily ability, financial ability, and security. They disagreed about the details of bodily and financial ability. Al-Shāfiʿī, Abū Ḥanīfa, and Aḥmad, and this was the view of Ibn ʿAbbās and ʿUmar ibn al-Khaṭṭāb, held that the conditions for these are food provisions and the availability of transportation. Mālik said that for the person who is able to walk the availability of a riding animal (a means of transportation) is not a condition of obligation and pilgrimage is obligatory for him. Likewise, surplus is not a condition for ability, in his view, if the person is able to earn a living on the way even if he has to beg.

The reason for this disagreement arises from the conflict between the tradition (which is) laid down for the elaboration of ability and the general implication of its words. This is so as a tradition from the Prophet (God's peace and blessings be upon him) is laid down that "he was asked, 'What is the ability (to perform the pilgrimage)?' He said, 'Food provisions and a riding animal'". Abū Ḥanīfa and al-Shāfiʿī interpreted this to apply to everybody, while Mālik interpreted it to apply to a person who was not able to walk and also did not have the strength to eke out a living on the way. Al-Shāfiʿī formed this opinion as it is his method that if an unelaborated text occurs in the Qurʾān and then a *sunna* is laid as an elaboration of this unelaborated word it is not possible to avert the elaboration.

With respect to its obligation through ability by delegation, Mālik and Abū Ḥanīfa maintain that delegation is not binding, even when that ability is there, if the inability for direct performance exists. Al-Shāfiʿī maintains that it is binding, thus, for a person who possesses sufficient wealth with which someone other than he can perform the pilgrimage, if he himself cannot perform it physically, then that person must perform it on his behalf. But if someone is found who can perform it on his behalf with his own wealth and physical ability, like a brother or next of kin, his liability is dropped. This is an issue that they termed *ma'ḍūb* (incapacitated person), who is a person who cannot be seated on the riding animal. In his view, if a person dies without performing the pilgrimage, it is binding upon his heirs to set something from his estate with which some person can perform the pilgrimage on his behalf.

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[237] The apparent meaning here is that though the disbelievers are subject to all the laws of Islam, they have been excluded from this worship by the stipulation of Islam as a condition.

[238] Qurʾān 3 : 97.

The reason for disagreement over this arises from the conflict of analogy with a tradition. Analogy dictates that acts of worship cannot be performed by one person on behalf of another by delegation, thus, no one prays on behalf of another nor does one pay *zakāt* in another's place. The tradition opposing this is the well-known tradition of Ibn 'Abbās recorded by the two shaykhs (al-Bukhārī and Muslim), *and it reads* "*that a woman from* Khath'am *said to the* Messenger of Allāh (God's peace and blessings be upon him), 'O Messenger of Allāh, *ḥajj* is an obligation prescribed for His servants, but I find my father an old man who cannot sit firmly on a riding animal. Should I then perform the *ḥajj* for him?' He said, 'Yes'". This was the case of a living person. In the case of a dead person there is a tradition that was recorded by al-Bukhārī, which is also from Ibn 'Abbās, who said, "A woman from Juhayna came up to the Prophet (God's peace and blessings be upon him) and said, 'O Messenger of Allāh, my mother made a vow to perform *ḥajj*, but she died, so should I perform it on her behalf?' He said, 'Perform the pilgrimage for her. Do you think that if she had a debt would you not pay it off? The debt of Allāh has a prior claim for satisfaction'". There is no dispute among the Muslim jurists that it is voluntary when performed for another, the disagreement is about its performance as an obligation.

In this topic, they disagreed about the person who performs *ḥajj* for someone else, who may be living or dead, as to whether it is a condition for him that he should have performed *ḥajj* himself. Some of the jurists held that this is not a condition, but if he has performed the obligation for himself that would be better. This was Mālik's opinion for the person who performed *ḥajj* on behalf of a dead person, for in his view *ḥajj* for a person who is living is not valid. The other jurists held that it is a condition that he should have performed the obligation for himself. This was the opinion of al-Shāfi'ī and others besides him, and if a person, who had not performed *ḥajj* for himself, did perform *ḥajj* for another it would be converted to a personal performance. The reliance of these jurists is upon the tradition of Ibn 'Abbās "that the Prophet (God's peace and blessings be upon him) heard a man pronouncing the *talbiya* on behalf of someone called Shubrama. He said, 'And who is this Shubrama?' The man replied that he was his brother or (he said) his close relative. He said, 'Have you performed *ḥajj* for yourself?' The man said, 'No'. He said, 'Perform *ḥajj* for yourself first and then for Shubrama'". The first group of jurists objected to this tradition as it was narrated as *mawqūf* up to Ibn ʿAbbās (i.e. the *isnād* (chain) did not contain the name of the Companion's disciple).

They also differed, in this topic, about a person who offers himself for a wage to perform *ḥajj* on behalf of someone else. Mālik and al-Shāfiʿī disapproved of this, but said that if it happens it is permissible. Abū Ḥanīfa did not permit it. He relied on the argument that the purpose was to seek nearness to Allāh and wages are not allowed for that. The argument of the first group was the consensus about the permissibility of earning wages for writing the *muṣḥaf* and for the construction of mosques, which are also one way of seeking nearness to Allāh. Hiring during *ḥajj*, in Mālik's view, is of two kinds. The first is what his disciples called the ***balāgh***, whereby a person offers his services for a wage that would be enough to provide the (required) provision and a riding animal. If that wage falls short of the ***balāgh*** he is to be paid what would be enough, and if an excess is left over he is to return it. The second is the customary hiring whereby something falling short is to be made up by him and if there is an excess it belongs to him. The majority maintain that *ḥajj* is not binding upon a slave until he is manumitted, but some of the Ẓāhirites make it obligatory for him.

This is all about the person on whom this worship is obligatory and about the person whose performance is valid.

With respect to the time when it becomes obligatory, they disagreed whether the command necessitates immediate or delayed compliance?[239] Both opinions are attributed to Mālik and his disciples. The apparent opinion of the later jurists of his school is that it is delayed, but his disciples from Baghdād said that it is immediate. Reports from Abū Ḥanīfa and his disciples differ, but their preferred opinion is that it is immediate. Al-Shāfiʿī said that it is spread out over a period of time. The reliance of those who say that it spreads over a span of time (is not immediate) is that *ḥajj* became obligatory years before the Prophet (God's peace and blessings be upon him) performed the *ḥajj*. If it required immediate compliance the Prophet (God's peace and blessings be upon him) would not have delayed the performance of his *ḥajj*. If he had done so because of an excuse he would have explained it. The argument of the other group is that if it is specific to a particular time, the principle would be to attribute sin to the person who relinquishes it till the time passes, the basis (for the analogy) being the time of prayer. The distinction between this and the command for prayer, in the view of the second group, is that its obligation is not renewed from moment to moment and in prayer it is renewed every moment. On the whole, those who held the initial time of obligation in *ḥajj*, as applicable to an individual who has the ability (for performance), to be similar to the initial time of prayer said that compliance is delayed, while those who held it to be similar to the last time of prayer said that compliance is immediate. The reason for holding it to be similar to the last portion of the time of prayer is that it is terminated with the advent of the time in which his act is not valid, just as the time of prayer is terminated with the advent of time in which the worshipper is not considered to be offering his prayer as *ʿadāʾ*. These jurists also argue on the basis of the risk that becomes associated with the postponement to another year because of the greater possibility of death occuring during a longer period. They maintain that this is different from the case of delay in prayer from its first time to its last, as the likelihood of the person's death within that short time is far less than it is within a year. Perhaps they may add that delaying prayer within its fixed period does not separate the worshipper from the chance to perform the prayer as *ʿadāʾ*, but delay in this case of *ḥajj* leads to the expiry of its period and the start of a much longer period in which the performance of this worship is not valid. This is not similar to the case of the unqualified command, because in the unqualified command, in the view of those who maintain that it implies liberty of delayed compliance, a delay in performance does not lead to the advent of a time in which the required worship is not valid, as it does in the case of *ḥajj* when it is time for it and the subject postpones it to the future. The disagreement, then, on this issue does not belong, as has been assumed, to the category of their dispute whether an unqualified command necessitates immediate or delayed compliance.

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[239] This issue appears to be based on the discussion in *uṣūl al-fiqh* whether an unqualified command requires immediate or delayed compliance. The author after discussing the details of the issue asserts that it is not actually based on this, but a little explanation of the discussion in *uṣūl al-fiqh* might help. The question becomes somewhat technical in legal theory and it is better to give one example to clarify it. Take the case of the *ẓuhr* prayer that may be observed during a period of time that is longer than the time required for the performance of the prayer, unlike the *maghrib* prayer for which the time span is just sufficient for prayer. If the time of the *ẓuhr* prayer has commenced and, say, that half an hour later there is a person, who has not yet prayed, goes on a journey. The question is whether the *aḥkām* of the traveller will apply to this person for this particular prayer? If we say that the command requires immediate compliance, the person becomes liable for the full prayer as soon as it was time for the prayer, but if the compliance is delayed the *aḥkām* of the traveller would apply.

They disagreed, within the topic, whether it is a condition for the obligation of *ḥajj* on a woman that she must have a husband or a *dhū maḥram* (a relative of the prohibited degree for marriage) who is willing to accompany her on the journey for *ḥajj*. Mālik and al-Shāfiʿī said that this is one alternative condition for the obligation. The other alternative is for a woman to go for *ḥajj* with a trustworthy female companion. Abū Ḥanīfa, Aḥmad, and a group of jurists said that the availability of a willing husband or a *maḥram* is a condition for the obligation.

The reason for the disagreement arises from the conflict of the command for *ḥajj* and of taking up travel for it with the proscription about a woman's travelling alone without her husband or a *maḥram*. This is so as it is established from the Prophet (God's peace and blessings be upon him) through Abū Saʿīd al-Khudrī, Abū Hurayra, Ibn ʿAbbās, and ʿUmar, that he said "It is not permitted for a woman, who believes in Allāh and the Last Day to travel without a *dhū maḥram*". Those who gave predominance to the generality of the command of *ḥajj* said that she may travel for *ḥajj* even when she is not accompanied by a *dhū maḥram* (but with a trustworthy group of women). Those who restricted the general implication with this tradition, or held that it is an elaboration of "ability", said that she is not to travel for *ḥajj*, unless she is accompanied by a *dhū maḥram*.

We have now spoken about this rite, which is called *ḥajj*, regarding the basis due to which it becomes obligatory, and for who and when. In this section there remains the discussion of the rite known as *ʿumra*. A group of jurists said that it is obligatory. This was the opinion of al-Shāfiʿī, Aḥmad, Abū Thawr, Abū ʿUbayd, al-Thawrī, al-Awzāʿī, and it was the opinion of Ibn ʿAbbās and Ibn ʿUmar from among the Companions, and also of a group of the Tābiʿūn. Mālik and a group of jurists said that it is a *sunna*. Abū Ḥanīfa said that it is voluntary, which was also the opinion of Abū Thawr[240] and Dāwūd. Those who maintained that it is obligatory argued on the basis of the words of the Exalted, "Perform the pilgrimage and the *ʿumra* for Allāh,"[241] and also on the basis of the reported traditions. One of these is the report from Ibn ʿUmar from his father, who said, "A Bedouin, who had a fair countenance and was wearing white clothes came up to the Messenger of Allāh (God's peace and blessings be upon him) and said, 'What is Islam, O Messenger of Allāh?' He replied, 'That you testify that there is no god but Allāh, that Muḥammad is His messenger, and you establish prayer, pay the *zakāt*, fast the month of Ramaḍān, perform the pilgrimage and the *ʿumra*, and wash yourself free of impurities'". ʿAbd al-Razzāq has mentioned that "Maʿmar informed us on the authority of Qatāda, who used to relate that when the verse 'And pilgrimage to the House is a duty unto Allāh for mankind, for him who can find a way thither',[242] was revealed the Messenger of Allāh (God's peace and blessings be upon him) said, 'The two, the *ḥajj* and the *ʿumra*, anyone who performs them has fulfilled the obligation'". It is related from Zayd ibn Thābit from the Prophet (God's peace and blessings be upon him) that he said, "The *ḥajj* and the *ʿumra* are two obligations, and there is no harm for you with whichever you commence". It is related from Ibn ʿAbbās that *ʿumra* is obligatory, and some have attribute this statement through an *isnād* to the Prophet (God's peace and blessings be upon him).

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[240] There appears to be an error here as the author mentions the name of Abū Thawr among those who consider it to be obligatory. This cannot be confused with the name of al-Thawrī, as his name is mentioned in that opinion too.

[241] Qurʾān 2 : 196. Pickthall's translation has been changed here slightly as he translates it as, "Perform the pilgrimage and the visit (to Mecca) for Allāh". This version does not place enough emphasis on the word *ʿumra* which is important for the discussion.

[242] Qurʾān 3 : 97.

The argument of the other group of jurists, who hold that it is not obligatory, is based on authentic and well-known traditions that have been laid down about the number of the obligations in Islam and that do not mention the *ʿumra*. An example is the tradition of Ibn ʿUmar, "Islam is structured upon five things", in which he mentioned the pilgrimage alone. There is also the tradition of the one asking what Islam is, and in some of its versions are the words, "that you perform the pilgrimage to the House". Perhaps, these jurists also said that a command implying completion (as it appeared in the Qurānic verse 2 : 196 quoted above) does not give rise to an obligation, as it means that once an obligation or a *sunna* act is started, it should be completed and not cut off. The jurists who maintained that it is a *sunna*, also argued on the basis of traditions. These include the tradition of al-Ḥajjāj ibn ʿArṭā from Muḥammad ibn al-Munkadir from Jābir ibn ʿAbd Allāh, who said, "A man asked the Prophet (God's peace and blessings be upon him) about the *ʿumra*, whether it was obligatory? He replied, 'No, but if you perform the *ʿumra* it is better for you'". Abū ʿUmar ibn ʿAbd al-Barr said that this is not persuasive insofar as he was the sole narrator.

Perhaps, those who maintained that it was voluntary argued on the basis of what is related from Abū Ṣāliḥ al-Ḥanafī, who said, "The Messenger of Allāh (God's peace and blessings be upon him) said, '*Ḥajj* is obligatory and *ʿumra* is voluntary'". This, however, is a *munqaṭiʿ* tradition.

The reason for the disagreement stems thus from the conflict of traditions on the subject, and the vacillation of the command requiring completion between whether or not it gives rise to an obligation.

9.2. The Second Category

This covers the identification of the acts of this worship (*ḥajj*), namely its basic elements, as well as the discussion of acts to be avoided during the period of its performance. This worship, as we have said, is of two types: *ḥajj* and *ʿumra*. *Ḥajj* itself is of three types: *ifrād*,[243] *tamattuʿ*,[244] and *qirān*.[245] All these consist of determined acts (to be performed) at determined locations and at determined times. Some of these are obligatory, while some are not, along with things to be avoided during these acts, each one of which has determined *aḥkām* (to be applied) either at the time of a breach or on the occurrence of an obstacle.

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[243] That is, to start with *ḥajj* and perform the *ʿumra* afterwards.

[244] To start with the *ʿumra*, then wait for the start of *ḥajj*, enjoying the acts prohibited during *ḥajj* in the meantime.

[245] To combine both *ḥajj* and *ʿumra*.

This category is, therefore, divided first into a discussion of the acts (to be performed) and a discussion of the things to be avoided. The third category will include the discussion of the *aḥkām*.

We begin, then, with the acts (of this worship). Some of these acts are stipulated for these four kinds of rites, that is, for the three types of *ḥajj* and for *ʿumra*, while some are specific to individual types. We begin the discussion with the acts common to them and will then move to what is specific to the individual types. We say: The first of the acts in *ḥajj* and *ʿumra* is the act known as the *iḥrām*.

9.2.1. Chapter 1 Discussion of the Conditions of Iḥrām

The first condition for the *iḥrām*[246] is that of location and time. The locations are what are called the *mawāqīt* of *ḥajj*. We will begin the discussion with these. The jurist generally agree that the *mawāqīt* are where the *iḥrām* (intention to start the *ḥajj* as well as wearing the *ḥajj* attire) is to be formulated. For the people of Medina the location is Dhū al-Ḥulayfa, for the people of Syria it is al-Juḥfa, for the people of Najd it is Qarn, and for the people of Yemen it is Yalamlam, because all this is established from the Messenger of Allāh (God's peace and blessings be upon him) in the tradition of Ibn ʿUmar and others. They disagreed about the *mīqāt* for the people of Iraq. The majority of the jurists of the provinces maintain that the *mīqāt* for them is Dhāt ʿIrq. Al-Shāfiʿī and al-Thawrī said that if they adopt the *iḥrām* at al-ʿAqīq it would be preferable. They disagreed as to who had determined this location for them. A group of jurists said that it was ʿUmar ibn al-Khaṭṭāb. Another group of jurists said that, in fact, it was the Messenger of Allāh (God's peace and blessings be upon him) himself who determined the location for the people of Iraq to be Dhāt ʿIrq or al-ʿAqīq. This has been related in traditions from Jābir, Ibn ʿAbbās, and ʿĀʾisha.

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[246] *Iḥram* is the ceremonial status of the pilgrim from the moment he starts the *niyya* for *ḥajj*—meaning the *ḥajj* attire—until he completes all the pilgrimage rites and is released from the *ḥajj* restrictions. In this state he is described as a *muḥrim*. *Iḥrām* also denotes the forming of the *niyya* for *ḥajj* in addition to denoting the *ḥajj* attire.

The majority of the jurists maintain that the person who misses these points, though he has in mind to go through the *iḥrām* and does so after crossing them is liable for atonement by slaughtering (of an animal) (*dam*). Some of these jurists said that if he returns to the *mīqāt* and performs the *iḥrām* there the liability for atonement is dropped. Al-Shāfiʿī is one of these jurists. Some of them said that the liability for atonement is not dropped even if he returns. This was Mālik's opinion. One group said that there is no atonement for him. Another group said that if he does not return to the *mīqāt* his *ḥajj* becomes invalid and that he should return and begin the rites of the *ʿumra*. This is discussed fully in the chapter dealing with the *aḥkām*.

The majority of the jurists maintain that the person whose residence is nearer (Mecca) than the *mīqāt*, the *mīqāt* for his *iḥrām* is his residence. They disagreed whether there is greater merit for the pilgrims to begin the process of *iḥrām* from their residences or from the *mīqāt* if their residences are nearer to Mecca than the *mīqāt*. A group of jurists said that it is better for such a person to start from his residence, and that to start from the *mīqāt* in their case is an exemption. This was the opinion of al-Shāfiʿī, Abū Ḥanīfa, al-Thawrī, and a group of jurists. Mālik, Isḥāq, and Aḥmad said that to start from the the *mawāqīt* is better. The reliance of these jurists is on the preceding traditions and (on the argument) that it is a *sunna* established by the Messenger of Allāh (God's peace and blessings be upon him) and is therefore better. The reliance of the other group is on the argument that the Companions—Ibn ʿAbbās, Ibn ʿUmar, Ibn Masʿūd, and others—started the process of the *iḥrām* from the *mīqāt*. They said that they (the Companions) knew better the *sunna* of the Prophet (God's peace and blessings be upon him). The principles of the Ẓāhirites imply that it is not permitted to commence the *iḥrām* from any place other than the *mīqāt*, unless an authentic consensus indicates the contrary.

They disagreed about the person who does not commence the *iḥrām* from the *mīqāt* assigned to his region and starts instead from another *mīqāt*, like a resident of Medina relinquishing Dhū al-Ḥulayfa and starting from al-Juḥfa. A group of jurists said that he is liable for atonement by slaughtering an animal (*dam*). Those who held this opinion are Mālik and some of his disciples. Abū Ḥanīfa said that there is no liability for him. The reason for the disagreement is whether it is one of the rites the relinquishment of which makes a person liable for atonement by slaughtering an animal (*dam*).

There is no disagreement that it is binding upon a person who passes by these locations, when he intends to perform the *ḥajj* or the *ʿumra*, to commence the *iḥram* there. In the case of persons who do not intend to perform these rites, but pass by the locations, a group of jurists said that it is binding on them to adopt the *iḥrām*, except those who do so very frequently, like woodcutters and other similar people. This was Mālik's opinion. Another group of jurists said that this is not binding on any person except those who intend to perform the *ḥajj* or the *ʿumra*. All this is in the case of persons who are not residents of Mecca.

The residents of Mecca adopt the *iḥrām* from their residences, in case of the *ḥajj*. In the case of the *ʿumra*, they go outside the boundaries of the *Ḥaram* (*ḥill*), and that is necessary. With respect to the time when the residents of Mecca are to adopt the *iḥrām*, it is said that they do so when they sight the new moon (of Dhū al-Ḥijja), and it is said when the pilgrims start moving toward Minā (on the eighth of Dhū al-Ḥijja). This is the (discussion of the) *mīqāt* with reference to location, which is stipulated for the different types of this worship.

9.2.2. Chapter 2 Discussion of the *Mīqāt* of Time

The *mīqāt* of time is also determined for the the three types of *ḥajj*. It is the period comprising Shawwāl, Dhū al-Qaʿda, and the first nine days of Dhū al-Ḥijja, by agreement. Mālik said that it is a total of three months. Al-Shāfiʿī said that it consists of the two first months and the first nine days of Dhū al-Ḥijja. Abū Ḥanīfa said that it is the two months plus the first ten days of Dhū al-Ḥijja.

The evidence for Mālik's opinion is the generality of the words of the Exalted, "The pilgrimage is (in) the well-known months",[247] implying that this applies to all the days of Dhū al-Ḥijja as it does to all the days of Shawwāl and Dhū al-Qaʿda. The evidence of the second group is the termination of the ritual state of *iḥrām* before the completion of the third month by the completion of all its obligatory acts. The implication of the dispute is the (permissibility of) delaying of the of the *ṭawāf al-ifāḍa* (the obligatory final circumambulation of the Kaʿba) till the end of the month.

Mālik disapproves a person's commencing the *iḥrām* before the months of *ḥajj*, but such commencing of the *iḥrām* is valid in his view. Other jurists maintain that the *iḥrām* of this person is not valid. Al-Shāfiʿī said that his *iḥrām* is to be converted to the *iḥrām* for *ʿumra*. Those who held this to be similar to the time for prayer said that it is not effective before time. Those who relied upon the general implication of the words of the Exalted, "Complete the performance of the pilgrimage and the *ʿumra* for Allāh",[248] said that whenever he starts the *iḥrām* it takes effect, for he is commanded to complete (the pilgrimage). Perhaps, they held *ḥajj* in this context to be similar to *ʿumra* and held the *mīqāt* of time to be similar to those of *ʿumra*. Al-Shāfiʿī's opinion is based upon the argument that whoever undertakes an act of worship in a time that pertains to an identical worship the worship is converted to the identical form, like one fasting after a vow during Ramaḍān. There is disagreement over this principle in the School (Mālik's).

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[247] Qurʾān 2 : 197.

[248] Qurʾān 2 : 196. Pickthall's translation changed.

The jurists agreed that *ʿumra* is permissible at any time of the year, as in the days of *jāhiliyya* it was not performed during the days of *ḥajj* (but during the rest of the year), which is the meaning of the saying of the Prophet (God's peace and blessings be upon him), "*ʿUmra* stands merged in the *ḥajj* up to the Day of Judgment". Abū Ḥanīfa said that it is permitted throughout the year, except on the day of *ʿArafa*, the day of sacrifice, and the days of *tashrīq* when it is considered disapproved.

They disagreed about its repetition in a single year. Mālik considered one *ʿumra* as desirable every year but disapproved the performance of two or three in one year. Al-Shāfiʿī and Abū Ḥanīfa held that there is no abomination in this.

This, then, is the discussion of the conditions of the *iḥrām* pertaining to time and location. It is necessary after this to move to the discussion of the *iḥrām*, but before that it is essential to talk about the things to be avoided by the person in the ritual state of the *iḥrām*. Thereafter, we will talk about the specific acts of the person in a ritual state of the *iḥram* until he is released from it and these are all the acts that are to be observed or are to be shunned relinquishments of *ḥajj*. We shall then take up the *aḥkām* of vitiation due to the commission of a prohibited act or the relinquishment and abuse of a required act. We, therefore, begin with the relinquishments.

9.2.3. Chapter 3 Discussion of the Acts to be Avoided

These are ordinarily permissible acts that are not permitted to a person in the ritual state of *iḥrām*. The source for this topic is what is established through the tradition of Mālik from Nāfiʿ from ʿAbd Allāh ibn ʿUmar "that a man asked the Messenger of Allāh (God's peace and blessings be upon him), 'What kind of clothes does a person in a ritual state of *iḥrām* wear?' The Messenger of Allāh (God's peace and blessings be upon him) said, 'You should neither wear shirts, nor turbans, nor trousers, nor hooded cloaks, nor shoes, unless a person does not find sandals for then he may wear shoes after cutting them below the ankles. And do not wear any clothing which has been touched (dyed) by saffron or *wars* (yellow dye)'".

The jurists agreed upon some of the *aḥkām* laid down in this tradition and they disagreed about some. Those that they agreed upon are that the person in the ritual state of *iḥrām* should not wear a shirt or any other thing mentioned in this tradition nor anything that is similar, that is, stitched clothing. This is specific for men, that is, wearing stitched clothing, and there is no harm if a woman wears a shirt, coat, trousers, shoes, and a head-cover.

They differed about the person who does not find anything other than trousers. Is he to wear them? Mālik and Abū Ḥanīfa held that he is not permitted to wear trousers and if he does so he atones for it. Al-Shāfiʿī, al-Thawrī, Aḥmad. Abū Thawr, and Dāwūd said that there is no liability upon him if he cannot find a loin-cloth. The reliance in Mālik's opinion is upon the apparent meaning of the preceding tradition of Ibn ʿUmar. He said that had there been some exemption in this the Messenger of Allāh (God's peace and blessings be upon him) would have expressed it as he did in the case of shoes. The reliance of the other group is upon the tradition of ʿAmr ibn Dīnār from Jābir and Ibn ʿAbbās, who said, "I heard the Messenger of Allāh (God's peace and blessings be upon him) saying, 'Trousers are for the person who does not find a loin-cloth and shoes for one who cannot find sandals'".

The majority of the jurists permit the wearing of shoes that have been cut down for a person who cannot find sandals. Aḥmad said that it is permitted to a person who cannot find sandals to wear shoes that have not been cut, and this by relying upon the unqualified implication in the tradition of Ibn ʿAbbās. ʿAṭāʾ said that in cutting them down there is waste and Allāh does not like waste. They differed about the person who wears cut down shoes when sandals are available. Mālik said that he has to make atonement, and this was also the opinion of Abū Thawr. Abū Ḥanīfa said that there is no atonement for him. Both views are related from al-Shāfiʿī, and we shall mention this in the discussion of the *aḥkām*.

The jurists agreed unanimously that the person in the state of *iḥrām* is not to wear clothing that is dyed with *wars* or saffron, because of the words of the Prophet (God's peace and blessings be upon him) in the tradition of Ibn ʿUmar, "And do not wear any clothing which has been touched [dyed] by saffron or *wars* [yellow dye]". They disagreed about clothing dyed with safflower. Mālik said that there is no harm in that as it is not a perfume. Abū Ḥanīfa and al-Thawrī said that it is a perfume and there is ransom (*fidya*) for using it. The evidence for Abū Ḥanīfa is what Mālik has recorded from ʿAlī "that the Prophet (God's peace and blessings be upon him) prohibited the wearing of *qassīy* (a silk striped garment) and a garment dyed with safflower".

They agreed that the *iḥrām* of a woman pertains to her face. She is to cover her head and hair and that she should let her head covering hang a little in front of her face so that she is veiled from the view of men; in accordance with what is related from ʿĀʾisha, who said, "We were accompanying the

Messenger of Allāh (God's peace and blessings be upon him) and were in the ritual state of *iḥrām*. When a rider would pass by us we would pull down our head-garments a little in front of our faces from over the head, and when the rider had passed we would lift it". There is no narration about the covering of their faces, except what has been related by Mālik from Fāṭima bint al-Mundhir, who said, "We used to veil our faces while wearing the *iḥrām* along with Asmāʾ daughter of Abū Bakr al-Ṣiddīq".

They disagreed about the covering of the face by a man in a state of *iḥrām* after they agreed unanimously that he is not to cover his head. Mālik has related from Ibn ʿUmar that the part of the head above the chin is not to be covered by a man in the state of *iḥrām*. This was the opinion of Mālik. It is also narrated from him that if he does this and does not uncover it up to its proper place he is to pay ransom. Al-Shāfiʿī, al-Thawrī, Aḥmad, Abū Dāwūd, and Abū Thawr said that a person wearing the *iḥrām* may cover his face up to the eyebrows. This is related from the Companions: from ʿUthmān, Zayd ibn Thābit, Jābir, Ibn ʿAbbās, and Saʿd ibn Abī Waqqāṣ.

They disagreed about the wearing of gloves by a woman. Mālik said that if a woman wears gloves she is liable for ransom. Al-Thawrī made an exemption in this, which is related from ʿĀʾisha. The evidence for Mālik is what has been related by Abū Dāwūd from Prophet (God's peace and blessings be upon him) "that he proscribed the wearing of veils and gloves". Some of the narrators report it with the chain stopping at Ibn ʿUmar, and some narrators report it with a complete chain, that is narrate it from the Prophet (God's peace and blessings be upon him).

These are their well-known agreements and disagreements over (the pilgrim's) clothing. The basis of all this is their dispute over the analogies constructed for the unexpressed cases from those that are expressly mentioned, their dispute over the possible interpretations of the text, and whether or not such text is authentic.

The second item in the things to be avoided is perfume. The jurists agreed that all kinds of perfume are to be avoided during *ḥajj* and *ʿumra* by the pilgrim so long as he is in a state of *iḥrām*. They disagreed about its permissibility for the *muḥrim* at the time when he is about to form the *niyya* the *iḥrām*, so that its effect may remain after he has entered into the state of *iḥrām*. Some jurists disapproved of it, while others permitted it. Included in those who disapproved it is Mālik, who related it from ʿUmar ibn al-Khaṭṭāb. It is also the opinion of ʿUthmān, Ibn ʿUmar, and a group of the Tābiʿūn. Those who permitted it include Abū Ḥanīfa, al-Shāfiʿī, al-Thawrī, Aḥmad, and Dāwūd. The evidence for Mālik, by way of transmission, is the tradition of Ṣafwān ibn Yaʿlā that has been recorded in the *Saḥīḥayn*, and it includes the words, "A man came to the Prophet (God's peace and blessings be upon him) donning a tunic and wearing perfume. He said, 'O Messenger of Allāh, what do you think about a man in a state of *iḥrām* for the *ʿumra* who wears a tunic and has applied perfume?' It was then that a revelation was sent down to the Messenger of Allāh (God's peace and blessings be upon him), and when he had recovered he said, 'Where is the questioner who asked about the *ʿumrā* a short while ago?' The man was found and brought to him. The Prophet (God's peace and blessings be upon him) said, 'As for the perfume that you have on, wash it away from yourself three times. The tunic you should take off, and then do for the *ʿumra* what you do for your *ḥajj*'". I have summarized the tradition and have mentioned its essential meaning.

The reliance of the other group is on what is related by Mālik from ʿĀʾisha, who said, "I used to apply perfume to the head of the Messenger of Allāh (God's peace and blessings be upon him) for his *iḥrām* before he had started the process of the *iḥrām*, and also when he was not in a state of *iḥrām* and was about to perform the circumambulation of the House". The first group relied on the tradition related from ʿĀʾisha, who having heard about the rejection by Ibn ʿUmar of the use of perfume prior to the *iḥrām* said, "May Allāh have mercy on the father of ʿAbd al-Raḥmān, I perfumed the Messenger of Allāh (God's peace and blessings be upon him) and he visited his wives and then arose in the morning in a state of *iḥrām*". They responded arguing that if he visited his wives, then, he must have taken a bath (afterwards), and only the smell of perfume remained upon him, not its substance. As a consensus occurred (they added) that all things not permitted to the *muḥrim* initially, like the wearing of clothing and killing of game, are not permitted to him during the state of *iḥrām*, it becomes necessary that the *ḥukm* of its continuity be the same, that is, it should be true for perfume. The reason for disagreement, therefore, stems from the conflict of traditions on the topic.

The third thing to be avoided is sexual intercourse. This is so as the Muslim jurists agreed that sexual intercourse with women is prohibited to the person performing the pilgrimage from the time that he assumes the state of *iḥrām*, because of the words of the Exalted, "There is (to be) no lewdness nor abuse nor angry conversation on the pilgrimage".[249]

The fourth thing prohibited is the removal of dirt, cutting hair, and killing lice, but they agreed that it is permitted for the person to wash his head because of a major impurity. They disagreed about the disapproval of washing his head due to a reason other than a major impurity. The majority said that there is no harm if he washes his head. Mālik upheld the disapproval and his reliance is on the fact that ʿAbd Allāh ibn ʿUmar did not wash his head while he was a *muḥrim*, except after a nocturnal emission. The reliance of the majority is on what is related by Mālik from ʿAbd Allāh ibn Jubayr "that Ibn ʿAbbās and al-Miswar ibn Makhrama disputed at al-Abwāʾ (the washing of the head by a *muḥrim*). ʿAbd Allāh said that a *muḥrim* may wash his head, while al-Miswar ibn Makhrama said that a *muḥrim* is not to wash his head. He said, ʿAbd Allāh ibn ʿAbbās sent me to Abū Ayyūb al-Anṣārī. I found him (he said) bathing between two props curtained with a cloth. I greeted him. He said, 'Who is that?' I said, "ʿAbd Allāh ibn Jubayr. ʿAbd Allāh ibn ʿAbbās sent me to you to ask you how the Messenger of Allāh (God's peace and blessings be upon him) used to wash his head when he was in the state of *iḥrām*'. Abū Ayyūb then slapped on the cloth till I could see his head. He said to the person who was pouring water on him to pour it over his head. The person poured it over his head and he moved his head with his hands, taking them forwards and backwards. He then said, 'This is how I saw the Messenger of Allāh (God's peace and blessings be upon him) doing it' ". ʿUmar also used to wash his head when he was in a state of *iḥrām* and said, "It will only make it (hair) more ruffled". It is recorded by Mālik in *al-Muwaṭṭaʾ*. Mālik interpreted the tradition of Abū Ayyūb al-Anṣārī to apply to (a bath because of a) major impurity. The evidence for him is their consensus that the *muḥrim* is prohibited from killing lice, trimming hair, or removal of *tafath*, which is dirt, and the person who washes his head does all or some of these things. They agreed about the prohibition of the *muḥrim* washing his head with marsh mallow. Mālik and Abū Ḥanīfa said that if he does this he has to pay ransom. Abū Thawr said that he is under no liability.

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[249] Qurʾān 2 : 197.

They disagreed about entering a public bath. Mālik disapproved this and held that whoever does this has to pay ransom. Abū Ḥanīfa, al-Shāfiʿī, al-Thawrī, and Dāwūd said that there is no harm in this. It is related through two channels from Ibn ʿAbbās that he entered the public bath when he was in a state of *iḥrām*. It is better to disapprove entry into the bath as the *muḥrim* is prohibited from removing dirt.

The fifth thing that is prohibited is hunting. This is also agreed upon because of the words of the Exalted, "To hunt on land is forbidden you as long as ye are on pilgrimage",[250] and His words, "Kill no wild game while ye are on the pilgrimage".[251] They agreed that the person in a state of *iḥrām* is not permitted to hunt nor to eat what he has hunted. They disagreed about whether it is permitted to the *muḥrim* to eat game when someone not in the state of *iḥrām* hunts it. There are thre opinions. According to one opinion it is permitted for him to eat it without restriction. This was expressed by Abū Ḥanīfa, and it is also the opinion of ʿUmar ibn al-Khaṭṭāb and al-Zubayr. One group said that it is prohibited for him under all circumstances. This is the opinion of Ibn ʿAbbās, ʿAlī, and Ibn ʿUmar, and it was also the opinion of al-Thawrī. Mālik said that as long as it has not been hunted for a *muḥrim* or for those in *iḥrām* generally it is permissible for him, but if it has been hunted for a *muḥrim* it is prohibited for each *muḥrim*.

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[250] Qurʾān 5 : 96.

[251] Qurʾān 5 : 95.

The reason for disagreement emanates from the conflict of traditions about this. One of these is a tradition recorded by Mālik from Abū Qatāda "that he was with the Messenger of Allāh (God's peace and blessings be upon him) when they were on one of the ways leading to Mecca when Abū Qatāda stayed behind with some of the Prophet's Companions who were in a state of *iḥrām*, while he was not. He noticed a wild ass and mounting on his horse asked his company to hand him his whip. They refused to do this so he asked them for his spear, which they also refused. He, then, took it himself and charging the wild ass killed it. Some of the Companions of the Messenger of Allāh (God's peace and blessings be upon him) ate of it while others did not. When they caught up with the Messenger of Allāh (God's peace and blessings be upon him) they asked him about it and he said, 'It was food that Allāh fed you with'". Implying the same is the tradition of Ṭalḥa ibn ʿUbayd Allāh that is recorded by al-Nasāʾī that ʿAbd al-Raḥmān al-Tamīmī said, "We were with Talḥa ibn ʿUbayd Allāh and in a state of *iḥrām*. A gazelle was brought as a gift for him when he was sleeping. Some of us ate of it and when Ṭalḥa woke up he approved of eating, and said, 'We ate it along with the Messenger of Allāh (God's peace and blessings be upon him)'". The second tradition is from Ibn ʿAbbās and has also been recorded by Mālik that "a wild ass was brought for the Messenger of Allāh (God's peace and blessings be upon him) at al-Abwāʾ or at Waddān. He returned it to the person and said, 'We would not wish to decline it, it is only that we are in a state of *iḥrām*'".

There is another reason for the disagreement and that is whether the proscription is linked to eating the game itself, as distinct from whether the *muḥrim* killed it or it was killed for him, or to the act of killing by the *muḥrim*, or to a combination of both. Those who relied upon the tradition of Abū Qatāda said that the proscription is related to eating along with the act of killing. Those who acted upon the tradition of Ibn ʿAbbās said that the proscription is related to each individual action. Those who adopted the method of preference in these traditions either acted upon the tradition of Abū Qatāda or on the tradition of Ibn ʿAbbās. Those who reconciled the traditions upheld the third opinion. They said that reconciliation is better and they supported this with the tradition related from Jābir from the Prophet (God's peace and blessings be upon him) that he said, "Game from the land is permitted to you when you are in a state of *iḥrām* as long as you have not hunted it and it has not been hunted for you".

They disagreed about the case of the person under duress whether he is to consume carrion or is to hunt in the state of *iḥrām*. Mālik, Abū Ḥanīfa, al-Thawrī, Zufar, and a group of jurists said that if he is under duress he may eat carrion or swine flesh without hunting. Abū Yūsuf said that he is to hunt and eat, and he is obliged to make reparation. The first view is better for the blocking of the means (to seek an unlawful end), while the view of Abū Yūsuf reflects a better analogy, because this (carrion) is prohibited for itself and hunting is (temporarily) prohibited for some reason, and what is prohibited temporarily for a reason is lesser in gravity than what is perpetually prohibited in itself.

The Muslim jurists agreed that these five things are prohibitions of the *iḥrām*, but they differed about the marriage of the *muḥrim*. Mālik, al-Shāfiʿī, al-Layth, and al-Awzāʿī said that a *muḥrim* is not to marry nor give someone away in marriage. If he does that the marriage is void. This is also the opinion of ʿUmar, ʿAlī ibn Abī Ṭālib, Ibn ʿUmar, and Zayd ibn Thābit. Abū Ḥanīfa and al-Thawrī said there is no harm if the *muḥrim* marries himself or gives someone away in marriage.

The reason for their disagreement arises from the conflict of traditions on the subject. One of these is related as a tradition from ʿUthmān ibn ʿAffān, who said, "The *muḥrim* is not to marry nor give someone away in marriage, nor is he to make a marriage proposal". The tradition that opposes this is from Ibn ʿAbbās "that the Messenger of Allāh (God's peace and blessings be upon him) married Maymūna when he was in a state of *iḥrām*". It is recorded by the compilers of the authentic traditions, except that it has been opposed by a number of traditions from Maymūna (herself), who said "that the Messenger of Allāh (God's peace and blessings be upon him) married her when he was not in the state of *iḥrām*". It has been related from her through various channels from Abū Rāfiʿ, from Sulaymān ibn Yassār, who was her *mawlā* (client), and from Zayd ibn al-Aṣamm. It is possible to reconcile the traditions by interpreting one to imply disapproval and the other to indicate permissibility.

These are the well-known issues about what is prohibited to the *muḥrim*. As to when he is to be released from the status of *iḥrām*, when the proscribed acts become permissible again, we shall mention it when discussing the acts of *ḥajj*. The state of *iḥrām* for the person performing the *ʿumra* ceases after he has made the *ṭawāf* and the *saʿy*, and had his head shaved. They differed about the termination of this state for those performing *ḥajj*, as will be coming up later. And now, as we have discussed the things to be avoided by the *muḥrim*, we move to a discussion of his acts.

9.2.4. Chapter 4 Discussion of the Rites of Pilgrimage

The persons in the ritual state of *iḥrām* either perform the *ʿumra* separately and the *ḥajj* separately (*mufrid*) or they combine the *ḥajj* and the *ʿumra*. He who intends to do both may begin with the *ḥajj*, in which case he is called a *mufrid*, or with the *ʿumra*, in which case he is a *mutamattiʿ*, or he may combine both, and then he is known as a *qārin*. It is necessary, initially, to separate the three types of these rites and then to discuss what the *muḥrim* does in each one of these, and discuss what is specific to each of these types, if there is something specific to them. We shall do the same thing after discussing the *iḥrām* with the acts of *ḥajj*.

9.2.4.1. *Section 1: Detailed discussion of the rites*

We say: *ifrād* (the method by which the pilgrim begins with *ḥajj*) is the type stripped of the characteristics of *tamattuʿ* and *qirān*. It is, therefore, necessary that we first begin with a description of *tamattuʿ* and then follow it up with the description of *qirān*.

9.2.4.1.1. Discussion of *tamattuʿ*

We say: The jurists agreed that this is the kind of rite[252] that is implied in the words of the Exalted, "Then whosoever enjoyed freedom from the restriction of the *iḥrām* by commencing with the *ʿumra* before the *ḥajj*, (shall give) such gifts as can be had with ease".[253] This means that the pilgrim pronounces the *talbiya* for the *ʿumra* from the appointed locations (*mīqāt*) during the months of *ḥajj*. This is the case if his residence is beyond the *Ḥaram* (otherwise he does so from his residence). He moves from there until he reaches the House (the Sacred Mosque) and makes the circuits around the Kaʿba, performs the *saʿy*, and then has his hair shaved (or shortened) within these months. He is then no longer in the state of *iḥrām* though he is in Mecca. He will begin his *ḥajj* in the very same year and in these appointed months without going back to his homeland, except what is related from al-Ḥasan. He said that he is to be considered a *mutamattiʿ* even if he goes back to his homeland without performing the *ḥajj*, that is, he is liable for the sacrifice of the *mutamattiʿ* that is mentioned in the words of the Exalted, "such blood sacrifice as can be had with ease".[254] He (al-Ḥasan) used to maintain that a *ʿumra* during the days of

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[252] *Tamattuʿ* means that the *mutamattiʿ*, after finishing the *ʿumra* and while waiting in Mecca to begin the *ḥajj*, can enjoy doing things that are forbidden to the *muḥrim*.

[253] Qurʾān 2 : 196.

[254] Qurʾān 2 : 196.

ḥajj amounts to *tamattuʿ*. Ṭāwūs maintained that the person who performs *ʿumra* before the months of *ḥajj* and then stays on (in Mecca) till the *ḥajj* and performs it in the same year is also to be considered a *mutamattiʿ*.

The jurists agreed that a person who is not residing (permanently) in the (vicinity of) *al-Masjid al-Ḥarām* is eligible for being a *mutamattiʿ*. They disagreed about the resident of Mecca whether he is eligible for *tamattuʿ*. Those who maintained that he is eligible agreed that there is no (obligation of) atonement , because of the words of the Exalted, "That is for him whose folk are not present in the vicinity of *al-Masjid al-Ḥarām*".[255] They disagreed as to who is resident in *al-Masjid al-Ḥarām*. Mālik said that they are the residents of the town of Mecca and those of Dhū Ṭuwa, as well as others whose residence is as far from Mecca as Dhū Ṭuwa. Abū Ḥanīfa said that they are the persons who live withing the *mawāqīt* and within Mecca. Al-Shāfiʿī said, at Egypt, that these are the persons who live up to a distance of two nights travel from Mecca, and this is the maximum distance of the *mawāqīt*. The Ẓāhirites said that they are those who live within the boundaries of the Ḥaram, while al-Thawrī said that they are the residents of Mecca alone.

Abū Ḥanīfa said that *tamattuʿ* does not apply to the persons present at *al-Masjid al-Ḥarām*. Mālik considered this to be disapproved. The reason for their disagreement stems from their dispute over the minimum and maximum implication of "those present at *al-Masjid al-Ḥarām*", therefore, there is no doubt that the residents of Mecca are among "those present at *al-Masjid al-Ḥarām*", just as there is no doubt that those living outside the *mawāqīt* are not among them.

This then is the well-known form of the method known as *tamattuʿ*. The meaning of *tamattuʿ* is that the pilgrim benefited from the removal of the prohibitions of *iḥrām* between the two rites and by the elimination of the need for making another journey for the *ḥajj*.

There are two other kinds of *tamattuʿ* over which the jurists disagreed. The first is the conversion of *ḥajj* into *ʿumra*, which is the changing of the intention of the *iḥrām* for *ḥajj* into to one for *ʿumra*. The majority of the jurists from the first generation, as well as the jurists of the provinces, disapprove of this. Ibn ʿAbbās held this to be permissible, and it was also upheld by Aḥmad and Dāwūd, and they all agreed that the Messenger of Allāh (God's peace and blessings be upon him) ordered his Companions in the year he went for *ḥajj* to convert their *ḥajj* into *ʿumra*, and this is according to the saying of the Prophet (God's peace and blessings be upon him), "If I were to start off again, I would not drive the sacrificial animals, and I would change it to *ʿumra*". Moreover, he directed those of his Companions who had not brought sacrificial animals to convert their declared intention of *ḥajj* into that for *ʿumra*. This is what the Ẓāhirites relied upon. The majority maintained that this is specific to the Companions of the Messenger of Allāh (God's peace and blessings be upon him). They also argued for this on the basis of what is related from Rabīʿa ibn Abī ʿAbd al-Raḥmān from al-Ḥārith ibn Bilāl ibn al-Ḥārith al-Madanī from his father, who said, "I said, 'O Messenger of Allāh, Is the cancellation for us specifically, or for those who come after us?' He said, 'It is specific to us'". This has not reached the required level of authenticity for the Ẓāhirites insofar as it is opposed by the earlier practice. It is related from ʿUmar that he said, "I have forbidden two kinds of *mutʿa* that existed in the days of the Messenger of Allāh (God's peace and blessings be upon him), and I will award punishment for them; namely, the *mutʿa* with women and the *mutʿa* of *ḥajj*". It is related from ʿUthmān that he said, "The *mutʿa* of *ḥajj* was for us and is not for you". Abū Dharr said: "It was not proper for anyone after us to pronounce the *talbiya* for *ḥajj* and then convert it to *ʿumra*". All of this conforms with the words of the Exalted, "Perform the pilgrimage and the *ʿumra* for Allāh",[256] The Ẓāhirites maintain that the principle is to act upon the practice of the Companions until an evidence from the Qurʾān or the authentic *sunna* indicates that it has been restricted. The reason for the disagreement stems from whether the practice of the Companions is to be construed as implying a general or a specific rule.

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[255] Qurʾān 2 : 196. Pickthall's translation changed.

The second kind of *tamattuʿ* is the one that was explained by Ibn al-Zubayr to the effect that the *tamattuʿ* mentioned by Allāh is where one is overwhelmed by a disease or besieged by the enemy.[257] This happens when a person departs for the pilgrimage but is hampered by a disease or an incident because of which he is prevented from completing *ḥajj* until the days of *ḥajj* have passed. He, therefore, goes up to the House, makes the circumambulation, performs the *saʿy* between al-Ṣafā and al-Marwa. and then removes his *iḥrām*. After this, he can enjoy what was prohibited by the *iḥrām* until the next *ḥajj* season when he performs the *ḥajj* and makes the sacrifice. Accordingly, the well-known form of *tamattuʿ* is not upheld by consensus. Ṭāwūs also deviated (from the majority view) and said that if a resident of Mecca performs *tamattuʿ* from another town he is liable for the sacrifice.

The jurists disagreed about the case of a person who commences his *ʿumra* before the months of *ḥajj* and then carries it forward to the months of *ḥajj* performing the *ḥajj* thereafter in the same year. Mālik said that his *ʿumra* pertains to the month in which he completed it. If he does this in the months of *ḥajj* he is considered a *mutamattiʿ*, but if he does it before the months of *ḥajj* he is not a *mutamattiʿ*. Almost the same opinion as his was expressed by Abū Ḥanīfa, al-Shāfiʿī, and al-Thawrī, except that al-Thawrī stipulated that his entire circumambulation should occur during Shawwāl, and that was upheld by al-Shāfiʿī. Abū Ḥanīfa said that if he performs three circuits in Ramaḍān and four in Shawwāl he is to be considered a *mutamattiʿ*, but if the matter is the other way round he is not a *mutamattiʿ*, I mean, if he performs four circuits in Ramaḍān and four in Shawwāl. Abū Thawr said that if he commences the *ʿumra* before the months of *ḥajj* he is not to be considered a *mutamattiʿ* irrespective of his having performed the circuits during the months of hajj or before that.

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[256] Qurʾān 2 : 196. Pickthall's translation has been changed.

[257] There is a detailed discussion about what this means in the third category dealing with the *aḥkām* of *ḥajj*.

The reason for the disagreement stems from the question of whether he becomes a *mutamattiʿ* by pronouncing the *talbiya* for *ʿumra* during the months of *ḥajj* alone or by the performance of the circumambulation along with it. Further, if it is with the occurrence of the circumambulation, then, is it through the complete circuits or through most of them? Thus, Abū Thawr says that he does not become a *mutamattiʿ* except with the *iḥrām* of *ʿumra* during the *ḥajj* months, as the *ʿumra* is constituted by its *iḥrām*. Al-Shāfiʿī said that the circuits are the major element of the *ʿumra*, and it is, therefore, necessary that he should become a *mutamattiʿ* because of them. The majority of the jurists thus maintain that one who has performed part of it during the *ḥajj* months is the same as one who has performed it entirely in these months.

The conditions of *tamattuʿ*, in Mālik's view, are six. The first is that he should perform the *ḥajj* and *ʿumra* in a single month. The second is that this should occur in the same year. The third is that he perform part of the *ʿumra* in the *ḥajj* months. The fourth is that he should perform the *ʿumra* before *ḥajj*. The fifth is that he should commence the *ḥajj* after completing the *ʿumra* and after his release from its *iḥrām*. The sixth is that his place of residence should be other than Mecca.

This, then, is the form of *tamattuʿ* with the well-known disagreement over it as well as the agreement.

9.2.4.1.2. Discussion of the *qārin*

Qirān is the pronouncing of the *iḥrām* (intention) for performing the *ḥajj* and the *ʿumra* together, or it is the pronouncing of the *iḥrām* for the *ʿumra* during the *ḥajj* months and then commencing with the *ḥajj* before his release[258] from the *iḥrām*.

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[258] The text uses the word for wearing the *iḥrām* and declaring the intention. Obviously, the release from the *iḥrām* is intended.

The disciples of Mālik differed about the time when the pilgrim can do this (i.e. combining *ḥajj* with *ʿumra*). It is said that he has a right to do this as long as he has not commenced the circumambulation (of the *ʿumra*), not even a single circuit. It is also said that as long as he has not completed the circuits and bowed (offered the post-*ṭawāf sunna* prayer) after that. It is considered disapproved after the circumambulation and even before the *ʿīd ṭawāf* prayer, but if he does so it becomes binding upon him. It is also said that he has a right to do this as long as some part of the *ʿumra* is still left, either the circuits or the *saʿy*. They agreed, however, that if he pronounces the *iḥrām* (intention) of *ḥajj* and none of the acts of the *ʿumra* is left, except the clipping of the hair, he cannot be considered a *qārin*.

The *qārin* on whom the same sacrifice as the *mutamattiʿ*s is binding is not one of those who are permanently resident in the vicinity of *al-Masjid al-Ḥarām*. Ibn al-Mājishūn, one of the disciples of Mālik, said that a *qārin*, even on who is a resident of Mecca, is in his view under an obligation for the sacrifice.

Ifrād is a kind (of *ḥajj*) that is devoid of these attributes and is performed by one who is neither a *mutamattiʿ* nor a *qārin*, and he begins by pronouncing the *iḥrām* (the intention) of *ḥajj* alone.

The jurists disagreed over which form is better: *ifrād*, *qirān*, or *tamattuʿ*. The reason for their disagreement arises from their dispute over the form of *ḥajj* performed by the Messenger of Allāh (God's peace and blessings be upon him). It is related about him that he performed it as a *mufrid*, as a *mutamattiʿ*, and as a *qārin*. Mālik chose *ifrād*, and for this he relied upon what is related from ʿĀʾisha that she said, "We accompanied the Messenger of Allāh (God's peace and blessings be upon him) on the Farewell Pilgrimage and with us were those who began with the *ʿumra*, those who combined *ḥajj* and *ʿumra*, and the Messenger of Allāh (God's peace and blessings be upon him) started with *ḥajj*". This tradition has been related from ʿĀʾisha through many channels. Abū ʿUmar ibn ʿAbd al-Barr said: "*Ifrād* as performed by the Prophet (God's peace and blessings be upon him) was reported by Jābir ibn ʿAbd Allāh through various channels that are *mutawātir* and authentic". This (the greater merit of *ifrād*) was also the opinion of Abū Bakr, ʿUmar, ʿUthmān, ʿĀʾisha, and Jābir.

Those who maintained that the Prophet (God's peace and blessings be upon him) performed it as a *mutamattiʿ* argued on the basis of what is related by al-Layth from ʿUqayl from Ibn Shihāb from Sālim from Ibn ʿUmar, who said, "The Messenger of Allāh (God's peace and blessings be upon him) performed *tamattuʿ* during the Farewell Pilgrimage by commencing with the *ʿumra* and [later] moving on to *ḥajj*. He drove the sacrificial animals with him from Dhū al-Ḥulayfa". This was the view of ʿAbd Allāh ibn ʿUmar, Ibn ʿAbbās, Ibn al-Zubayr, and the report from ʿĀʾisha varies between *ifrād* and *tamattuʿ*.

Those who maintain that the Prophet (God's peace and blessings be upon him) performed as *qārin* rely on a large number of traditions, including the tradition of Ibn ʿAbbās from ʿUmar ibn al-Khaṭṭāb, who said, "I heard the Messenger of Allāh (God's peace and blessings be upon him) saying when he was at the valley of al-ʿAqīq, 'The previous night a revelation came to me from my Lord instructing me: "Proclaim the *iḥrām* in this blessed valley, and let the *ʿumra* be included in the *ḥajj*"'". It has been recorded by al-Bukhārī. There is also the tradition of Marwān ibn al-Ḥakam, who said, "I witnessed ʿUthmān and ʿAlī, when ʿUthmān was prohibiting the *mutʿa* or to combine the two (*ḥajj* and *ʿumra*). When ʿAlī saw this he pronounced the *talbiya* for both: *labbayk* for the *ʿumra* and *ḥajj*. He said, 'I was not about to give up the *sunna* of the Messenger of Allāh (God's peace and blessings be upon him) for anyone's opinion'". It has been recorded by al-Bukhārī. Moreover, in the tradition of Anas, which has also been recorded by al-Bukhārī, he also said, "I heard the Messenger of Allāh (God's peace and blessings be upon him) saying: *labbayk, ʿumra* and *ḥajj*". And in the tradition of Mālik from Ibn Shihāb from ʿUrwa from ʿĀʾisha, she said, "We accompanied the Messenger of Allāh (God's peace and blessings be upon him) on the Farewell Pilgrimage and we pronounced the *talbiya* for the *ʿumra*. The Messenger of Allāh then said, 'The person who has his sacrificial animal with him should pronounce the *talbiya* for *ḥajj* with the *ʿumra*, and he will not be released from the *iḥrām* until he has completed both'". They argued saying that it is known that he (God's peace and blessings be upon him) had the sacrificial animals with him, and it is unlikely that he should order the person who had his sacrificial animal to perform *qirān*, and then not perform *qirān* himself when he had the sacrificial animals. In another tradition of Mālik also from Nāfiʿ from Ibn ʿUmar from Ḥafṣa from the Prophet (God's peace and blessings be upon him), he said, "I have garlanded my sacrificial animal and matted my hair, so I will not take off my *iḥrām* until I sacrifice my animal". Aḥmad said: "I have no doubt that the Messenger of Allāh (God's peace and blessings be upon him) was a *qārin*, but *tamattuʿ* is dearer to me. He argued for choosing *tamattuʿ* on the basis of the saying of the Prophet (God's peace and blessings be upon him), 'If I were to start off again, I would not drive the sacrificial animals, and I would change it to *ʿumra*'".

Those who maintained that *ifrād* is better argued by way of reason that *tamattuʿ* and *qirān* are prescribed as exemptions, because of which atonement (a blood sacrifice) has been made obligatory in them.

We have now discussed the obligation of this rite, on whom it is obligatory, what are the conditions of its obligation, when it becomes obligatory, for what time, and from which location. After this we discussed what the *muḥrim* is to avoid followed by the different forms of this rite that become obligatory. It is necessary that we now discuss the first act of the pilgrim or of one performing the *ʿumra*, and that is the *iḥrām*.

9.2.5. Chapter 5 Discussion of the *Iḥrām*

The majority of the jurists agreed that bathing is a *sunna* for commencing with the *iḥrām*, and it is one of the acts of the *muḥrim*, so much so that Ibn Nawāz said: Bathing for the *iḥrām* has greater significance, for Mālik, than bathing for the Friday prayer. The Ẓāhirites said that it is obligatory. Abū Ḥanīfa and al-Thawrī said that performing the ablution is sufficient.

The evidence of the Ẓāhirites is the *mursal* report by Mālik in the tradition of Asmāʾ bint ʿUmays "that she gave birth to Muḥammad ibn Abī Bakr at al-Baydāʾ. Abū Bakr mentioned this to the Messenger of Allāh (God's peace and blessings be upon him), who said, 'Tell her to bathe and then wear the *iḥrām*' ". The command in their view implies an obligation. The reliance of the majority is upon the principle that the original rule is freedom from liability until an obligation is established by an irrefutable command.

Further, ʿAbd Allāh ibn ʿUmar used to bathe for his *iḥrām* before commencing it, and for entering Mecca, and on the evening prior to the his stationing at ʿArafa. Mālik held these three baths to be the acts of the *muḥrim*.

They agreed that (the ritual state of) *iḥrām* cannot be assumed without forming an intention. They disagreed on whether the intention is enough without the pronouncement of the *talbiya*. Mālik and al-Shāfiʿī said that intention without the *talbiya* is sufficient. Abū Ḥanīfa said that *talbiya* in *ḥajj* is like the initial *takbīr* in prayers, except that any words used as a substitute for the *talbiya* are sufficient, just as all words used in the place of the *takbīr* on the commencement of prayer are enough, when they indicate exaltedness.

The jurists agreed that the words of the *talbiya* of the Messenger of Allāh (God's peace and blessings be upon him) were "*labbayk Allāhumma labbayk, labbayka lā sharīka laka labbayk, inna ʾl-ḥamda wa ʾn-niʿmata laka wa ʾl-mulk, lā sharīka lak* (At Your command, O Allāh, at Your command; at Your command, You have no partner, at Your command; all praise and grace are Yours, and Yours the dominion; You have no partner). It is the narration of Mālik from Nāfiʿ from Ibn ʿUmar from the Prophet (God's peace and blessings be upon him) and it carries the highest degree of authenticity. They disagreed on whether the *talbiya* has to be in these words. The Ẓāhirites said that it is obligatory that it be said in these words. There is no disagreement among the majority of the jurists about the desirability of these words, but they differed about the additions to them or about substitutions. The Ẓāhirites also considered the raising of the voice with the *talbiya* as obligatory, which is desirable according to the majority, because of what is related by Mālik "that the Messenger of Allāh (God's peace and blessings be upon him) said, 'Jibrīl came to me and directed me to order my companions and those who are with me that they should raise their voices with the *talbiya* and in forming the intention'". The jurists agreed that (the manner of) a woman's *talbiya*, as related by abū ʿUmar, is that she should be able to hear herself pronouncing it.

Mālik said that the *muḥrim* is not to raise his voice in congregational mosques, and it is enough to let the person next to him hear him; except for *al-Masjid al-Ḥarām* and the mosque at Minā, for he is to raise his voice there. The majority considered the raising of voice desirable on encountering a company and on approaching elevated places. Abū Ḥāzim said: The voices of the Companions of the Messenger of Allāh (God's peace and blessings be upon him) became hoarse by the time they reached al-Rawḥāʾ.

Mālik did not hold *talbiya* to be an element (*rukn*) of *ḥajj*, and held the person who neglects it is to be liable for atonement by slaughtering a sacrificial animal. The other jurists besides him considered it to be a *rukn*. The evidence of those who deemed it obligatory is that if the acts of the Prophet (God's peace and blessings be upon him) occur as an elaboration of an obligatory act they are to be construed as implying an obligation until another evidence indicates the contrary. And this is so because of the saying of the Prophet (God's peace and blessings be upon him), "Acquire your rites from me (my actions)". This is the tradition relied upon by those who consider the words of the *talbiya* to be obligatory. Those who do not consider the words to be obligatory relied upon what is related of the tradition of Jābir, who said, "the Messenger of Allāh (God's peace and blessings be upon him) pronounced the *talbiya*". After this he repeated the words that are in the tradition of Ibn ʿUmar and said, "The people used to add words *labbayka dhā ʾl-maʿārij*[259] and similar phrases. The Prophet (God's peace and blessings be upon him) listened to them and did not say anything". Further, it is related from Ibn ʿUmar that he used to add to the *talbiya*, which is also related from ʿUmar ibn al-Khaṭṭāb, Anas, and others.

The jurists considered it desirable that the *muḥrim* begin reciting the *talbiya* after the prayer (two *rakʿas* of *iḥrām*) that he should observe. Mālik used to consider it desirable that it follow the supererogatory prayers, because of his *mursal* report from Hishām ibn ʿUrwa from his father "that the Messenger of Allāh (God's peace and blessings be upon him) used to observe two *rakʿas* at the mosque at Dhū al-Ḥulayfa, and when his mount rose he pronounced the

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[259] This means: "Here we come, Lord of the Ascending Stairways".

talbiya". The traditions differ about the location from where the Messenger of Allāh (God's peace and blessings be upon him) commenced the *iḥrām* with the implication in the traditions that he did so from the area around Dhū al-Ḥulayfa, but a group said that he did so from the mosque at Dhū al-Ḥulayfa after praying in it. Another group said that he adopted the *iḥrām* when he approached al-Baydāʾ. Yet another group said that he pronounced the *iḥrām* and *talbiya* when his mount rose up with him. Ibn ʿAbbās was asked about their disagreement over this and he said: "Each has related not his (God's peace and blessings be upon him) first *talbiya* but the one he heard for the first time. The people used to arrive with some following the others and because of that there is no conflict, and the *talbiya* follows the prayer".

The jurists agreed that adopting the *iḥrām* (intention) is not binding upon a resident of Mecca until he departs for Minā to perform the acts of *ḥajj*. Their reliance is upon what is related by Mālik on the authority of Ibn Jurayj, who said to ʿAbd ʿAllāh ibn ʿUmar, "I have seen you doing four things here that I have not seen anyone else doing". He mentioned one of these saying, "I have seen you when you were at Mecca delaying the *iḥrām* until the day of *tarwiya* (the eighth day of Dhū al-Ḥijja), when the other people did so on sighting the moon". Ibn ʿUmar replied saying, "As to the assumption of the *iḥrām*, I have not seen the Messenger of Allāh (God's peace and blessings be upon him) commencing it until his mount rose up with him". He meant thereby until the commencement of the acts of *ḥajj* (on the day of *tarwiya*). Mālik has related from ʿUmar ibn al-Khaṭṭāb that he used to direct the residents of Mecca to begin the *iḥrām* on sighting the moon. There is no disagreement that when the resident of Mecca is performing the pilgrimage he is only to pronounce the *iḥrām* from within Mecca, but if he is performing the *ʿumra* they agreed that it is binding upon him to move to the outskirts of the Ḥaram and form the *iḥrām* (intention), and traverse the external area and the Ḥaram as the others pilgrims do, I mean, because they go to *ʿArafa*, which is outside the boundary of the Ḥaram. They agreed, generally, that this is the *sunna* for one performing the *ʿumra*. They disagreed on when he does not do so. A group of jurists said that his performance is to be considered valid, but he has to make atonement by sacrificing an animal. This was upheld by Abū Ḥanīfa and Ibn al-Qāsim. Another group said that this is not sufficient for him. This was the opinion of al-Thawrī and Ashhab.

With respect to the time when the *muḥrim* stops pronouncing the *talbiya*, it is related by Mālik from ʿAlī ibn Abī Ṭālib (God be pleased with him) that he stopped *pronouncing the talbiya when the sun went down on the day of ʿarafa*, and Mālik said that this is the practice still followed by the learned in our land. Ibn Shihāb has said that the Imāms Abū Bakr, ʿUmar, ʿUthmān, and ʿAlī used to stop pronouncing the *talbiya* after the declining of the sun on the day of *ʿArafa*. Abū ʿUmar ibn ʿAbd al-Barr has said that reports from ʿUthmān and ʿĀʾisha differ about this. The majority of the jurists of the provinces, the traditionists, Abū Ḥanīfa, al-Shāfiʿī, al-Thawrī, Aḥmad, Isḥāq, Abū Thawr, Dāwūd, Ibn Abī Laylā, Abū ʿUbayd, al-Ṭabarī, and al-Ḥasan ibn Yaḥyā maintain that the *muḥrim* is not to stop reciting the *talbiya* until he throws pebbles at the first pillar at Minā (*Jamrat al-ʿAqaba*), because of what is established that "the Messenger of Allāh (God's peace and blessings be upon him) continued to pronounce the *talbiya* until he threw pebbles at the *Jamrat al-ʿAqaba*". They disagreed about the exact time when he is to discontinue it. A group of jurists said that this is when he has finished throwing the pebbles and this is because of what is related from Ibn ʿAbbās that al-Faḍl ibn ʿAbbās, who was riding behind the Messenger of Allāh (God's peace and blessings be upon him) on his riding beast, when he was pronouncing the *talbiya* while throwing the pebbles at the *Jamrat al-ʿAqaba* and he stopped when he had cast the last pebble. A group of jurists said that he is to stop when he throws the first pebble and this is related from Ibn Masʿūd. There are other opinions besides these that have been related about the termination of the *talbiya*, but these two opinions are better known.

They disagreed about when to stop the *talbiya* during *ʿumra*. Mālik said that he is to stop pronouncing it upon reaching the Ḥaram. This was also upheld by Abū Ḥanīfa. Al-Shāfiʿī said that he does this on commencing the circumambulation. Mālik followed Ibn ʿUmar and ʿUrwa in this, while the reliance of al-Shāfiʿī is upon the argument that the meaning of *talbiya* is a response for returning to the circumambulation of the House, so it should not be stopped until the act is commenced. The reason for the disagreement stems from the conflict of analogy with the practice of some of the Companions.

The majority of the jurists agree about the conversion of *ḥajj* into *ʿumra*, but they disagree about the conversion of *ʿumra* into *ḥajj*. Abū Thawr said that *ḥajj* cannot be converted into *ʿumra* nor can *ʿumra* be converted into *ḥajj*, just as one prayer cannot be converted into another.

These are the acts of the *muḥrim* insofar as he is a *muḥrim*, and it is the first act of *ḥajj*. The act that follows this is the circumambulation upon entry into Mecca. We, therefore, move to the circumambulation.

9.2.6. Chapter 6 Discussion of the Circumambulation of the House

This discussion is about the circumambulation of the House, its description, its conditions, the *ḥukm* of its obligation or recommendation, and about the number of the circuits.

9.2.6.1. *Section 1: Description of the circumambulation*

The majority agree unanimously that the form of the circumambulation, whether obligatory or recommended, is that the worshipper begins at *al-ḥajar al-aswad* (the Black Stone). If he is able to kiss the stone he should do so, or touch it with his hand if possible and then kiss it. He then turns, with the House on his left, and he walks around it. He makes seven circuits, adopting the *ramal* (rythmic trot while shrugging the shoulders; marking time but moving ahead) for the first three circuits. He then walks in the remaining four circuits. This is for the circumambulation of greeting (*ṭawāf al-qudūm*) on entering Mecca and it is for those performing *ḥajj* or *ʿumra* (as well as those who are simply visiting the House of Allāh) to the exclusion of the *mutamattiʿ*. There is no *ramal* for women. The worshipper is to make a salutation to *al-rukn al-yamānī*, which is the corner (of the House) before *al-rukn al-aswad* (the corner with the Black Stone) (by raising both hands toward it), because this has been established as an act of the Prophet (God's peace and blessings be upon him).

They disagreed about the *ḥukm* of *ramal* in the first three circuits for the person coming into Mecca, whether this is a *sunna* or an act of merit. Ibn ʿAbbās said that it is a *sunna*, and this was the opinion of al-Shāfiʿī, Abū Ḥanīfa, Isḥāq, Aḥmad, and Abū Thawr. The opinions of Mālik and those of his disciples vary on the point. The difference between the two opinions is that those who deem it to be a *sunna* made its relinquishment liable to atonement (*dam*), while those who did not consider it a *sunna* did not impose any duty. Those who did not consider *ramal* to be a *sunna* argued on the basis of the tradition of Ibn al-Ṭufayl from Ibn ʿAbbās that he said, "I said to Ibn ʿAbbās that some people are under the impression that the Messenger of Allāh (God's peace and blessings be upon him) adopted *ramal* when he made the circumambulation of the House, and that this is a *sunna*. He said, 'They spoke in truth and they lied'. I said, 'What was the truth and what was the lie?' He said, 'They were truthful about the *ramal* adopted by the Messenger of Allāh when he circumambulated the House, and they lied about saying it is a *sunna*. The Quraysh, during the time of Ḥudaybiya, while they were stationed on the Quʿayqiyān (mountain) watching the Prophet (God's peace and blessings be upon him) and his Companions, said, 'He and his companions are emaciated'. When this was communicated to the Prophet (God's peace and blessings be upon him) he said to his Companions, 'Adopt the *ramal* and let them see that you have strength'. The Messenger of Allāh (God's peace and blessings be upon him) adopted the *ramal* from the Black Stone to *al-rukn al-yamānī*, but when he was concealed from their view he walked". The evidence of the majority is based upon the tradition of Jābir "that the Messenger of Allāh (God's peace and blessings be upon him) adopted the *ramal* in the (first) three circuits during the Farewell Pilgrimage and walked in (the remaining) four". It is an authentic tradition related by Mālik and others. The majority maintained that the versions related by Abū al-Ṭufayl from Ibn ʿAbbās have varied; thus it is related from him "that the Messenger of Allāh (God's peace and blessings be upon him) adopted the *ramal* from the Black Stone up to the Black Stone", which is different from the first narration. *Ramal* is obligatory in accordance with the principles of the Ẓāhirites, because of the saying of the Prophet (God's peace and blessings be upon him), "Acquire your rites from me", and that was their opinion or it is the opinion of some of them now, as far as I know.

They agreed that there is no *ramal* for the person who begins the *iḥrām* of *ḥajj* from Mecca, other than its residents, and these are the persons who are performing *tamattuʿ*, as they have already performed *ramal* when they entered Mecca and performed the initial circumambulation. They disagreed about the residents of Mecca whether they are to adopt *ramal* if they perform *ḥajj*. Al-Shāfiʿī said that in each (session of) circumambulation made before the day of *ʿarafa*, and which is followed by the *saʿy*, there is *ramal*. Mālik considered this desirable, while Ibn ʿUmar did not consider them to be subject to *ramal* when they made the circumambulation, in accordance with the report from him by Mālik.

The reason for the disagreement arises from the question of whether *ramal* was adopted for an underlying reason or whether it pertains to the traveller. The background for this is that when the Prophet (God's peace and blessings be upon him) performed the *ramal* he had travelled to Mecca.

They agreed that one of the *sunan* of the circumambulation is the salutation of the two corners, the corner of the Black Stone and *al-rukn al-yamānī*, and that this is for men and not the women. They disagreed on whether the salutation was to be made on all corners. The majority maintained that the salutation is made at only two corners, because of the tradition of Ibn ʿUmar "that the Messenger of Allāh (God's peace and blessings be upon him) did not make the salutation except at two corners". Those who upheld the salutation at all corners argued on the basis of what is related by Jābir, who said, "When we circumambulated we made the salutation at all corners". Some of the predecessors deemed it necessary to make the salutation at two corners, except for the odd-numbered circuits.

They agreed, likewise, that the kissing of the Black Stone in particular was one of the practices of the circumambulation, and if the worshipper was not able to reach it he was to kiss his hand. This is based upon the tradition of ʿUmar ibn al-Khaṭṭāb, which has been related by Mālik, that he said, "You are a stone, and if I had not seen the Messenger of Allāh kissing you I would not kiss you". He then kissed it.

They agreed that one of the *sunan* of the circumambulation is the observance of two *rakʿas* of prayer after the completion of the circuits. The majority maintain that the worshipper observes them at the end of each week if he performs the circumambulation (a number of times) for more than a (period of one) week. Some of the predecessors permitted that he should not make a distinction on the basis of weeks and he should not separate them by praying and then he should observe two *rakʿas* for every week. This is related from ʿĀʾisha that she did not separate three weeks and then observe six *rakʿas*. The evidence for the majority is "that the Messenger of Allāh (God's peace and blessings be upon him) made the circumambulation of the House in seven circuits and then observed two *rakʿas* behind the station [of Ibrāhīm], and then said, 'Acquire your rites from me' ". Those who permitted the combining (of the *rakʿas*) said that the object is the observance of two *rakʿas* every week, and circumambulation has no fixed time nor *rakʿas* after it that have been established as a practice; therefore, it is permissible to combine more than two *rakʿas* for more than two weeks. Those who considered it desirable to distinguish between (a block of) three weeks did so as the Messenger of Allāh (God's peace and blessings be upon him) observed the *rakʿas* after an odd number of circumambulations. Thus the person who has performed the circuits for a number of weeks that are not odd and then observes the *rakʿas* is not doing so after an odd-numbered circumambulation.

9.2.6.2. *Section 2: Discussion of its conditions*

Its conditions include the delineation of its boundary. The majority of the jurists maintain that the *ḥijr* (northern wall) is part of the House, and whoever circumambulates the House is bound to include the *ḥijr* in it, and that it is a condition for the *ṭawāf al-ifāḍa* (the post-ʿArafāt circumambulation, after throwing the pebbles). Abū Ḥanīfa and his disciples said that it is a *sunna*. The evidence of the majority is what is related by Mālik from ʿĀʾisha that the Messenger of Allāh (God's peace and blessings be upon him) said, "Were it not for the fact that disbelief is a recent memory of your people I would have demolished the Kaʿba and erected it on the foundations laid by Ibrāhīm". They had left seven *dhirāʿ* of the *ḥijr* due to shortage of funds and wood. This was the opinion of Ibn ʿAbbās. He argued relying on the words of the Exalted, "And go around the ancient House",[260] and said that the Messenger of Allāh (God's peace and blessings be upon him) made the circumambulation beyond the *ḥijr*. The evidence for Abū Ḥanīfa is the apparent meaning of the verse.

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[260] Qurʾān 22 : 29.

They disagreed about the time of its permissibility holding three opinions. The first is the permissibility of circumambulation after the morning prayer and after *ʿaṣr*, and its prohibition at the time of sunrise and sunset. This is the opinion of ʿUmar ibn al-Khaṭṭāb and Abū Saʿīd al-Khudrī. This was upheld by Mālik, his disciples, and a group of jurists. The second opinion is about its abomination after the morning prayer and *ʿaṣr*, and its prohibition at sunrise and sunset. This was the opinion of Saʿīd ibn Jubayr, Mujāhid and a group. The third opinion permits it at all times. This was upheld by al-Shāfiʿī and a group of jurists.

The roots of their disagreement can be found in the prohibition or permissibility of prayer during these times. The traditions are unanimous about the prohibition of prayer at sunrise and sunset. Whether circumambulation is linked to prayer for this purpose is a matter of dispute. The evidence relied upon by the Shāfiʿites is the tradition of Jubayr ibn Muṭʿim that the Prophet (God's peace and blessings be upon him) said, "O sons of ʿAbd Manāf—or he said O sons of ʿAbd al-Muṭṭalib—if you come to supervise anything from this affair do not prevent anyone circumambulating this House from praying at any hour of the day or night". It is related by al-Shāfiʿī and others from Ibn ʿUyayna with its chain reaching up to Jubayr ibn Muṭʿim.

They disagreed about the permissibility of circumambulation without purification after their agreement that purification is a *sunna* for it. Mālik and al-Shāfiʿī said that it is not valid to circumambulate without purification, whether it is done intentionally or due to forgetfulness. Abū Ḥanīfa said that this is valid and he considered its repetition desirable. He also held the person liable for atonement (*dam*). Abū Thawr said that if he performs the circumambulation without ablution his act is to be considered valid if he was not aware of it, but it is not valid if he did know. Al-Shāfiʿī stipulates the purification of the dress of the person making the circumambulation, as he does for one praying.

The reliance of those who stipulate purification for circumambulation is upon the words of the Prophet (God's peace and blessings be upon him) to a menstruating woman, who was Asmāʾ bint ʿUmays, "Do what the pilgrims are doing but do not make the circumambulation of the House". This is an authentic tradition. They also argue on the basis of the saying of the Prophet (God's peace and blessings be upon him), "Circumambulation is prayer, except that Allāh has permitted speech in it, so do not utter anything but what is good". The reliance of those who permitted circumambulation without purification is upon the consensus of the jurists about the permissibility of *saʿy* between al-Ṣafā and al-Marwa without purification. They argue that purity from menstruation is stipulated for a type of worship, and it does not follow that purity from *ḥadath* would also be stipulated. Fasting is a good example (purity from menstruation is a condition for fasting, but purity from *janāba* is not).

9.2.6.3. *Section 3: Discussion of its types and their* aḥkām

The jurists agreed that circumambulation is of three types: the circumambulation of greeting (*ṭawāf al-qudūm*) on arrival in Mecca, *ṭawāf al-ifāḍa* after throwing pebbles at the first pillar (*Jamrat al-ʿAqaba*) on the day of sacrifice, and the farewell circumambulation (before departure from Mecca). They agreed that the obligatory circumambulation among these, without which the *ḥajj* is lost, is the *ṭawāf al-ifāḍa*, and that is the one intended in the words of the Exalted, "Then let them make an end of their unkemptness and pay their vows and go around the ancient House".[261] Further, no atonement is acceptable in its place. The majority also maintain that the initial circumambulation is not a valid substitute for the *ṭawāf al-ifāḍa* if the pilgrim forgets the latter, because of its being before the day of sacrifice. One group, from among the disciples of Mālik, maintained that the initial circumambulation is a valid substitute for the *ṭawāf al-ifāḍa*, and it appears that they considered the obligation to be for only one type of circumambulation. The majority of the jurists maintain, however, that the farewell circumambulation is a valid substitute for the *ṭawāf al-ifāḍa*, if the pilgrim has not performed the latter, as the former is a circumambulation performed during the period of the obligatory circumambulation, which is the *ṭawāf al-ifāḍa*, as against the initial circumambulation that is performed before the time of the *ṭawāf al-ifāḍa*.

They agreed, according to what has been related from Abū ʿUmar ibn ʿAbd al-Barr, that the initial and the farewell circumambulation are part of the *sunan* for the pilgrim, except for the person who fears losing the *ḥajj* (due to shortage of time), for in his case the *ṭawāf al-ifāḍa* is sufficient. A group of the jurists considered it desirable for a person faced with such a situation to adopt the *ramal* in the first three circuits of the *ṭawāf al-ifāḍa*, in accordance with the practice in the initial circumambulation.

They agreed that a resident of Mecca is only obliged to perform the *ṭawāf al-ifāḍa*, just as they agreed that for the person performing the *ʿumra* the only obligation is for the initial circumambulation. They also agreed that the person who has benefited from the performance of the *ʿumra* (in the *tamattuʿ* form of *ḥajj*) before beginning the *ḥajj* is under the obligation to perform two circumambulations, one for the *ʿumra* and another for *ḥajj* on the day of sacrifice, in accordance with the well-known tradition of ʿĀʾisha. The person performing *ḥajj* as a *mufrid* is obliged for only one circumambulation, as we have said, on the day of the sacrifice. They disagreed about the *qārin*. Mālik, al-Shāfiʿī, Aḥmad, and Abū Thawr maintained that one circumambulation and one *saʿy* are sufficient for the *qārin*, which was also the opinion of ʿAbd Allāh ibn ʿUmar and Jābir. Their reliance for this is on the tradition of ʿĀʾisha that has preceded. Al-Thawrī, al-Awzāʿī, Abū Ḥanīfa, and Ibn Abī Laylā maintain that the *qārin* is under an obligation of performing two circumambulations and two *saʿys*. They related this from Ibn Masʿūd, as they are two rites with each having a condition, if performed separately, that the circumambulation be performed with the *saʿy*; thus, it is necessary that it be the same when they are performed together.

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[261] Qurʾān 22 : 29.

This, then, is the discussion about the obligation of this act, its description, conditions, types, time, and description of the time period. The act of *ḥajj* that follows this, I mean the initial circumambulation, is the *saʿy* between al-Ṣafā and al-Marwa. It is the third act in the state of *iḥrām* and we now move to it.

9.2.7. Chapter 7 Discussion of the *Saʿy* between al-Ṣafā and al-Marwa

The discussion of the *saʿy* covers its *ḥukm*, its description, conditions, and its order.

9.2.7.1. *Section 1: Discussion of its* ḥukm

Mālik and al-Shāfiʿī said that it is obligatory by its *ḥukm*, and if the pilgrim does not perform it, *ḥajj* would (still) be obligatory upon him in the next season. This was also the opinion of Aḥmad and Isḥāq. The Kūfīs said that it is a *sunna*, and if he returns to his homeland without performing it he is liable to atonement by slaughtering an animal. Some of the jurists said that it is voluntary and there is no obligation upon the person who relinquishes it.

The reliance of those who made it obligatory is upon the report "that the Messenger of Allāh (God's peace and blessings be upon him) used to perform the *saʿy* and say, 'Perform the *saʿy* for Allāh has prescribed the *saʿy* for you'". This tradition has been related by al-Shāfiʿī from ʿAbd Allāh ibn al-Muʾmil. Further, the principle is that the acts of the Prophet (God's peace and blessings be upon him) in this worship are to be construed as conveying obligation, except those excluded by a transmitted evidence, consensus, or analogy in the view of those who uphold analogy to be a valid principle. Those who did not consider it obligatory relied on the words of the Exalted, "Lo! (the mountains) as-Ṣafā and al-Marwa are among the indications of Allāh. It is therefore no sin for him who is on pilgrimage to the House (of God) or visiteth it, to go around them".[262] They said that the meaning here is that he may "not go round them", which is the (variant) reading of Ibn Masʿūd, just as the words of the Exalted, "Allāh expoundeth unto you, so that ye err (not)",[263] mean "lest ye err". They also considered the tradition of Ibn al-Muʾmil to be weak. ʿĀʾisha said that the verse is to be understood in its obvious meaning, and it was revealed in the case of the Anṣār who shunned running between al-Ṣafā and al-Marwa in the way they used to during the period of the *jāhiliyya* as it served as a place for the slaughtering of animals for the polytheists. It is also said that they used not to run between al-Ṣafā and al-Marwa out of veneration for some of the idols (Manāt). They inquired about this, and the verse was revealed validating their hesitation.

The majority decided that it is one of the acts of the *ḥajj*, because it is described as an act of the Prophet (God's peace and blessings be upon him) by way of *tawātur* in these traditions, I mean the linking of *saʿy* with circumambulation.

9.2.7.2. *Section 2: Discussion of its description*

In describing it, the majority of the jurists maintained that a *sunna* of the *saʿy* between al-Ṣafā and al-Marwa is that the worshipper having ascended al-Ṣafā is to go down its slope after completing the supplication. He is then to walk at his normal pace till he reaches the bottom of the *masīl* (valley, bed of the stream).[264] He is (now) to adopt the *ramal* through it until he traverses it getting closer to al-Marwa from where he moves at his normal gait till he arrives at al-Marwa. He ascends it until he can see the House, then he makes a supplication and pronounces the *takbīr* in a manner similar to what he said at al-Ṣafā. If he stops at the base of al-Marwa (and does not climb it) it is considered valid in their collective view. He then descends from al-Marwa and proceeds at his normal pace until he reaches the bottom of the valley. When he reaches it he is to adopt the *ramal* until he crosses over to the side of al-Ṣafā. He is to do this seven times, beginning at al-Ṣafā and ending at al-Marwa. If he begins at al-Marwa before going to al-Ṣafā, that journey is annulled, because of the saying of the Messenger of Allāh (God's peace and blessings be upon him), "We begin with that with which Allāh began, so we begin with al-Ṣafā", and by this he meant the words of the Exalted, "Lo! (the mountains) as-Ṣafā and al-Marwa are among the indications of Allāh. It is therefore no sin for him who is on pilgrimage to the House (of God) or visiteth it, to go around them".[265] ʿAṭāʾ said that if he does not know and begins at al-Marwa, his act is to be considered as valid.

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[262] Qurʾān 2 : 158. the word "visiteth" in Pickthall's translation here stands for *ʿumra*.

[263] Qurʾān 4 : 177. The parenthesis have been placed around the word "not" to bring into focus what the author is saying.

[264] Today this is represented by lines at some distance from each other on the paved floor of the tract between al-Ṣafā and al-Marwa.

They agreed unanimously that there is no determined opinion about the time for the *saʿy*, as it is a case of supplication. It is established in the tradition of Jābir "that the Messenger of Allāh (God's peace and blessings be upon him), when he stood at al-Ṣafā, pronounced the *takbīr* three times and said, 'There is no god but Allāh alone, and He has no partner, His is the dominion and for Him is all praise, and He has power over all things'. He did this three times, and he made a supplication at al-Marwa and did the same thing".

9.2.7.3. *Section 3: Discussion of its conditions*

They agreed that one of its conditions is purity from menstruation, as is the case with the circumambulation, because of the saying of the Prophet (God's peace and blessings be upon him) in the tradition of ʿĀʾisha, "Do what all the pilgrims do, but do not circumambulate the House and do not perform the *saʿy* between al-Ṣafā and al-Marwa". Yaḥyā was alone in relating this addition from Mālik as compared to the others who have related this tradition from him. There is no dispute among them that ablution is not one of its conditions, except for al-Ḥasan as he held it to be similar to the circumambulation.

9.2.7.4. *Section 4: Discussion of its order*

The jurists agreed that in the order of performance the *saʿy* comes after the circumambulation, and that the person who performs the *saʿy* before circuiting the House is to go back and perform the circumambulation even if he has moved out of Mecca. If he did not realize this, in the case of the *ʿumra* or the *ḥajj*, until he has cohabited with women, he is under the obligation for *ḥajj* in the next season and for the sacrifice or for *ʿumra* (as the case may be). Al-Thawrī said that if he does this he is not liable for anything. Abū Ḥanīfa said that if he leaves Mecca he is not obliged to return, but he is liable for atonement.

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[265] Qurʾān 2 : 158.

This was the discussion of the *ḥukm* of *saʿy*, its description, well-known conditions, and the order (of performance).

9.2.8. Chapter 8 Moving Out to ʿArafa

The act of the pilgrim that follows this act (*saʿy*) is moving out on the Day of *Tarwiya* (eighth of Dhū al-Ḥijja) to Minā and staying there the eve of ʿArafa. They agreed that the *imām* leads the people in prayer on the eighth of Dhū al-Ḥijja at Minā, and *ẓuhr* and *ʿaṣr* and *maghrib* and *ʿishāʾ* are curtailed over there. They agreed, however, that this act is not a condition for the validity of *ḥajj* for the person who is short of time. When the sun rises on the Day of ʿArafa (ninth Dhū al-Ḥijja) the *imām* walks with the people from Minā up to ʿArafa, and they take up station there.

9.2.9. Chapter 9 The Station at ʿArafa

The discussion of this act includes the identification of its *ḥukm*, its description, and its conditions. The jurists agreed about the *ḥukm* of stopping at ʿArafa that it is one of the essential elements (*arkān*) of *ḥajj*. In the opinion of the majority of the jurists the person who misses this is under an obligation to perform *ḥajj* in the next season and to make the sacrifice, because of the saying of the Prophet (God's peace and blessings be upon him), "The *ḥajj* is ʿArafa".

Its description is that the *imām* leads the people in prayer at ʿArafa on the Day of ʿArafa (ninth Dhū al-Ḥijja) before the declining of the sun. If the sun has declined he is to address the people and then combine *ẓuhr* and *ʿaṣr* in the first timing of *ẓuhr*, and thereafter they stay stationed there until the sun goes down.

They agreed upon this as this is the description that is agreed upon unanimously in the acts of the Prophet (God's peace and blessings be upon him). There is no dispute among them that the establishing of the *ḥajj* (leading the prayer) is the right of the sultan with the highest authority, or of a person whom the sultan has appointed, and also that the people are to pray behind him whether he is pious, sinful, or and innovator. The *sunna* for this is that he should come to the mosque at ʿArafa on the Day of ʿArafa along with the people. When the sun has declined he should address the people, as we have said, and he should combine the *ẓuhr* and *ʿaṣr* prayers.

They disagreed about the time for the call to the prayer by the *muʾadhdhin* for the *ẓuhr* and *ʿaṣr* prayers. Mālik said that the *imām* is to address the people and when the major part of his sermon is over the *muʾadhdhin* should make the call for prayer while he (the *imām*) is addressing the people. Al-Shāfiʿī said that he is to make the call when the *imām* begins the second sermon. Abū Ḥanīfa said that when the *imām* ascends the pulpit he should order the *muʾadhdhin* to make the call, who is to make the call as is the case in the Friday congregational prayer. When the *muʾadhdhin* has finished making the call the *imām* is to begin his sermon, after which he is to descend and the *muʾadhdhin* will announce the *iqāma* (the call for the commencement of prayer). This was also the opinion of Abū Thawr, who held it to be similar to the Friday prayer. Ibn al-Mundhir has related from Mālik that he said: "The call for prayer is to be made after the *imām* sits down for the sermon. The words in the tradition of Jābir are 'that when the sun had declined the Prophet (God's peace and blessings be upon him) ordered al-Qaṣwāʾ to be brought and riding on it he reached the middle of the valley and addressed the people. Bilāl then made the call for prayer. After this he stood up and prayed *ẓuhr*. He then rose up and prayed *ʿaṣr* without anything intervening between the two prayers. He then returned to where he was stationed'".

They disagreed whether these two prayers are to be combined with two calls for prayer and two calls for commencement, or with one call for prayer and two calls for commencement. Mālik said that they are to be combined with two calls for prayer and two calls for the commencement. Al-Shāfiʿī, Abū Ḥanīfa, al-Thawrī, Abū Thawr, and a group of jurists said that they are to be combined with one call for prayer and two calls for commencement. An opinion like theirs has also been related from Mālik. It is also related from Aḥmad that they are to be combined with two calls for commencement. The evidence for al-Shāfiʿī is the lengthy tradition of Jābir about the description of the *ḥajj* of the Prophet (God's peace and blessings be upon him), in which he says, "He observed *ẓuhr* and *ʿaṣr* with one call for prayer and with two calls for commencement", as we have said. The opinion of Mālik has been related from Ibn Masʿūd, and hie evidence is the principle that each prayer is to be individually preceded by a call for prayer and a call for commencement.

There is no dispute among the learned that if the *imām* does not deliver the sermon the prayer is valid, as against the Friday prayer. They also agreed that the recitation in this prayer is inaudible, and the prayer is curtailed if the *imām* has travelled (to this place). They disagreed when the *imām* is a resident of Mecca, whether he is to curtail the prayer on the eighth of Dhū al-Ḥijja at Minā, at ʿArafa on the Day of ʿArafa, and at Muzdalifa on the eve of the day of sacrifice, if he is a resident of one of these places. Mālik, al-Awzāʿī, and a group of jurists said the *sunna* for occasions is curtailment whether or not he is a resident. Al-Thawrī, Abū Ḥanīfa, al-Shāfiʿī, Abū Thawr, and Dāwūd said that it is not permitted to curtail the prayer if he is a resident of one these places. The evidence for Mālik is that no one has related that some person completed his prayer while praying with the Prophet (God's peace and blessings be upon him), after he had made the salutation. The argument of the other group is the retention of the well-known principle that curtailment of prayer is not permitted to anyone other than a traveller, unless another evidence restricts it.

The jurists disagreed about the obligation of Friday prayer at Minā and at ʿArafa. Mālik said that the Friday congregational prayer is not obligatory at ʿArafa nor at Minā, except during the days of *ḥajj*, neither for the residents of Mecca nor for others, unless the *imām* himself is a resident of ʿArafa. Al-Shāfiʿī held the same opinion, except that he stipulated for the obligation of the Friday congregational prayer that there be present at least forty men, in accordance with his opinion about the stipulation of this number for Friday. Abū Ḥanīfa said that if the leader of the *ḥajj* is a person whose prayer cannot be curtailed at Minā or at ʿArafa, he is to lead them in the Friday prayer if this happens by chance. Aḥmad said that if it is the governor of Mecca he is to lead the assembly. This was also the opinion of Abū Thawr.

The (first) condition for it is the assumption of the station at ʿArafa after the prayer, and there is no disagreement among the jurists "that the Messenger of Allāh (God's peace and blessings be upon him), after he had observed *ẓuhr* and *ʿaṣr* at ʿArafa, arose and stopped close to the mountain making supplications to Allāh, the Exalted. All those who were with him also stayed up to sunset. When the setting of the sun was ascertained and it became obvious to him he proceeded toward Muzdalifa". There is no dispute among them that this is the *sunna* of the stationing at ʿArafa. They agreed that the person who stops at ʿArafa prior to the declining of the sun and moves from there before the declining of the sun, his stationing there is of no account. If he does not return and stop there till after the declining of the sun or on this night before the rise of the dawn, his *ḥajj* is lost. It is related from ʿAbd Allāh ibn Maʿmar al-Daylī, who said, "I heard the Messenger of Allāh (God's peace and blessings be upon him) saying, 'The *ḥajj* is ʿArafāt, thus he who makes it to ʿArafa before the rise of the dawn has made it'". It is a tradition which is related by this person alone from among the Companions, except that it is agreed upon.

They disagreed about the person who stays at ʿArafa after the declining of the sun and then leaves before sunset. Mālik said that he is liable for *ḥajj* in the next season, unless he returns before dawn. If, however, he leaves before the *imām*, but after sunset, his act is considered to be valid. On the whole, the condition for the validity of stationing, in his view, is that he should stay the night. The majority of the jurists said that the person who stays on at ʿArafa till after the declining of the sun his *ḥajj* is complete, even if he leaves before sunset, except they differed about the obligation of atonement for him. The reliance of the majority is on the tradition of ʿUrwa ibn Muḍarris, which is agreed upon for its authenticity, that he said, "I went up to the Messenger of Allāh (God's peace and blessings be upon him) at Muzdalifa (Jamʿ) and said to him, 'Have I completed the *ḥajj*?' He replied, 'The person who observes this prayer with us and stops at this station and he arose and moved before this from ʿArafāt, by night or by day, has completed his *ḥajj* and has done away with the dirt on his body'". They agreed that the meaning of his words, "by day", in this tradition imply that it is after the declining of the sun. Those who stipulated the night argued on the basis of his (God's peace and blessings be upon him) being stationed at ʿArafa when the sun was setting, but the majority may reply that his being stationed at ʿArafa up to sunset has been indicated by the tradition of ʿUrwa ibn Muḍarris to the effect that it is better if the person has a choice.

It is related from the Prophet (God's peace and blessings be upon him) through different channels that he said, "All of ʿArafa is a station, but keep away from the middle of ʿUrana. All Muzdalifa is a station, except the middle of Muḥassir. All of Minā is the place of sacrifice. The road to Mecca is a place of sacrifice and a stop for the night". The jurists differed about the person who moves from ʿArafa and stays (again) at ʿArafa. It is said that his *ḥajj* is complete, but he is liable for atonement. This was Mālik's opinion, while al-Shāfiʿī said that there is no *ḥajj* for him. The reliance of those who nullify his *ḥajj* is the proscription laid down about this in a tradition. The reliance of those who do not invalidate it is the principle that staying at any place in ʿArafa is permitted, unless the contrary is indicated by an evidence. They said that the proscription is not laid down in the tradition in a manner that makes its evidence binding and the giving up of the principle necessary.

This, then, is the discussion about the *sunan* of the day of ʿArafa. The act, from among the acts of *ḥajj*, that follows the stationing at ʿArafa is the movement toward Muzdalifa after sunset and what is done there.

9.2.10. Chapter 10 Discussion of the Acts at Muzdalifa

A general discussion of this too is covered by the identification of its *ḥukm*, description, and time.

The existence of this act as one of the constituent elements of *ḥajj* is based on the words of the Exalted, "But, when ye press on in the multitude from

ʿArafāt, remember Allāh by the sacred monument. Remember Him as He hath guided you, although before this you were astray".[266] They agreed that the person who after stationing at ʿArafa spends the eve of the day of sacrifice at Muzdalifa, combining the *maghrib* and *ʿishāʾ* prayers that night with the *imām*, and stays up to the morning light, his *ḥajj* is complete. They also argued that this was the description of the act of the Messenger of Allāh (God's peace and blessings be upon him). They disagreed, however, as to whether staying at Muzdalifa till after the morning prayers and spending the night there is a *sunna* of *ḥajj* or one of its obligations. Al-Awzāʿī and a group of the Tābiʿūn said that it is an obligation of *ḥajj*, and the person who misses this is under an obligation to perform *ḥajj* in the next season and along with the sacrifice. The jurists of the provinces maintain that it is not an obligation of *ḥajj*, and the person who misses the stay at Muzdalifa during the night is liable for atonement by sacrifice. Al-Shāfiʿī said that the person who spends the first half of the night there and then leaves not spending the whole night is liable to atonement.

The reliance of the majority is upon the authentic tradition from the Prophet (God's peace and blessings be upon him) that he sent the weak members of his family during the night and they did not stay to witness the morning there with him. The reliance of the first group is on the saying of the Prophet (God's peace and blessings be upon him) in the tradition of ʿUrwa ibn Muḍarris, which is agreed upon (by al-Bukhārī and Muslim) for its authenticity, that "the person who observes this prayer with us", that is, the morning prayer at Muzdalifa, "and stops at this station and he arose and moved before this from ʿArafāt, by night or by day, has completed his *ḥajj* and has done away with the dirt on his body". They also rely on the words of the Exalted, "But, when ye press on in the multitude from ʿArafāt, remember Allāh by the sacred monument. Remember Him as He hath guided you, although before this you were astray".[267] The other group argue that the Muslim jurists agreed unanimously on relinquishing the adoption of all that is in this tradition. Thus, most of them maintain that the person who stops at Muzdalifa during the night and leaves before the morning prayer his *ḥajj* is complete, and so also the person who stays the night there and kept on sleeping without praying. They also agreed that the person who stays at Muzdalifa without engaging in the remembrance of Allāh his *ḥajj* is complete. Their reliance upon the verse is also weak in the light of its apparent meaning.

Muzdalifa and Jamʿ are the two names for this place and the *sunna* of *ḥajj* for it, as we have said, is that the person spend the night there combining

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[266] Qurʾān 2 : 198.

[267] Qurʾān 2 : 198.

maghrib and *ʿishāʾ* in the early part of the time for *ʿishāʾ*, and then stay up to the morning there.

9.2.11. Chapter 11 Discussion of Throwing Pebbles at the *Jamras*

The act that follows it (the stay at Muzdalifa) is the throwing of pebbles at the pillars (*jimār*), because the Muslim jurists agreed that "the Prophet (God's peace and blessings be upon him) stopped at *al-mashʿar al-ḥarām*, which is Muzdalifa, till after he had observed the morning prayer. He then departed from there before sunrise toward Minā. It was on this day, which was the day of sacrifice, that he threw stones at the *Jamrat al-ʿAqaba* after sunrise". The Muslim jurists also agreed that the person who throws stones at it on this day at this time, that is, after sunrise up to the declining of the sun, has thrown them during the prescribed time. They agreed that the Messenger of Allāh (God's peace and blessings be upon him) did not throw pebbles at the other *jamarāt* besides it on the day of the sacrifice.

They disagreed about the case of the person who throws pebbles at the *Jamrat al-ʿAqaba* before sunrise. Mālik said: "No report has reached us that the Messenger of Allāh (God's peace and blessings be upon him) made an exemption for anyone to throw the pebbles before sunrise, and this is not permitted. If he throws the pebbles before dawn he is to repeat the act". This was also the opinion of Abū Ḥanīfa, Sufyān, and Aḥmad. Al-Shāfiʿī said there is no harm in this, although it is desirable that he do it after sunrise.

The evidence of those who prohibited this is the act of the Prophet (God's peace and blessings be upon him) along with his saying, "Acquire your rites from me". Further, it is related from Ibn ʿAbbās "that the Messenger of Allāh (God's peace and blessings be upon him) sent the weak among his family members (from Muzdalifa) and said, 'Do not throw pebbles at the *jamra* until the sun rises'". The reliance of those who permitted stoning before dawn is the tradition about Umm Salama, which has been recorded by Abū Dāwūd and others, "that ʿĀʾisha said, 'The Messenger of Allāh (God's peace and blessings be upon him) sent Umm Salama on the day of sacrifice and she threw pebbles before dawn, after which she hastened on and performed the *ṭawāf al-ifāḍa*'. This was a day when the Messenger of Allāh (God's peace and blessings be upon him) was with her". There is also the tradition of Asmāʾ that she threw pebbles at the *jamra* during the night and said: "We used to do this during the days of the Messenger of Allāh (God's peace and blessings be upon him)".

The jurists agreed that the desirable time for throwing pebbles at the *Jamrat al-ʿAqaba* is from the rising of the sun up to its decline, but if a pilgrim throws the pebbles before the setting of the sun on the day of sacrifice his act is valid and does not incur a liability (for atonement). Mālik, however, said that it is desirable for such a person to atone by sacrifice. They disagreed about the case of a person who does not throw the pebbles till after the setting of the sun, and does it during the night, or on the next day. Mālik said that he is liable for atonement by slaughtering an animal. Abū Ḥanīfa said that if he throws the pebbles during the night he does not incur any liability, but if he delays it till the next day he is liable to atonement by slaughtering an animal. Abū Yūsuf, Muḥammad, and al-Shāfiʿī said that there is no liability for him if he delays it till the night or up to the next day. Their evidence is "that the Messenger of Allāh (God's peace and blessings be upon him) made an exemption for those tending the camels to throw the pebbles during the night", and also the tradition of Ibn ʿAbbās "that the Messenger of Allāh (God's peace and blessings be upon him) was asked by a questioner, 'O Messenger of Allāh, I threw the pebbles after sundown.' He said to him, 'No harm done'". Mālik's reliance is on the argument that this time, which is agreed upon, during which the Messenger of Allāh (God's peace and blessings be upon him) threw the pebbles is the *sunna*, and the person who violates one of the *sunan* of *ḥajj* is liable for atonement by slaughtering an animal, in accordance with what is related from Ibn ʿAbbās. This opinion was adopted by the majority.

Mālik said that the underlying meaning of the exemption for the persons tending the camels is this that if the day of sacrifice had passed and they had thrown pebbles at the *Jamrat al-ʿAqaba* and then the third day would arrive, which was the first day of departure, the Messenger of Allāh (God's peace and blessings be upon him) made an exemption for them that they may throw pebbles for that day (the second) and for the day following it, and they may depart as they have finished or stay behind with the people till the next day, the day of final departure, and then leave. The meaning of the exemption for the persons tending the animals in the view of a group of jurists is the combining of two days in one, except that combining in Mālik's view is possible for what has become due, like combining in the third day and thus throwing pebbles for the second and the third day, because delayed performance is not possible in his view except for what has become due. Many jurists, however, made an exemption for combining two days into one, whether the day being added to the other has passed or is yet to come, and they did not draw a similarity with *qaḍāʾ*.

It is established "that the Messenger of Allāh (God's peace and blessings be upon him) threw pebbles during his *ḥajj* at the *jamra* on the day of sacrifice, he then sacrificed a she-camel, then had his head shaved, and thereafter performed the *ṭawāf al-ifāḍa*". The jurists agreed that this was the *sunna* of *ḥajj*. They disagreed over the case of someone who advances an act over the sequence maintained by the Prophet (God's peace and blessings be upon him) or delays it. Mālik said that the person who shaves his head before throwing pebbles at the *Jamrat al-ʿAqaba* is liable for redemption (*fidya*; ransom). Al-Shāfiʿī, Aḥmad, Dāwūd, and Abū Thawr said that there is no liability for him. Their reliance is upon what was related by Mālik of the tradition of ʿAbd Allāh ibn ʿUmar, who said, "The Messenger of Allāh (God's peace and blessings be upon him) stopped for the people at Minā, when they were asking him questions. A man came up and said, 'O Messenger of Allāh, I did not realize it and shaved my head before making the sacrifice'. The Prophet (God's peace and blessings be upon him) said, "'ake the sacrifice, there is no harm'. Another man then came forward and said, 'O Messenger of Allāh, I did not know and made the sacrifice before throwing the pebbles'. The Prophet (God's peace and blessings be upon him) said, 'Throw the pebbles, there is no harm'. Whenever, on this day, the Messenger of Allāh (God's peace and blessings be upon him) was asked about advancing or delaying an act over the sequence he replied, 'Do it, there is no harm'". This has (also) been related on the authority of Ibn ʿAbbās from the Prophet (God's peace and blessings be upon him).[268] Mālik's reliance is upon the argument that the Messenger of Allāh (God's peace and blessings be upon him) laid down the *ḥukm* of redemption for a person shaving his head earlier due to a necessity; so how can this be for a person who does it when there is no necessity, along with the fact that the tradition does not mention the shaving of the head before the throwing of pebbles.

In Mālik's view, the person who shaves his head before slaughtering the animal is under no liability, and also the person who slaughters the animal before throwing the pebbles. Abū Ḥanīfa said that if the person shaves his head or throws the pebbles before he makes the sacrifice, he is liable for atonement by slaughtering an animal, and if he is a *qārin* he has to atone twice. Zufar said that he is liable for atoning three times, once for *qirān*, and twice for shaving his head before the sacrifice and before throwing the pebbles.

They agreed unanimously that the person who makes the sacrifice before throwing the pebbles is not liable for anything as that is explicitly mentioned in the text, except for Ibn ʿAbbās who used to say that the person who advances or delays anything in his *ḥajj* has to sacrifice an animal, and the person who advances the *ṭawāf al-ifāḍa* over throwing of pebbles and shaving of the head is bound to repeat the circumambulation. Al-Shāfiʿī, and those who followed him, said that he is not obliged to repeat it. Al-Awzāʿī said that if he performs the *ṭawāf al-ifāḍa* before throwing pebbles at the *Jamrat al-*

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[268] See two paragraphs above.

ʿAqaba and then has intercourse with his wife he is to atone by sacrificing an animal.

They agreed that the total number of pebbles that the pilgrim is to throw is seventy including seven at the *Jamrat al-ʿAqaba* on the day of sacrifice. The pilgrim is to throw these pebbles at the *Jamrat al-ʿAqaba*, from whichever spot is convenient, striking the lower part, the upper, and the middle, and there is freedom in this. The place of choice for the position taken is the middle of the valley in accordance with what is laid down in the tradition of Ibn Masʿūd that he sought the middle of the valley and said: "By Him, besides Whom there is no god, I saw the one to whom the *sūrat al-Baqara* was revealed throwing the pebbles in this way". They agreed that the pilgrim is to throw a pebble again if it does not strike the *Jamrat al-ʿAqaba*. He is to throw pebbles each day during the days of *tashrīq* (11th, 12th, and 13th of Dhū al-Ḥijja) on all the three *jamarāt*, twenty-one pebbles in all with seven for each *jamra*. It is permitted to him to throw the pebbles on two days and leave on the third day, because of the words of the Exalted, "Remember Allāh through the appointed days. Then whoso hasteneth (his departure) after two days, it is no sin for him, and whoso delayeth, it is no sin for him".[269]

The size of the stones, in their view, is similar to the size of date stones, because of what is related in the traditions of Jābir, Ibn ʿAbbās, and others that the Prophet (God's peace and blessings be upon him) threw stones at the *jimār* that were similar in size to date stones.

The *sunna* for the throwing of stones at the *jamarāt* on each day of the days of *tashrīq*, in their view, is that the pilgrim throw stones at the first *jamra* halting there for a while and and making a supplication. He is to do the same at the second *jamra* and prolong his stay. He is then to throw stones at the third and is not to stay, because of what is related about this from the Messenger of Allāh (God's peace and blessings be upon him), and "this is what he used to do in his throwing of the pebbles". It is preferable in their view to pronounce the *takbīr* while throwing pebbles at each *jamra*, as that is related from the Prophet (God's peace and blessings be upon him). They agreed that one *sunna* for throwing pebbles at the three *jamarāt* during the days of *tashrīq* is that it be undertaken after the declining of the sun. They disagreed when a pilgrim throws the pebbles before the declining of the sun during the days of *tashrīq*. The majority of the jurists maintained that the person who throws the pebbles before the declining of the sun is to repeat the performance after its decline. It is, however, related from Abū Jaʿfar Muḥammad ibn ʿAlī that he said, "The throwing of pebbles is undertaken any time from moment of the rising of the sun until it sets".

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[269] Qurʾān 2 : 203.

They agreed unanimously that the person who did not throw pebbles at the *jimār* during the days of *tashrīq* up to the time when the sun sets on the last of these days is not permitted to do so after these days. They disagreed about the obligation for this in terms of expiation. Mālik said that the person who relinquishes the throwing of pebbles at the *jimār* in part or completely or even at one of them, he is liable to atonement by slaughtering an animal. Abū Ḥanīfa said that if he relinquishes this completely he is liable for atonement by slaughtering an animal, but if he misses one pillar or more he is liable to feed needy person with half a *ṣāʿ* of wheat for each pillar missed until the amount reaches the sacrifice of an animal. This, however, does not apply to the *Jamrat al-ʿAqaba* and the person who misses it has to sacrifice an animal. Al-Shāfiʿī said that for each pebble missed he is liable for one *mudd* of food, for two pebbles it is two *mudds*, but for three he is liable for sacrificing an animal. Al-Thawrī held the same opinion, except that he imposed the sacrifice of an animal on the fourth pebble. A group of the Tābiʿūn made an exemption for missing one pebble and imposed no penalty for it, and their evidence is the tradition of Saʿd ibn Abī Waqqāṣ, who said, "We accompanied the Messenger of Allāh (God's peace and blessings be upon him) during his *ḥajj*, and some of us said, "We threw seven," while others said, "We threw six". We did not, however, find fault with each other". The Ẓāhirites said that there is no atonement in all this.

The majority maintained that the *Jamrat al-ʿAqaba* (throwing pebbles at it) is not an one of the elements (*arkān*) of *ḥajj*. ʿAbd al-Malik, one of the disciples of Mālik, said that it is an element of *ḥajj*.

These, then, are all the acts of *ḥajj* from the time of assuming the state of *iḥrām* up to the time of release from it. Release from the *iḥrām* is of two types: major, which is the *ṭawāf al-ifāḍa*, and minor, which is the throwing of stones at the *Jamrat al-ʿAqaba*. We will mention the disagreement surrounding these in what follows.

9.3. The Third Category

This category includes the discussion of the *aḥkām*. We shall discuss fully the *ḥukm* of certain incidents that occur during *ḥajj*. The greatest of these relates to the pilgrim who commences *ḥajj*, but is prevented (from completing it) by an illness, or by being besieged by the enemy, or he misses some rite at its prescribed time, which is a condition for the validity of *ḥajj*, or his *ḥajj* stands nullified by his commission of certain forbidden acts that vitiate *ḥajj* or his commission of acts whose relinquishment is required. We begin, out of these, with the factors mentioned explicitly in the law; namely, the *ḥukm* of the person obstructed, the *ḥukm* of the person killing game, the *ḥukm* of the person shaving his head before the occasion arises, and of getting rid of his dirt before the removal of the *iḥrām*. Included in this topic is the *ḥukm* of the *mutamattiʿ* and the *ḥukm* of the *qārin* on the basis of the opinion that the obligation of sacrificing an animal is imposed on them because of this exemption.

9.3.1. Chapter 1 Discussion of the Person Prevented

The source for (the *aḥkām* of) confinement are the words of the Exalted, "And if ye are prevented, then send such gifts as can be obtained with ease",[270] up to His words, "And if ye are in safety, then whosoever enjoyed freedom from the restriction of the *iḥrām* by commencing with the *ʿumra* before the *ḥajj*, (shall give) such gifts as can be had with ease".[271] The jurists disagreed extensively over the meaning of this verse, the cause of which is the *ḥukm* of the person prevented due to disease or by the enemy.

The first point of their disagreement over this verse is whether the person prevented is besieged by the enemy or he is prevented by disease. A group of jurists said that here it means the person besieged by the enemy. Some other jurists said that in fact it is the person prevented by disease. Those who maintained that the person prevented here is one besieged by the enemy argued on the basis of the words of the Exalted, "And whoever among you is sick or hath an ailment of the head must pay a ransom of fasting or alsmgiving or offering". They asserted that if (in the first case) he was prevented by disease, what was the point of mentioning disease once again? They also argued on the basis of the words of the Exalted, "And if ye are in safety, then whosoever enjoyed freedom from the restriction of the *iḥrām* by commencing with the *ʿumra* before the *ḥajj*, (shall give) such gifts as can be had with ease". This is very clear evidence.

Those who maintained that the verse was laid down for the person prevented by disease argued that *al-muḥṣar* is the passive participle of the fourth form, that is, "to be obstructed by illness", and this form by itself is not used (in Arabic) to denote one besieged by the enemy. What may be used in case of prevention by the enemy is the first form of the verb "*ḥaṣara*". Thus, the correct usage is to say "*ḥaṣarahu al-ʿaduww*" (the enemy besieged him) and "*aḥṣarahu al-maraḍ*" (he is prevented by disease). They said that disease has been mentioned again in the verse as disease is of two types: disease that prevents and disease that does not prevent. They added that the meaning of the words of the Exalted, "And if ye are in safety", is safety from disease. The first group maintained the opposite of this. They said that the fourth and the first forms of the verb, while they share the root meaning, convey separate shades of meaning. The first form is used when one does something to another, while the fourth form is employed to convey the idea of being exposed to suffer that action. Thus, it is said "he killed him" when the object, the sufferer, is the victim directly, and the other form simply means that he exposed him to harm. If this is the case then the fourth form "*aḥṣara*" is more likely used to convey the idea of being besieged by the enemy, and the first form *ḥaṣara* is more suitable for sickness, as the enemy is merely the cause of the confinement while disease is the direct actor in prevention. They also added that the word "*amn*" (safety) is never used except for the absence of fear of the enemy and when it is used in the case of disease it is a figurative application, but figurative use is not to be resorted to except for something that necessitates the departure from the literal application. Further, the mentioning of the *ḥukm* of the diseased person after giving the *ḥukm* of *al-muḥṣar* shows that *al-muḥṣar* is not the diseased person. This is the opinion of al-Shāfiʿī. The second opinion is that of Mālik and Abū Ḥanīfa. Another group of jurists said that the person besieged in this case is one who is prevented from *ḥajj* by any reason, either by disease or by the enemy or by an error in counting or by anything else besides these. The majority, however, maintain that the person prevented is of two types: the person prevented by disease, and the person besieged by the enemy.

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[270] Qurʾān 2 : 196.

[271] The complete verse reads: "Perform the pilgrimage and the Visit (to Mecca) for Allāh. And if ye are prevented, then send such gifts as can be obtained with ease, and shave not your heads until the gifts have reached their destination. And whoever among you is sick or hath an ailment of the head must pay a ransom of fasting or alsmgiving or offering. And if ye are in safety, then whosoever enjoyed freedom from the restriction of the *iḥrām* by commencing with the *ʿumra* before the *ḥajj*, (shall give) such gifts as can be had with ease. And whosoever cannot find (such gifts), then a fast of three days while on the pilgrimage, and of seven when ye have returned; that is, ten in all. That is for him whose folk are not present at the Inviolable Place of Worship. Observe your duty to Allāh, and know that Allāh is severe in punishment."

The majority of the jurists agreed that the person prevented by the enemy is to relinquish the state of *iḥrām* for the *ʿumra* or *ḥajj* where and when he is besieged. Al-Thawrī and al-Ḥasan ibn Ṣāliḥ held that he is not to do so except on the day of sacrifice. Those who maintained that he is to resume his normal state when and where he was stopped, differed about his obligation to sacrifice an animal and about the place of sacrifice if he is obliged to make a sacrifice. They disagreed on whether he is to repeat what he has been prevented from, whether that is *ḥajj* or *ʿumra*. Mālik held that he is not under an obligation to make a sacrifice, but if he has a sacrificial animal with him he is to sacrifice it where he relinquishes the state of *iḥrām*. Al-Shāfiʿī upheld the obligation of sacrifice upon him, and that was also the opinion of Ashhab. Abū Ḥanīfa stipulated the slaughter of the animal at the Ḥaram, while al-Shāfiʿī said he is to do it wherever he was intercepted. With respect to repetition, Mālik held that there is no repetition for him, while a group of jurists maintained that he is to repeat the worship. Abū Ḥanīfa said that if he was undertaking the *ḥajj* he is under an obligation of performing *ḥajj* as well as *ʿumra*, but if he was a *qārin* then he is under an obligation for *ḥajj* and two *ʿumras*. If, on the other hand, he was undertaking *ʿumra*, he is to perform his *ʿumra* as *qaḍāʾ*. There is no obligation of shaving or shortening his hair in the view of Abū Ḥanīfa and Muḥammad ibn al-Ḥasan, but Abū Yūsuf differed on that.

Mālik's reliance for maintaining that *al-muḥṣar* is not under an obligation to repeat the worship he has missed is "that the Messenger of Allāh (God's peace and blessings be upon him) and his Companions released themselves from the *iḥrām* at al-Ḥudaybiya where they sacrificed their animals, shaved off their heads and became free of all restrictions before they could reach Mecca to make the circumambulation of the House, and before the sacrifice reached the House. Further, it was never heard that the Messenger of Allāh (God's peace and blessings be upon him) ordered any of the Companions or any of those who were with him to perform any rite as *qaḍāʾ* or to repeat it".

The reliance of those who made repetition obligatory is "that the Messenger of Allāh (God's peace and blessings be upon him) performed the *ʿumra* in the next year after the year of al-Ḥudaybiya as *qaḍāʾ* for the *ʿumra* he had missed". It is, therefore, called the *ʿumrat al-qaḍāʾ*. Further, they arrived at a consensus that the person prevented by illness or something similar is under an obligation to perform it as *qaḍāʾ*. The reason for their disagreement is whether the Messenger of Allāh (God's peace and blessings be upon him) performed the *ʿumra* as *qaḍāʾ*, and whether *qaḍāʾ* can be established through analogy. The majority of the jurists maintain that *qaḍāʾ* can become obligatory because of a command different from the command for *ʿadāʾ*.

Those who made the sacrificing of animals obligatory (on *al-muḥṣar*) did so on the basis that the verse deals with the person prevented by the enemy, or that it is a general command for that all causes of obstruction, and the order of sacrificing an animal is explicitly laid down in the verse. They also argued on the basis of the slaughter of animals by the Prophet (God's peace and blessings be upon him) and his Companions in the year of al-Ḥudaybiya when they were prevented (by the Quraysh). The other group replied with the argument that the sacrifice by the Prophet and his Companions then was not the means for release from the status of *iḥrām*, but because sacrificial animals had been brought along already. The reliance of these jurists is on the principle that there is no obligation on such a person for sacrificing an animal, unless an evidence were to indicate this.

The basis of their disagreement over the place of sacrifice, in accordance with the opinion of those who made it obligatory, stems from the dispute over the place where the Messenger of Allāh (God's peace and blessings be upon him) sacrificed his animals in the year of al-Ḥudaybiya. Ibn Isḥāq (author of the Prophet's biography) said that he sacrificed them (or had them sacrificed) in the Ḥaram. Some others reported that he sacrificed them outside it (*ḥill*), and argued on the basis of the words of the Exalted, "These it was who disbelieved and debarred you from the Inviolable Place of Worship, and debarred the offering from reaching its goal".[272]

Abū Ḥanīfa maintained that anyone who is prevented from performing *ḥajj* is under an obligation for performing the *ḥajj* and the *ʿumra* as the pilgrim had annulled his *ḥajj* while he was involved with the *ʿumra*, and he did not perform either. This, then, is the *ḥukm* of the person prevented by the enemy, in the view of the jurists.

With respect to the person prevented due to illness, it is the opinion of al-Shāfiʿī and the jurists of al-Ḥijāz that he can be released from the restrictions of the *iḥrām* only by undertaking the circumambulation of the House and the *saʿy* between al-Ṣafā and al-Marwa. In other words, he can be freed from the restrictions of the *iḥrām* by undertaking the *ʿumra*, because the loss of his *ḥajj*, having missed the rites at *ʿArafa* due to a prolonged illness converts the *ḥajj* into *ʿumra*. This is the opinion of Ibn ʿUmar, ʿĀʾisha, and Ibn ʿAbbās. The jurists of Irāq opposed this and said that he is freed from the *iḥrām* where he is and his *ḥukm* is the same as that of the person prevented by the enemy, that is, he is to send his sacrificial animal to the Ḥaram and is to watch for the Day of Sacrifice and then be fully free from the *iḥrām* on the third day (of Dhū al-Ḥijja). This was the opinion of Ibn Masʿūd. They argued on the basis of the tradition of al-Ḥajjāj ibn ʿAmr al-Anṣārī, who said, "I heard the Messenger of Allāh (God's peace and blessings be upon him) saying, 'A person [on pilgrimage] who breaks a bone or becomes lame moves out of the ritual state of *iḥrām* and is under an obligation to perform another *ḥajj*'". Further, they argued on the basis of their consensus that circumambulating the House is not a condition for moving out of the state of *iḥrām* for a person prevented by the enemy.

The majority of the jurists maintain that a person prevented by disease is under an obligation for making a sacrifice. Abū Thawr and Dāwūd maintained, relying upon the apparent *ḥukm* of such a prevented person, that there is no obligation for him to sacrifice an animal. They also claimed that the verse was laid down for the person prevented by the enemy, but they did uphold the obligation of *qaḍāʾ* for him.

The person who misses his *ḥajj* due to an error in counting the days of *ḥajj* because the moon was concealed from his view or who has some other excuse, his *ḥukm* is the same, in Mālik's view, as that of the person prevented by disease. Abū Ḥanīfa said that the person who has missed the *ḥajj* due to an excuse other than disease moves out of the ritual state of *iḥrām* by undertaking *ʿumra* and he is under no obligation to sacrifice an animal, but he is under an obligation to repeat the *ḥajj*. A resident of Mecca prevented by disease is, in Mālik's view, like a person who is not a resident of Mecca, and is freed from the *iḥrām* by undertaking the *ʿumra* and is under an obligation to sacrifice an animal. Al-Zuhrī said that it is necessary that he undertake the *wuqūf* (at ʿArafa) in *ʿumra* even if he has to be carried upon a cot (bier).[273] The principle in Mālik's opinion is that if the person prevented by disease were to stay in the state of *iḥrām* until the next year when he would perform his *ḥajj* as *qaḍāʾ* there would be no sacrifice for him, but if he frees himself from the *iḥrām* by undertaking *ʿumra* he would be under an obligation to sacrifice an animal.

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[272] Qurʾān 48 : 25.

All those who interpreted the words of the Exalted, "And if ye are in safety, then whosoever enjoyed freedom from the restriction of the *iḥrām* by commencing with the *ʿumra* before the *ḥajj*, (shall give) such gifts as can be had with ease",[274] to mean that it is a communication for the person prevented (by the enemy) are bound to rule on the grounds of the apparent meaning of the text that he is obliged to make two offerings: a sacrifice for shaving his head while moving out of the state of *iḥrām* prior to the sacrifice on account of the *qaḍāʾ ḥajj*, and a sacrifice for benefiting through the *tamattuʿ* by advancing the *ʿumra* before the *ḥajj*. If he moves out of the state of *iḥrām* of the *ʿumra* during the months of *ḥajj* a third sacrifice is obligatory upon him, which is the sacrifice due to *tamattuʿ*, and this offering is one of the rites of *ḥajj*. Mālik, may Allāh have mercy on him, used to interpret the verse, because of this complication, to mean that the person prevented is under an obligation for making one sacrifice. He used to say that the sacrifice mentioned in the words of the Exalted "And if ye are prevented, then send such gifts as can be obtained with ease",[275] is the same sacrifice that is mentioned in the words of the Exalted, "And if ye are in safety".[276] This interpretation, however, is not plausible. A more obvious interpretation of the words of the Exalted, "And if ye are in safety, then whosoever enjoyed freedom from the restriction of the *iḥrām* by commencing with the *ʿumra* before the *ḥajj*, (shall give) such gifts as can be had with ease",[277] would be that they do not apply to the person prevented but to the person who is actually performing *ḥajj* through the *tamattuʿ* form. Thus, the words would appear to mean, "And if you are not in a state of fear, but have released yourself from the *iḥrām* by undertaking the *ʿumra* before the *ḥajj*, then, such gifts as can be had with ease". This meaning is indicated by the words of the Exalted, "That is for him whose folk are not resident in the vicinity of the Sacred Mosque",[278] because the persons who are resident there as well as others are on the same footing with respect to prevention (by the enemy), by consensus.

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[273] The editor of the original manuscript points out that this is how the statement appears in most of the manuscripts, while in some it reads, "He must repeat", and the rest is a blank. The contradiction, it appears, arises in the use of the text of "*wuqūf*" which is peculiar to *ḥajj*, and so far it is alright, but why does he say *bi-ʿumra*? The solution is to interpret the word *yaqifa* to mean "undertake *ʿumra*".

[274] Qurʾān 2 : 196.

[275] Qurʾān 2 : 196.

[276] Qurʾān 2 : 196.

9.3.2. Chapter 2 Discussion of the *Aḥkām* of Reparation for Game

We say: The Muslim jurists agreed unanimously that the words of the Exalted, "O ye who believe! Kill no wild game while ye are on the pilgrimage. Whoso of you killeth it of set purpose he shall pay its forfeit in the equivalent of that which he hath killed, of domestic animals, the judge to be two men among you known for justice, (the forfeit) to be brought as an offering to the Kaʿbah; or, for expiation, he shall feed poor persons, or the equivalent thereof in fasting, that he may taste the evil consequences of the deed",[279] explicitly govern the issue. They disagreed over the details of the *aḥkām* in the verse, and over what kinds of analogies are to be based upon its implications.

One of these disagreements is whether the obligation for killing game is payment of its value or payment with a similar animal (*mithl*). The majority of the jurists maintained that the obligation is for a similar animal. Abū Ḥanīfa held that the person has a choice to pay by value, that is, to pay the value or to buy an animal with the value. They also disagreed about issuing a new ruling for a person killing game with reference to cases already decided by the predecessors from among the Companions. For example, their ruling that if a person kills an ostrich he is liable for a she-camel, and the person who kills a gazelle is liable for a goat, and the person who kills a wild buffalo is liable for a domesticated cow. Mālik said that a new ruling is to be issued in each case that occurs under this rule. This was also Abū Ḥanīfa's opinion. Al-Shāfiʿī said that if the decision is arrived at in accordance with the precedents of the Companions it is permitted.

Another disagreement is whether the verse implies an order or whether there is a choice. Mālik said that it implies a choice, which was also the opinion of Abū Ḥanīfa. He meant thereby that the two arbitrators (estimators) are to grant the person who has to make the reparation a choice. Zufar said that the verse implies an order.

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[277] Qurʾān 2 : 196.
[278] Qurʾān 2 : 196.
[279] Qurʾān 5 : 95.

They disagreed on whether the value is to be that of the game killed or that of the substitute animal, if the person chooses to feed needy persons, so that he may purchase food in the value, and this in accordance with the opinion that permits such an obligation. Mālik said that he is to procure the valuation of the animal killed, while al-Shāfiʿī said that he is to obtain the valuation of the substitute animal.

They did not disagree in general over the determination of the equivalence of fasts with food, even though they did disagree on details. Mālik said that he is to fast one day for each *mudd* of food, and that is the amount to be given to each needy person in their view. This was also the opinion of al-Shāfiʿī and the jurists of al-Ḥijāz. The jurists of Kūfa maintained that he is to fast one day for every two *mudds* of food, and that is the quantity of food to be given to each needy person in their view.

They disagreed about the killing of game by mistake, whether that entails reparation. The majority of the jurists maintained that reparation is to be paid for it, while the Ẓāhirites said that there is no reparation.

They also disagreed about a group participating in the killing of the animal. Mālik said that if a group of people in a ritual state of *iḥrām* participate in killing game, then, on each person is the obligation of making a full reparation. This was also the opinion of al-Thawrī and a group of jurists. Al-Shāfiʿī said that they are liable for one reparation as a group. Abū Ḥanīfa made a distinction between those who are in a state of *iḥrām* and those who are not when they participate in killing game withing the Ḥaram. He said that each person in the state of *iḥrām* is liable for a full reparation, while those who are not in the state of *iḥrām* are liable for one as a group.

They disagreed whether one of two estimators can be the person who has killed game. Mālik said that this is not permitted, while al-Shāfiʿī said that it is. The disciples of Abū Ḥanīfa differed on this issue.

They disagreed about the place where the needy are to be fed. Mālik said that this is the location where the game was hunted, if the food is sufficient for that place, otherwise it is to be in locations adjacent to it. Abū Ḥanīfa said that this may be any place. Al-Shāfiʿī said that only the needy of Mecca are to be fed.

The jurists agreed unanimously that if a person in a state of *iḥrām* kills game he is under an obligation to make reparation, because of the text, but they differed about the person who is not in the state of *iḥrām* who kills game within the Ḥaram. The majority of the jurists of the provinces said that he is liable for reparation. Dāwūd and his disciples said that there is no reparation for him.

The Muslim jurists did not differ about the prohibition of killing game within the Ḥaram, but they disagreed about the expiation to be made for it, and this because of the words of the Exalted, "Have they not seen that We have appointed a sanctuary immune (from violence), while mankind are ravaged all around them?"[280] and also because of the saying of the Messenger of Allāh (God's peace and blessings be upon him), "Allāh made Mecca a sanctuary the day He created the heavens and the earth". The majority of the jurists of the provinces maintain that if a person in the state of *iḥrām* kills an animal and eats it he is liable for one expiation. It is related from ʿAṭāʾ and a group of jurists that there are two expiations for it.

These are the well-known issues related to this verse.

With respect to the reasons that led them on to this dispute, we shall indicate some of them, therefore, we say:

Those who stipulated, for the obligation of reparation, that the killing should be intentional argue that such stipulation is mentioned in the verse. Further, intention is a cause for penalty and expiation is a kind of punishment. Those who made reparation obligatory in the case of forgetfulness have no (valid) evidence, unless they hold the killing of the hunted animal to be similar to the destruction of wealth, as wealth in the view of the majority is to be compensated even when destroyed by mistake or through forgetfulness. This analogy is opposed by the stipulation of intention for the obligation of reparation. Some of these jurists answered this point by saying: "Intention is stipulated as being related to penalty in His words, 'That he may taste the evil consequences of the deed'".[281] This argument, however, is meaningless as tasting the evil consequences relates to penalty, so whether he kills an animal by mistake or intentionally, he has to taste the evil of the consequences (of his deed). There is no dispute, however, that a person acting in forgetfulness is not to be punished, and this argument is binding to the utmost for those who maintain the principle that expiation is not established by analogy. Thus, those who establish it against the person acting in forgetfulness have no evidence, except analogy.

The reason for their disagreement over *mithl* (similar), whether it entails similarity in resemblance or similarity in value, is that the term *mithl* is applied to that thing which is similar in appearance and also to that similar in value. The argument, however, of those who maintain that it is similarity in appearance is stronger from the aspect of the implication of the text, because the application of the term *mithl* to similarity in appearance, in the usage of the Arabs, is evident and well-known as compared to its application to value.

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[280] Qurʾān 29 : 67.

[281] Qurʾān 5 : 95.

There are, on the other hand, reasons that moved those who apply it to value to adopt such a belief. The first is that *mithl* is the equivalence that is explicitly mentioned in the text in the case of feeding and fasting. Further, if *mithl* is interpreted here to mean equivalence it becomes generally applicable to all kinds of game, as there is a certain kind of game for which an equivalent cannot be found. In addition, *mithl* in the case of animals for which one similar in appearance cannot be found is equivalence. In fact a similar animal for a wild animal cannot be found except in genus, and it has been stated in the text that the *mithl* due in its place is from a different species, thus, it becomes necessary that it be *mithl* in the sense of equivalence and value. Beyond this, there is no difficulty in deciding upon an animal similar in appearance, but the *ḥukm* of equivalence is something that differs with a change in seasons and because of that it is always in need of two arbitrators (valuers) mentioned in the text. On the basis of this the verse becomes subject to interpretation (though it was explicit [*muḥkam*] before this).[282] It would appear to say: "Those of you who intentionally kill wild game are under an obligation to pay its value, or an equivalent value in the shape of food or an equivalent of that in fasting".

With respect to their disagreement over whether the valuation is to be based on the hunted animal or on a similar animal when an equivalence for food is being determined, those who maintained that the basis of valuation is the hunted animal argued that if a similar animal is not to be found then the (value of the) hunted animal is to be ascertained (anyway) to detere the equivalence in food. Those who maintained that the basis is the animal offered as reparation said that the valuation of a thing is to be carried out if a similar animal is not found, that is, one that resembles it. Those who maintained that the verse indicates a choice had recourse to the word *aw* (or) as its implication in the usage of the Arabs is choice. Those who attached significance to the order of expiation in it held it to be similar to other cases of expiation where a sequence is followed by agreement, and these are the expiations in imprecation and homicide.

The reason for their disagreement over the issue of whether a new ruling is to be given each time for every single wild animal for which a ruling has already been laid down by the Companions is whether the *ḥukm* is legal without a rational underlying basis or whether it does have a rational underlying cause. Those who maintained that it does have an underlying reason said that what has been decided may not be based on the availability of a similar animal at that time, like the ostrich for which no similar animal can be found, thus, they held that there is no point in reviewing the ruling. Those who maintained that it is an act of worship (that is deciding through valuation by two persons each time) maintained that the process should be repeated, and that this is obligatory. This was Mālik's opinion.

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[282] See the beginning of this chapter on reparation.

In their disagreement about the case of a group of persons participating in killing a single wild animal, the basis is whether the cause of reparation is the tort itself or whether it is tort against a corpus of the animal. Those who said that it is the delict itself made reparation obligatory on each member of the group that killed the animal. Those who said that it is the delict against the corpus of the animal said that they are liable to a single reparation. This issue is similar to the assessment of *niṣāb* (the minimum scale for liability) in theft and with *qiṣāṣ* in the case of limbs and life, which will be coming up in its proper place in this book, God willing. The distinction drawn by Abū Ḥanīfa between those in the state of *iḥrām* and those who kill the animal in the Ḥaram but are not in the state of *iḥrām* is by way of enhancing the penalty for those who are in the state of *iḥrām*. Those who made reparation obligatory on each person did so for blocking the legal means to an illegal end (*sadd al-dharāʾiʿ*). If the penalty was to be dropped against them completely those who wished to hunt animals within the Ḥaram without penalty would have done it in a group. If we maintain that the reparation is expiation for a sin, then it appears that the sin for killing the wild animal should not be split up by participation in it; it then becomes necessary to say that the reparation should also not be split up and each one of them should be liable for expiation.

The reason for their disagreement over whether a person killing a wild animal can himself be one of the two persons evaluating stems from the conflict of the meaning arising from an obvious interpretation and the meaning arising from a legal principle. This is so as they did not stipulate any condition for the arbitrators, except *ʿadāla* (probity). Thus, in accordance with this apparent meaning it is permissible that the arbitrator be a person in whom this condition is met, wether he is the killer of game or someone else. The meaning arising from the principle of the law is that a litigant cannot be a judge in his own cause.

Their disagreement about the location is based upon its being unqualified (in meaning), that is, no condition has been stipulated for the location. Those who held it to be similar to *zakāt* insofar as it is a right of the needy persons said that it is not to be transferred from its location. Those who maintained that the purpose of this (law) is compassion for the needy persons of Mecca said that only the needy of Mecca are to be fed with it. Those who relied upon the apparent unqualified meaning said that he may use it to feed persons wherever he likes.

Their disagreement over whether the person who kills game in the Ḥaram, while not in the state of *iḥrām*, is liable to expiation is based on the question of whether analogy can be drawn for cases of expiation, in accordance with the opinion of those who uphold *qiyās* as a principle, and on whether *qiyās* is a principle of interpretation in the law, for those who dispute this. The Ẓāhirites deny the application of analogy to the case of the person in the state of *iḥrām*, who kills game in the Ḥaram, because of their rejection of analogy as a principle in the law. It proves true also on the principle of Abū Ḥanīfa who denies the application of analogy to cases of expiation. There is no dispute among them, however, about attributing sin to such persons, because of the words of the Exalted, "Have they not seen that We have appointed a sanctuary immune (from violence), while mankind are ravaged all around them?"[283] and also because of the saying of the Messenger of Allāh (God's peace and blessings be upon him), "Allāh made Mecca a sanctuary the day He created the heavens and the earth".

In their disagreement over the case of a person who kills it and then consumes it as to whether he is liable to one or two reparations, arises from whether his eating it is an additional tort, besides the tort of killing the animal. Further, if it is a tort, then, is it equal to the first tort? This is so as they agreed that he sins if he eats it.

As the expiation through reparation comprises four elements—identification of the obligation, identification of the person upon whom it is obligatory, identification of the act because of which it is obligatory, and the identification of the subject-matter of the obligation—and as a discussion of most of these has been undertaken, two things remain. The first is the disagreement over some of the things due from among the animals similar to those hunted. The second is about the creature killed, which does not amount to a wild animal. We must, therefore, examine what remains.

One of the sources of this topic is what has been related from ʿUmar ibn al-Khaṭṭāb that he awarded a *kabsh* (ram) for a *ḍabʿ* (hyena) and an *ʿanz* (goat) for a gazelle, a *jafra* (four month old goat) for a rabbit and a gerbil. A gerbil (*yarbūʿ*) is a creature with four legs that moves (haltingly) like a goat, and it belongs to the genus of rodents. An *ʿanz*, according to the learned, is a goat that has given birth to offspring or is one of the same age. The *jafra* and *ʿanāq* are goats, with the *jafra* being a young goat that has started eating and is past the age of weaning, while the *ʿanāq* is said to be older than the *jafra*, and it is also claimed that it is younger. Mālik opposed this tradition saying that in the case of a gerbil and rabbit, there is to be no valuation for less than what is given as an offering and sacrifice. This would be a *jadhaʿ* (two year old goat) and what is above that from sheep, and *thanīy* (two years for cows and five years for camels, and above) from camels and cows. The evidence for Mālik is in the words "to be brought as an offering to the Kaʿba".[284] They agreed that the person who imposes on himself the making of an offering is not considered to have met the requirement with less than a *jadhaʿ* or what is older in sheep and a *thanīy* in what is besides them. The rule is the same for young game as it is for game older in years. Al-Shāfiʿī said that the ransom for a younger wild animal is its equivalent in younger cattle and older for older. This is also related from ʿUmar, ʿUthmān, ʿAlī, and Ibn Masʿūd. His argument is that this reflects exact similarity. Thus, in his view, for a large ostrich is a she-camel or a cow, and for a smaller ostrich a young camel separated (due to its age) from its mother. Abū Ḥanīfa abides by his principle of determining the value.

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[283] Qurʾān 29 : 67.

They disagreed under this topic about the pigeons in Mecca and things besides them. Mālik held that in the case of a pigeon of Mecca there is to be one goat, while there is to be damage assessment (*ḥukūma*) in the case of pigeons on the outskirts (*ḥill*) of Mecca. The opinion of Ibn al-Qāsim differs in the case of the pigeons of the Ḥaram, other than those of Mecca. He said once that there is a goat for each, as in the case of the pigeons of Mecca, while he said another time that there is *ḥukūma* like that for the pigeons of the outskirts of Mecca. Al-Shāfiʿī said that for each pigeon there is a goat, but for pigeons outside the Ḥaram the value is to be paid. Dāwūd said that there is no reparation for any wild animal for which a similar animal cannot be found, except for the pigeons for which there is a goat for each. Perhaps, he thought that this was based upon consensus. It is related from ʿUmar ibn al-Khaṭṭāb and none of the Companions opposed him in this. It is related from ʿAṭāʾ that he said: "For each bird there is a goat".

They differed under this topic about the eggs of an ostrich. Mālik said that he held an ostrich egg to be compensated with one-tenth value of a camel or a cow. Abū Ḥanīfa abides by his principle of valuation, and al-Shāfiʿī agreed with him on this issue. This was also the opinion of Abū Thawr. Abū Ḥanīfa maintained that if there was a dead offspring in the egg the person is liable for reparation, that is, reparation for an ostrich. Abū Thawr stipulated here that the offspring should come out alive and then die (for such reparation). It is related from ʿAlī that he ruled in the case of an ostrich egg that a male and female camel be allowed to mate and if the female is impregnated the offspring is to be designated as compensation for the egg—the narrator said: this would be equal to a sacrificial animal—and if the fetus is lost there is to be no reparation in this case. ʿAṭāʾ said that for the person who owns camels the opinion of ʿAlī is to be followed, otherwise two *dirhams* are to be paid for each egg. Abū ʿUmar said that it is related from Ibn ʿAbbās from Kaʿb ibn ʿUjra from the Prophet (God's peace and blessings be upon him) that "for the egg of an ostrich a person in the state of *iḥrām* is charged its price", but this is not authentic from some aspects. It is related from Ibn Masʿūd that the value of the egg is to be paid, and he said there is a weak tradition about this.

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[284] Qurʾān 5 : 95.

The majority of the jurists maintained that for locust, among the creatures on land, there is an obligation for reparation on the person in the state of *iḥrām*. They disagreed about the extent of the obligation in this. ʿUmar, may Allāh be pleased with him, said that it is a handful of food. This was also Mālik's opinion. Abū Ḥanīfa and his disciples said that is a dried date given as charity for each locust. Al-Shāfiʿī said that there is to be valuation for the locust, which was also the opinion of Abū Thawr, except that he said that whatever is given as charity whether a handful of food or dates becomes its value. It is related from Ibn ʿAbbās that there is a liability for a date for a locust, as in Abū Ḥanīfa's opinion. Rabīʿa said that there is one *ṣāʿ* of food for it, however, that is a deviant opinion. It is related from Ibn ʿUmar that there is a small goat for this, but this too is deviant.

These are the well-known issues in which they agreed about the imposition of reparation, but disagreed about what is the (exact) reparation.

In their disagreement about what is game and what is not, and about what is catch from the sea (or rivers) and what is not, they agreed that wild animals on the land are prohibited to the person in the state of *iḥrām*, except for five offending creatures that have been mentioned in the text, and they disagreed what can be linked to these and what cannot. Likewise, they agreed that all of the catch from the sea (or rivers) is permitted to the person in the state of *iḥrām*, but they disagreed about the description of such catch from the sea (or rivers). This disagreement arises from the differences in the understanding of the the words of the Exalted, "To hunt and to eat the fish of the sea is made lawful for you, a provision for you and for seafarers; but to hunt on land is forbidden you so long as you are on the pilgrimage".[285] We shall discuss the well-known issues from those agreed upon and those disputed in these two categories.

We say: It is established from the traditions of Ibn ʿUmar and others that the Messenger of Allāh (God's peace and blessings be upon him) said, "There are five creatures for the killing of which there is no sin upon the *muḥrim*: the crow, the kite, the scorpion, the rat, and the biting dog". The jurists agreed in their opinions about (the implications of) this tradition, and the majority of them maintain the permissibility of killing what it includes, because it is not wild game, even though some of them stipulated some additional characteristics for these things. They disagreed over whether this was the category of a specific (*khāṣṣ*) implying a specific, or it was the specific category conveying a general (*ʿāmm*) meaning. Those who said that it was the specific category implying generality disputed what kind of general meaning was intended. Mālik said that the biting dog mentioned in the tradition implies every aggressive predatory animal, but any animal that is not aggressive is not to be killed by the *muḥrim*, and he also did not uphold the killing of their young offspring nor of those that were not aggressive.

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[285] Qurʾān 5 : 96.

There is no disagreement among them about the killing of a snake, the viper, and the python. This is related from the Prophet (God's peace and blessings be upon him) in the tradition of Abū Saʿīd al-Khudrī, who said, "The Messenger of Allāh (God's peace and blessings be upon him) said, 'The viper and the python are to be killed' ". Mālik said that he did not uphold the killing of ants. The reports about killing them are *mutawātir*, but generally not in the Ḥaram, therefore, Mālik suspended judgment in the case of the Ḥaram. Abū Ḥanīfa said that biting dogs are not to be killed, unless they are pets, and also wolves (are to be killed). A group of jurists deviated and said that nothing is to be killed except the spotted crow. Al-Shāfiʿī said that each thing that is prohibited for eating is linked to the five things. Al-Shāfiʿī's reliance is on the argument that only those things permissible for consumption to the non-*muḥrim* have been prohibited for the *muḥrim*, and the killing of things permitted for eating is not permitted by consensus based upon the proscription by the Messenger of Allāh (God's peace and blessings be upon him) of hunting animals. Abū Ḥanīfa, on the other hand, did not understand a biting dog to mean a pet alone, but every wild wolf. They disagreed about wasps, with some of them holding them to be similar to scorpions and considering their sting to be weaker.

On the whole, the specifically mentioned categories imply different kinds of injury. Those who thought that these are specific cases to be extended generally associated similar things with each one of them, if a similarity existed, while those who did not uphold this confined the cases to the expressly stated categories. A group of jurists deviated saying that only the spotted crow is to be killed, thus, they restricted the general term (crow) stated in the tradition with what is related from ʿĀʾisha that the Prophet (God's peace and blessings be upon him) said, "five things are to be killed in the Ḥaram", and he mentioned among these "the spotted crow". Al-Nakhaʿī deviated from all this and prohibited the *muḥrim* from killing any wild animal except the rat.

With respect to their disagreement over what is catch from the sea (or rivers) and what is not, they agreed that fish is included in it. They disagreed about what is besides fish, and this is based on their belief that out of these the things that need to be slaughtered are not game from the sea (or rivers), and most of these are prohibited (for eating). There is no disagreement among those who believe that all things found in the sea (or rivers) are permitted for eating that their hunting is allowed. These jurists differed about the *ḥukm* to be applied to things that live in the sea as well as in water. The conclusion to be drawn from the opinions of most jurists is that the *ḥukm* of the place where they live usually is to be assigned to them, which is where they are born.

The jurists agreed that birds living on water are governed by the *ḥukm* of animals living on the land. It is related from ʿAṭāʾ that he maintained about the birds of water that the *ḥukm* of the place where they normally thrive is to be applied to them.

They disagreed about the vegetation in the Ḥaram whether there is reparation for it? Mālik said that there is no reparation, but there is sin in destroying it, because of the proscription laid down for it. Al-Shāfiʿī said that there is reparation for it: a cow for a tall branching tree and a goat for what is less than that. Abū Ḥanīfa said that anything that is the result of human plantation has no reparation for it, but whatever is naturally growing vegetation is to be assessed by value. The reason for disagreement arises from whether an analogy for vegetation can be drawn from animals, because of the common proscription laid down for both in the saying of the Prophet (God's peace and blessings be upon him), "Its animals are not to be driven away nor are its trees to be cut down".

This is the discussion of the well-known issues in this category (section). We now move to the *ḥukm* of a person shaving off his head before the time appointed for it.

9.3.3. Chapter 3 Discussion of Ransom for Ailment and the *Ḥukm* of the Person Shaving his Head before the Appointed Time

The ransom for ailment (in the head) is also agreed upon because of its being laid down in the Book and in the *sunna*. In the Book it is the words of the Exalted, "And whoever among you is sick or hath an ailment of the head must pay a ransom of fasting or almsgiving or offering".[286] The *sunna* is in the authentic tradition of Kaʿb ibn ʿUjra, "That he was with the Messenger of Allāh (God's peace and blessings be upon him) in a state of *iḥrām*, and he was afflicted with lice in his head. The Messenger of Allāh (God's peace and blessings be upon him) ordered him to shave off his head and said, 'Fast for three days, or feed six needy persons with two *mudds* for each person, or make a sacrifice of a goat, whichever you do will be sufficient for you'".

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[286] Qurʾān 2 : 196.

The discussion of this verse deals with (the following): the person who is liable to pay ransom and the person who is not; if it becomes due then what is the amount of the ransom and what is its form; and the person for whom it becomes due, when, and where?

With respect to the person on whom it is obligatory, the jurists agreed that it is every person who removes the cause of the ailment due to necessity, because of the existence of the text about this. They disagreed about the person who removes it without necessity. Mālik said that he is liable for ransom stated in the text. Al-Shāfiʿī and Abū Ḥanīfa maintained that if he does it without necessity he liable for atonement by slaughtering an animal (*dam*) alone.

They disagreed about whether it is a condition for the person who becomes liable for ransom due to the removal of the ailment that he should have done it intentionally or whether the person doing it out of forgetfulness and one doing it intentionally are equal (in the eyes of the law). Mālik said that the person doing it intentionally and one doing it out of forgetfulness are equal. This is also the opinion of Abū Ḥanīfa, al-Thawrī, and al-Layth. Al-Shāfiʿī, in one of his opinions, and the Ẓāhirites said that there is no ransom for one doing it out of forgetfulness.

Those who stipulated necessity for the imposition of ransom have the text as their evidence. Those who imposed it upon the person not acting out of necessity argue that if it is obligatory for the one acting out of necessity, then, its obligation is more appropriate for the person not acting out of necessity. Those who made a distinction between the person acting intentionally and the person forgetting did so as this distinction is found on many occasions in the law, and they also held this because of the general implication of the words of the Exalted, "And there is no sin for you in the mistakes that ye make unintentionally but what your hearts propose (that would be a sin for you),[287] and because of the saying of the Prophet (God's peace and blessings be upon him), "Liability for mistake and forgetfulness has been lifted from my *ʿumma*". Those who did not make a distinction between them did so on the analogy of a number of acts of worship in which the law has not made a distinction between intention and forgetfulness.

With respect to the question what is the liability in the ransom of ailment, the jurists agreed that it comprises three things with a choice between them—fasting, feeding, and sacrifice—because of the words of the Exalted, "pay a ransom of fasting or almsgiving or offering".[288] The *majority maintain* that feeding is for six needy persons, and the minimum sacrifice is a goat. It is related from al-Ḥasan, ʿIkrima, and Nāfiʿ that they said: Feeding is of ten needy persons and fasting is for ten days. The evidence of the majority is the authentic tradition of Kaʿb ibn ʿUjra. Those who said that fasting is for ten days did so by drawing an analogy from the fasts of *tamattuʿ* and by equating fasts with feeding, and also because of what is reported about the reparation for hunting in the words of the Exalted, "or the equivalent thereof in fasting".[289]

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[287] Qurʾān 33 : 5.

[288] Qurʾān 2 : 196.

How much food is to be given to each needy person, out of the six mentioned in the text? The jurists disagreed about this because of the conflict of traditions about feeding in the cases of expiation. Mālik, al-Shāfiʿī, Abū Ḥanīfa, and their disciples maintained that the food to be given to each needy person is two *mudds*, in accordance with the *mudd* used by the Prophet (God's peace and blessings be upon him). It is related from al-Thawrī that he said: "for wheat it is one-half *ṣāʿ*, and for dried dates, raisins, and barley it is one *ṣāʿ*". The same opinion is also related from Abū Ḥanīfa, and that is his principle in the cases of expiation.

For what act does ransom become obligatory? The jurists agreed that it becomes obligatory upon a person who shaves off his head due to necessity arising from disease or due to an injury caused in the head by an animal (insect). Ibn ʿAbbās said: "A disease is that he have sores in his head and an ailment is that he have lice or other such things". ʿAṭāʾ said: "Disease means a headache and ailment means lice and other such problems".

The majority of the jurists maintain that anything that is not allowed to the *muḥrim* like (wearing) stitched garments, shaving of the head, clipping of nails, if he permits it to himself he is liable for ransom, that is, atonement by slaughtering an animal, in accordance with the dispute they have over it, or feeding of the needy. They did not make any distinction in these things on the basis of hardship. They hold the same in case of using fragrance. One group of jurists said that there is no liability for clipping nails, while another group said that there is atonement by slaughtering an animal for it. Ibn al-Mundhir has related that there is consensus on the prohibition of clipping nails for the *muḥrim*. They disagreed about the person who clips some of his nails. Al-Shāfiʿī and Abū Thawr said that the person who clips one nail should feed one needy person, and if he clips two he is to feed two needy persons, but if he clips three at one place (time) he is liable to atonement by slaughtering an animal. Abū Ḥanīfa, in one of his opinions, said that there is no liability on him unless he clips them all. Abū Muḥammad ibn Ḥazm said that the *muḥrim* may clip his nails and trim his whiskers, but this is a deviant opinion, and in his view there is no ransom but for the person who shaves off his head because of the excuse laid down in the text.

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[289] Qurʾān 5 : 95.

They agreed about the prohibition of shaving hair from the head, but they disagreed about shaving them from the rest of the body. The majority of the jurists maintain that this entails ransom, while Dāwūd said that there is no ransom for this. They disagreed about the person who plucks a hair or two from his head, or who pulls them out from his body. Mālik said that there is no liability upon the person who plucks out a small number of hair unless he has eliminated an ailment thereby, in which case there is atonement by slaughtering an animal. Al-Ḥasan said that for one hair there is one *mudd* (of food) and two *mudds* for two hair, and for three hair there is atonement by sacrifice. This was also the opinion of al-Shāfiʿī and Abū Thawr. ʿAbd al-Malik, the disciple of Mālik, said that in a small amount of hair there is feeding and for a larger number there is atonement. Those who understood the prohibition of shaving hair to be a mode of worship held a small number (of hair) and a large number to be the same, while those who understood it to mean cleanliness, adornment, and the ease that comes with shaving them made a distinction between small and large numbers, as in the removal of a small quantity of hair there is no elimination of an ailment.

They disagreed about the place of ransom. Mālik said that he may do what he likes in this case, if he prefers to do it in Mecca he may do so, and if he likes he may do it in his own land. Slaughter of an animal, fasting, and feeding are the same for him for this purpose. This was also the opinion of Mujāhid. In Mālik's view this is only a sacrifice and not an offering, as an offering only takes place inside Mecca or Minā. Abū Ḥanīfa and al-Shāfiʿī maintained that atonement by slaughtering an animal and feeding are not valid outside Mecca, but fasting may be undertaken wherever he likes. Ibn ʿAbbās said that atonement by slaughtering an animal is to take place in Mecca, while feeding and fasting may be undertaken wherever he likes. There is an opinion from Abū Ḥanīfa identical to this. Al-Shāfiʿī maintained consistently that atonement by feeding is not valid except for the needy persons within the Ḥaram.

The reason for disagreement arises from analogy for atonement by slaughtering an animal drawn from an offering. Those who drew an analogy for it from the offering imposed in it the conditions of the offering with respect to slaughter, a particular spot, and the needy of the Ḥaram, though Mālik used to hold that the offering may be used for feeding the needy outside the Ḥaram. The thing that is common between this sacrifice and the offering is its purpose of benefiting the needy around the House of Allāh. The opponents (of this opinion) maintain that as the law has made a distinction by naming one of them *nususk* and the other *hady* it follows that their *ḥukm* must be different.

With respect to the time, the majority of the jurists maintain that this expiation cannot occur except after the removal of the ailment, an it is not unlikely that there be a disagreement over this on the analogy of the expiation for oaths. This, then, is the discussion about the expiation for the removal of the ailment.

They disagreed about the shaving of the head whether it is a rite of *ḥajj*, or it is an act with which the person removes the *iḥrām*. There is no disagreement among the majority of the jurists that it is one of the acts of *ḥajj*, and that shaving the head has greater merit than clipping the hair, as has been established through the tradition of Ibn ʿUmar "that the Messenger of Allāh (God's peace and blessings be upon him) said, 'O Allāh, have mercy upon those who shaved their heads'. They said, 'And those who clip their hair, O Messenger of Allāh'. He said, 'O Allāh, have mercy upon those who shaved their heads'. They said, 'And those who clip their hair, O Messenger of Allāh'. He said, 'O Allāh, have mercy upon those who shaved their heads.' They said, 'And those who clip their hair, O Messenger of Allāh'. He said, 'And those who clip their hair' ".

The jurists agreed that women do not shave their heads and the *sunna* for them is clipping their hair. They disagreed over whether it is a rite that is primarily for the pilgrims and those performing the *ʿumra*. Mālik said that shaving is primarily for the pilgrims and those performing *ʿumra* and it has greater merit than clipping the hair, and it is also obligatory on a person who has missed his *ḥajj*, having been prevented by the enemy or by disease or by any excuse. This is also the opinion of a group of jurists, except in the case of prevention by the enemy, for Abū Ḥanīfa said that such a person is not obliged to shave his head or clip his hair. On the whole, those who held shaving or clipping to be a rite made atonement by sacrificing an animal obligatory, while those who did not consider it to be a rite did not impose any liability for it.

9.3.4. Chapter 4 Discussion of Expiation for the *Mutamattiʿ*

There is no dispute about the obligation of expiation for the *mutamattiʿ*, which is explicitly laid down in the words of the Exalted, the Glorious, "Then whosoever enjoyed freedom from the restriction of the *iḥrām* by commencing with the *ʿumra* before the *ḥajj*, (shall make) such offering as can be had with ease".[290] The disagreement, in fact, is about the *mutamattiʿ* as to who is the *mutamattiʿ*? The discussion of of the disagreement over this point has preceded, and of the discussion of this expiation also refers to the same categories: on whom is it obligatory? What is due? When does it become obligatory, for whom, and at what location?

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[290] Qurʾān 2 :196. Pickthall's translation has been changed somewhat to bring it in line with the terminology used in the discussion. His translation reads: "Then whosoever contenteth himself with the Visit for the Pilgrimage (shall give) such gifts as can be had with ease".

There is agreement that it is obligatory on the *mutamatti*ʿ, and the details of the disagreement as to who is the *mutamatti*ʿ have preceded. With respect to their disagreement about the obligation, the majority of the jurists maintain that the offering that can be had with ease is a goat. Mālik argued that the term *hady* is applied to mean a goat in accordance with the words of the Exalted in the reparation for killing game, "(the forfeit) to be brought as an offering (*hady*) to the Kaʿba",[291] and it is known by consensus that the obligation of reparation for killing game is a goat. Ibn ʿUmar maintained that the term *hady* is not applied to anything but camels and cows, and the words of the Exalted, "such offering as can be had with ease",[292] mean a cow of a lower quality than another cow and a *badana* (she-camel) of a lower quality than another *badana*.

They agreed that this expiation maintains an order, that is, only a person who is unable to make an offering is under an obligation to fast. They disagreed about the time during which he may move for the performance of his obligation from an offering to fasting. Mālik said that if he begins fasting he has transferred his obligation to fasting, even if he is able to make an offering during the period of fasting. Abū Ḥanīfa said that if is able to make the offering during the first three days of the period of fasting it becomes binding upon him, but if he finds it during the next seven days of fast it is not binding upon him (to make the offering). This issue is a parallel of the issue in which water becomes available to a person during his prayer when he has already performed *tayammum*.

The reason for disagreement stems from whether a condition stipulated initially for the worship continues to hold throughout its performance. Abū Ḥanīfa made a distinction between the first three days (of fasts) and the last seven, as three days of fasting, in his view, are a substitute for the offering, while the seven do not constitute a substitute (with equivalence). They agreed that if he fasts for three days in the first ten days of Dhū al-Ḥijja, he has complied with the obligation in its prescribed time, because of the words of the Exalted, the Glorious, "And whosoever cannot find (such gifts), then a fast of three days while on the pilgrimage".[293] And, there is no dispute that the first ten days of Dhū al-Ḥijja are a part of the period of *ḥajj*.

They disagreed about the person who undertakes these fasts during his occupation with the rites of the *ʿumra* and before he forms the *iḥrām* (*niyya*) for the *ḥajj*, or if he undertakes them during the days spent at Minā. Mālik permitted the fasts of this expiation during the days of Minā, while Abū Ḥanīfa disallowed them saying that if he loses the first days (of the month) the offering becomes due from him as a liability. Mālik prohibited them (immediately) before the commencement of the rites of *ḥajj*, while Abū Ḥanīfa allowed them. The reason for disagreement is whether these disputed days belong to the period of *ḥajj*. If they do, then, is it a condition of the expiation that the fasts must be undertaken after the occurrence of their cause? Those who maintained that expiation is not valid except after the occurrence of its cause said that fasting is not valid except after the commencement of *ḥajj*. Those who drew an analogy for it from the expiation of oaths said that it is valid. They agreed that if he fasts for seven days when he is (back home) with his family his act is valid. They disagreed over when he fasts on the way back. Mālik said that the fasts are valid, while al-Shāfiʿī said that they are not. The reason for disagreement is based upon the probabilities of interpretation of the words of the Exalted, the Glorious, "And of seven days when ye have returned",[294] as the term *rājiʿ* is applied to the person who has completed his return journey and also to one who is in the middle of the journey. This is the expiation that is established through the transmitted texts, and is agreed upon.

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[291] Qurʾān 5 : 95.

[292] Qurʾān 2 :196.

[293] Qurʾān 2 : 196.

There is no dispute about the case of a person who loses the *ḥajj* after he commenced it, either because of missing one of its elements (*arkān*), or because of a miscalculation of time, or because of his ignorance, or because of forgetfulness, or because of the commission of an act during *ḥajj* that renders it invalid, that he is under an obligation for *qaḍāʾ* if it was an obligatory *ḥajj*. But is he under an obligation for an offering along with *qaḍāʾ*? They disagreed about this. Further, if the *ḥajj* was voluntary, is he under an obligation of *qaḍāʾ*? There is a disagreement in all this, but the majority of the jurists maintain that he is liable for an offering because of the occurrence of a shortcoming that seems to denote the obligation of making an offering. A group of jurists deviated and said that there is no obligation for the offering or for *qaḍāʾ*, unless it is an obligatory *ḥajj*.

What is unique about an invalid *ḥajj* as compared to the remaining forms of worship is that the person continues to complete it even when he has invalidated it (due to some reason), and he is liable for atonement by slaughtering an animal. One group deviated and said that it is like the other forms of worship. The reliance of the majority is upon the words of the Exalted, "*Complete the Pilgrimage and the Visit* (*ʿumra*) (*to Mecca*) *for* Allāh".[295] The majority considered this to be a general (command), while the opponents restricted the meaning on the analogy of the remaining forms of worship when they are invalidated.

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[294] Qurʾān 2 : 196.

[295] Qurʾān 2 : 196. Pickthall's translation has been changed slightly; it reads: "Perform the pilgrimage and the Visit (to Mecca) for Allāh."

They agreed that an act invalidating *ḥajj* is either related to the commanded rites, like the dropping of the prescribed elements, which are a condition for its validity depending on their disagreement over what is an element and what is not, or it is related to one of the proscribed acts that are to be avoided, like sexual intercourse, even though they disagreed about the time at which sexual intercourse invalidates *ḥajj*. Their consensus about sexual intercourse as an invalidating factor for *ḥajj* is based upon the words of the Exalted, the Glorious, "And whoever is minded to perform the pilgrimage therein (let him remember that) there is (to be) no lewdness nor abuse nor angry conversation on the pilgrimage".[296] They agreed that the person who cohabits before the stationing at ʿArafa has invalidated his *ḥajj*. Likewise, one who has intercourse while undertaking the *ʿumra* before performing the circumambulation to be followed by the *saʿy*. They disagreed about the invalidation of *ḥajj* through sexual intercourse after the stationing at ʿArafa and prior to the throwing of pebbles at the *Jamrat al-ʿAqaba*, and also after throwing pebbles at it and before the *ṭawāf al-ifāḍa*, which is an obligation. Mālik said that the person who cohabits before throwing pebbles at the *Jamrat al-ʿAqaba* has invalidated his *ḥajj*, and he is liable for the offering as well as *qaḍāʾ*. This was also al-Shāfiʿī's opinion. Abū Ḥanīfa and al-Thawrī said that he is under an obligation to make an offering of a *badana* (she-camel), but his *ḥajj* is complete. An identical opinion is also related from Mālik. Mālik said that the pilgrim who cohabits after throwing pebbles at the *Jamrat al-ʿAqaba*, but before the *ṭawāf al-ifāḍa*, his *ḥajj* is complete. The majority maintain Mālik's view that cohabitation before the *ṭawāf al-ifāda* does not invalidate *ḥajj*, but the offering becomes binding upon him. One group of jurists said that the person who cohabits before the *ṭawāf al-ifāḍa* has invalidated his *ḥajj*. This is an opinion from Ibn ʿUmar.

The reason for disagreement is that there is for *ḥajj* a factor of completion that resembles the salutation in prayer (after which the pilgrim is free from the restrictions of the *iḥrām*). And this is of two types: full freedom (*taḥallul akbar*) which occurs after the *ṭawāf al-ifāḍa*; and partial freedom (*taḥallul aṣghar*) which occurs after the casting of pebbles at the *Jamrat al-ʿAqaba*. Is either form of freedom stipulated for the permissibility to engage in cohabitation or just one? There is no dispute among them that the minor *taḥallul*, which is due after the throwing of pebbles at the *Jamrat al-ʿAqaba* on the Day of Sacrifice, disengages the pilgrim from all that was prohibited to him due to *ḥajj*, except sex activity, use of fragrance, and hunting game. The jurists differed, however, about what does become permissible. The well-known opinion from Mālik is that the pilgrim is free from all restraints except matters related to women, such as contracting marriage, intercourse, and the use of fragrance. It is said in a narration from him that the restraints are women, perfume, and hunting, because the apparent meaning of the words of the Exalted, "But when ye have been freed from the *iḥrām*, then go hunting (if ye will)",[297] refer to *taḥallul akbar*.

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[296] Qurʾān 2: 196.

They also agreed that the person performing the *ʿumra* becomes free from the restrictions when he has made the circuits around the House and has performed the *saʿy* between al-Ṣafā and al-Marwa, even when he has not shaved his head or clipped his hair, because of the proof of this in the traditions, except for minor deviation (of opinion). It is related from Ibn ʿAbbās that this happens after the circumambulation. Abū Ḥanīfa said that the pilgrim is not free except after shaving his head, and if he cohabits before that his *ʿumra* is invalidated.

They disagreed about the nature of the cohabitation and the preliminaries that invalidate *ḥajj*. The majority of the jurists maintain that the union of the sexual organs invalidates *ḥajj*. It is likely that those who stipulate ejaculation along with the union of the sexual organs, as (factors) giving rise to the obligation for taking a bath, stipulate them also for *ḥajj* (as factors invalidating *ḥajj*). They disagreed about ejaculation outside of the vagina. Abū Ḥanīfa said that *ḥajj* is not invalidated except by ejaculation inside the vagina. Al-Shāfiʿī said that what results in the liability for *ḥadd* invalidates *ḥajj* (i.e., conditions associated with the act). Mālik said that ejaculation itself is sufficient for invalidating *ḥajj*, as are the preliminaries like fondling and kissing. Al-Shāfiʿī said that the person who performs the sexual act short of penetration should make an offering. They disagreed about the person who cohabits a number of times. Mālik said that he is liable for a single offering. Abū Ḥanīfa said that if cohabitation is repeated in a single session he is liable for a single offering, but if this occurs over several sessions he is liable for an offering for each act of cohabitation. Muḥammad ibn al-Ḥasan said that a single offering is sufficient even if the act is repeated a number of times, as long as he has not made the offering for the first act of cohabitation. All three opinions are related from al-Shāfiʿī; however, the well-known opinion from him is the same as that of Mālik's. They disagreed about the case of a person who cohabits out of forgetfulness. Mālik considered intention and forgetfulness to be the same in this case. Al-Shāfiʿī, in his last opinion, said that there is no expiation for him. They disagreed on whether a woman (in this case) is liable for making an offering. Mālik said that if he persuaded her she is liable for an offering, but if he forced her then he is liable for two offerings. Al-Shāfiʿī said that he is liable only for one offering, as was his opinion in the case of a person who cohabits during Ramaḍān.

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[297] Qurʾān 5 : 2.

The majority of the jurists maintain that if they (the cohabiting couple) perform *ḥajj* after this they have to do so separately, and it is also said that they are not to separate. The latter opinion is related from some of the Companions and the Tābiʿūn. This was also Abū Ḥanīfa's opinion. The opinions of Mālik and al-Shāfiʿī differed about the point at which they have to separate. Al-Shāfiʿī said that they have to separate from the time that their *ḥajj* has been invalidated, while Mālik said that they separate from the place where they commenced their *iḥrāms*, unless they did so before the *mīqāt*. Those who imposed separation upon them did so to eliminate the means (of corruption) and as a penalty, while those who did not impose this on them based their judgment on the principle that a *ḥukm* in this category cannot be issued unless it is based on a text.

They disagreed about the kind of offering that is obligatory on account of (proscribed) sexual intercourse. Mālik and Abū Ḥanīfa said that this should be a goat, while al-Shāfiʿī said that less than a *badana* (she-camel) is not enough, and if he cannot find one the value of the *badana* is to be converted into *dirhams* and the value of the *dirhams* into food, and he is then to fast one day for each *mudd* of food. He said that the offering and the food outside Mecca and Minā are not valid, but he may fast where he likes.

Mālik said that in the case of a deficiency that becomes associated with the *iḥrām*, whether it is due to cohabitation, or shaving of hair, or prevention, if the perpetrator of the act cannot find an offering he has to fast three days during *ḥajj* and seven when he goes back, and feeding of the needy does not enter into this. Mālik held the atonement by slaughtering an animal that is binding here should be similar to the atonement in the case of the *mutamattiʿ*, while al-Shāfiʿī held it to be similar to the atonement that is obligatory in *fidya* (ransom). Feeding of the needy in Mālik's view is only applicable in the expiation for killing game and the expiation for the elimination of an ailment. Al-Shāfiʿī maintains that fasting and feeding have been laid down as substitutes for the slaughtering of an animal in two places, while their substitute has not been mentioned on a single occasion, thus, the drawing of an analogy for the unexpressed cases from those that are expressed in the case of food is better. This then is what is specific to the invalidation occurring because of cohabitation.

With respect to invalidation occurring due to the lapse of time, which is the missing of the stationing at ʿArafa on the day of ʿArafa, the jurists agreed unanimously that the person who is in this situation is not released from his *iḥrām*, except by making the circumambulation of the House followed by *saʿy* between al-Ṣafā and al-Marwa, that is, he becomes free from the *iḥrām* after performing the *ʿumra*, and he is under an obligation to perform *ḥajj* in the next season. They disagreed over whether he is liable for the offering. Mālik, al-Shāfiʿī, Aḥmad, al-Thawrī, and Abū Thawr maintain that he is liable for the offering. Their reliance is upon their consensus that the person who has been delayed by illness until he missed the *ḥajj* is liable for the offering. Abū Ḥanīfa said that he is released from the *iḥrām* by undertaking the *ʿumra*. He is then to perform the *ḥajj* in the next season, and there is no liability (this time) for the offering. The evidence of the Kūfians is that the principle governing the offering is that it is a substitute for *qaḍāʾ*, thus, if he is liable for *qaḍāʾ* then there is no obligation for the offering, except in cases restricted by consensus.

Mālik, al-Shāfiʿī, and Abū Ḥanīfa disagreed about the case of a person who was *qārin* and has lost the *ḥajj*, whether he is to perform it (next time) as a *mufrid* (separately) or by combining it with *ʿumra* (as a *qārin*). Mālik and al-Shāfiʿī held that he is to perform it as a *qārin* as he is performing the *qaḍāʾ* of what he is liable for. Abū Ḥanīfa said that he is only under the obligation for the *ifrād* as he has already performed the circumambulation of his *ʿumra* and he is only to perform the *qaḍāʾ* of what he has missed.

The majority of the jurists maintain that the person who has missed his *ḥajj* is not to continue in the state of *iḥrām* till the next year, and this opinion was selected by Mālik, except that he permitted this so that the offering may be dropped from his liability, and he does not need to be released from the *iḥrām* by undertaking the *ʿumra*. The basis of this disagreement of theirs on this issue stems from their dispute about the person who forms the *niyya* of the *iḥrām* for *ḥajj* in days other than those of the *ḥajj* months. Those who did not consider such a person to be in a state of *iḥrām* did not permit the person who missed his *ḥajj* to remain in the state of *iḥrām* until the other year. Those who permitted the *iḥrām* in days other than the days of the *ḥajj* months permitted him to stay in the state of *iḥrām*.

The Qāḍī (Ibn Rushd) said: "We have discussed the expiations that are obligatory through the text in the case of *ḥajj*, the description of the *qaḍāʾ* for both the missed and the invalidated *ḥajj*, and the description of the acts of the person who has missed the *ḥajj*. We had discussed before this the expiations that are expressly laid down in the law and what the jurists had associated with them in the case of the person who invalidates his *ḥajj*. We are now left with the discussion of the expiations—over which they disagreed—pertaining to the omission of one of the rites of *ḥajj*, and these have not been expressly laid down".

9.3.5. Chapter 5 Discussion of Expiations not Expressly Laid Down

We say: The majority of the jurists agreed that the rites (of pilgrimage) are of two kinds: rites that are an emphatic *sunna* (*sunna muʾakkada*), and rites that are considered desirable. Those that are a *sunna* make the person who relinquishes them liable for atonement by slaughtering an animal, as his *ḥajj* becomes defective, the basis being the case of the *mutamattiʿ* and that of the *qārin*. It is related from Ibn ʿAbbās that he said: "The person who misses a rite is liable for atonement by slaughtering an animal". The rites that are supererogatory were not considered by the jurists as giving rise to atonement by slaughtering an animal, but they disagreed extensively over each rite as to whether its relinquishment gives rise to atonement. This was based upon their dispute over the identification of a rite as a *sunna* or as supererogatory. They had no dispute about the principle that obligatory rites cannot be validated through atonement. They differed, however, over whether each of the acts itself was obligatory. The Ẓāhirites did not uphold the imposition of atonement unless it was laid down in the text, because of their rejection of (the validity of) *qiyās*, especially in cases of worship. Likewise, they agreed that if a pilgrim commits acts, avoidance of which is *sunna*, he is liable to the ransom for removing an ailment, but he is not liable for anything if he commits acts whose avoidance is considered desirable. The jurists disagreed about the consequences of the relinquishment of an act, because of their disagreement whether it was a *sunna*. And here again, the Ẓāhirites did not impose ransom except in cases that were laid down in the text. We shall mention the well-known disputes of the *fuqahāʾ* over the relinquishment of each individual rite, that is, whether atonement by slaughtering an animal is obligatory. We shall take up these rites one by one, from the first rite to the last. So also we shall deal with the cases of the commission of prohibited acts.

The first rite that they disagreed about was the case of the person who passes the *mīqāt* without forming the intention of the *iḥrām* as to whether he is liable for atonement. A group of jurists said that he is not liable for atonement by slaughtering an animal (*dam*). Another group of jurists said that he is liable for atonement, even if he returns (to the *mīqāt* to form the *niyya* of the *iḥrām* there). This was the opinion of Mālik and Ibn al-Mubārak, and it is also related from al-Thawrī. A third group of jurists said that if he returns (to the *mīqāt*) he is not liable, but if he does not he is liable for atonement. This is the opinion of al-Shāfiʿī, Abū Yūsuf, Muḥammad, and the better known opinion of al-Thawrī. Abū Ḥanīfa said that if he returns pronouncing the *talbiya* he is not liable for atonement, but if he returns without pronouncing the *talbiya* he is liable. Yet another group of jurists said that returning to the *mīqāt* to form the *niyya* is an obligation and it cannot be rectified through atonement.

They disagreed about the pilgrim who washes his head with marsh mallow. Mālik and Abū Ḥanīfa said that he is liable for ransom. Al-Thawrī and some other jurists said that there is no liability upon him.

Mālik was of the view that entering a bath invokes the liability of ransom, while others permitted it. Entering the bath is attributed to Ibn ʿAbbās through authentic transmission.

The majority maintain that the person in the state of *iḥrām* is liable for ransom if he wears some of the things that he is prohibited from wearing. If he were to wear trousers in the absence of a loin-cloth is he is liable for ransom? They disagreed over this. Mālik and Abū Ḥanīfa said that he is liable for ransom, while al-Thawrī, Aḥmad, Abū Thawr, and Dāwūd said that there is no liability for one who does not have a loin-cloth. The reliance of those who disallowed this is the unqualified proscription about it, while the reliance of those who do not uphold ransom in this case is the tradition of ʿAmr ibn Dīnār from Jābir and Ibn ʿAbbās, who said, "I heard the Messenger of Allāh (God's peace and blessings be upon him) saying, 'Trousers are for the person who cannot find a loin-cloth and boots are for the person who cannot find sandals' ".

They disagreed about the case of a person who wears cut down boots when sandals exist. Mālik said that he is liable for ransom, while Abū Ḥanīfa held that he is not. Both opinions are related from al-Shāfiʿī. They disagreed about the case of a woman wearing gloves, whether she is liable to ransom. We have already discussed a large number of these *aḥkām* under the topic of *iḥrām*. They also disagreed about the case of a person who neglects the pronouncement of the *talbiya*, whether he is liable for atonement by slaughtering an animal. This too has preceded.

They agreed that the pilgrim who forgets to perform the circumambulation or who misses one of the circuits should perform it again as long as he is in Mecca, but they disagreed about what he should do when he has returned to his family. A group of jurists including Abū Ḥanīfa said that slaughtering an animal would atone for it. Another group of jurists said that he is to return and rectify what was defective, and slaughtering an animal will not compensate for it. Likewise, they disagreed about the case of a person who does not observe the *ramal* in the first three circuits. Its obligation was upheld by Ibn ʿAbbās, as did al-Shāfiʿī, Abū Ḥanīfa, Aḥmad, and Abū Thawr. The opinion of Mālik and his disciples differed over this.

The basis for the disagreement in all these issues is their dispute whether the act is a *sunna*. The discussion about all this has preceded.

If he misses kissing the Black Stone or kissing his hand after he has placed it on the Stone (in case he was not able to reach it), he is liable for atonement on the analogy of the *mutamattiʿ* in the view of those who do not consider it obligatory (i.e., consider it a *sunna*). Similarly, they disagree about the person who forgets to pray the two *rakʿas* of the circumambulation and returns to his homeland as to whether there is liability of atonement for him. Mālik said that he is liable for atonement, while al-Thawrī said that he may offer the two *rakʿas* as long as he is in the Ḥaram. Al-Shāfiʿī and Abū Ḥanīfa said that he may offer them wherever he pleases.

Those who upheld that the farewell circumambulation is not obligatory disagreed about the case of a person who neglects it and it is not possible for him to return to Mecca to perform it, whether he is liable for atonement. Mālik said that he is not liable for anything; however, he may return for it if he is near enough. Abū Ḥanīfa and al-Thawrī said that he is liable for atonement if he does not return. In their view he is to return as long as he has not reached the *mīqāt*. The argument of those who do not consider it a *sunna muʾakkada* (emphatic *sunna*) is that it is not obligatory upon the resident of Mecca or a menstruating woman.

In Abū Ḥanīfa's view if the person has not included the *ḥijr*[298] during the circumambulation he is to return to repeat the *ṭawāf*, as long as he has not left Mecca; if has left, he is liable for atonement by slaughtering an animal.

They disagreed about whether walking is a condition for the validity of the circumambulation for the pilgrim who is able to do so. Mālik said that it is a condition, like standing up in prayer. If he is unable to do so it is considered permissible like the prayer of the person observing it in a sitting posture. He is to return to repeat it (if he improves), unless he has returned to his homeland, in which case he is liable for atonement (*dam*). Al-Shāfiʿī said that riding during the circumambulation is permitted as the Prophet (God's peace and blessings be upon him) "performed the circumambulation of the House while riding, in the absence of an illness". He did so, however, in order to have a better view of the people.

Those who considered the *saʿy* to be obligatory imposed atonement for the person if he left for his homeland (without performing it), but those who considered it to be voluntary did not impose any liability. The discussion of their disagreement about the case of a person who performs the *saʿy* before the circumambulation has also preceded; it was then explained whether he is liable for atonement if he leaves Mecca (without repeating the rite).

They disagreed about the obligation of *dam* upon a person who left ʿArafa before sunset. Al-Shāfiʿī and Aḥmad said that if he returns and then leaves after sunset there is no atonement for him, but if he does not return by dawn (next morning) he is liable for atonement. Abū Ḥanīfa and al-Thawrī said that he is liable for atonement whether he returns or he does not. This has already been discussed.

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[298] The open fenced area adjacent to the western wall of the Kaʿba is considered part of it and the pilgrim has to go around it during the *ṭawāf*.

They disagreed about the person who stays at ʿUrana (and not at ʿArafa). Al-Shāfiʿī said that there is no *ḥajj* for him, while Mālik said that he is liable for *dam*. The reason for disagreement is whether the proscription of stopping there instead of at ʿArafa belongs to the category of prohibition or to that of disapproval. We have mentioned, in the section(s) on the performance of the acts of *ḥajj*, most of their disagreements about matters whose relinquishment prompts the imposition of *dam* and about those which do not, although the proper order requirs that they be mentioned here. But mentioning them on those occasions was easier.

The Qāḍī (Ibn Rushd) said: "We have discussed the obligation of this worship and the person on whom it is obligatory, as well as the conditions of its obligation and when it becomes obligatory. These are matters that form the preliminaries for the full knowledge of this worship. We discussed, thereafter, the time period of this worship, its location, and its prohibitions, and what acts are included in it with respect to each individual location out of the various locations, and also with respect to the individual segments of time among the various segments of time until the time for it is over. We then discussed the release from the restrictions of the *iḥrām* during this worship and also what is accepted by way of different forms of expiation for the rectification of defects as well as those acts that cannot be rectified and have to be repeated. We also discussed the *ḥukm* of repetition in accordance with the causes. In this topic was also included the case of a person who commences the worship, but is prevented from completing it by illness, or by the enemy, or by other things. What is left from the acts of this worship is the discussion of the offering (*hady*), because this is a kind of worship which is a part of the (larger) worship (of *ḥajj*) and which it is necessary to devote our attention to; so we now move to it".

9.3.6. Chapter 6 Discussion of the Offering (*Hady*)

We say: The study of the offering includes the identification of its obligation, the identification of its species, the identification of its age, the manner in which it is driven, from where it is to be driven and where it ends up after being driven, which is the place of sacrifice, and the *ḥukm* of its meat after slaughter.

We say: They agreed that the offering driven for this worship includes that which is obligatory and that which is voluntary. The obligatory offering is (either) obligatory through a vow, or it is obligatory in some forms of this worship, and it also includes that which is obligatory because it is an expiation.

The offering that is obligatory for some forms of this worship is the offering of the *mutamattiʿ*, by agreement, and the offering of the *qārin*, with accompanying disagreement. That which is (imposed as) an expiation is the offering for *qaḍāʾ* performance, in accordance with the opinion of those who stipulate an offering in it, the offering in the expiation for killing game, and the offering for removing ailments and dirt, and also the offerings resembling these offerings for which the jurists have drawn analogies for the case of each rite with cases that are explicitly mentioned in the texts.

With respect to the species of the offering, the jurists agreed that the offering should not be from things other than the eight categories explicitly laid down by Allāh, and that it is preferable that the offering should first be a camel then a cow then sheep then goats, but they differed about other slaughtered animals. With respect to the ages, they agreed that the *thanīy* (the age of one year for sheep, two years for cows, and five for camels) is valid, but a six-month old (*jadhaʿ*) from among goats is not valid as an offering (*hady*) or as a blood sacrifice (*ḍaḥiya;* pl. *ḍaḥāyā*), because of the saying of the Prophet (God's peace and blessings be upon him) to Abū Burda, "It is valid for you but is not valid for anyone after you". They differed about the permissibility of offering a six-month old sheep. The majority of the jurists uphold its permissibility as an offering and as a blood sacrifice. Ibn ʿUmar used to say that in offerings only a *thanīy* is valid from each species. There is no dispute that the more expensive the offering the better it is. Al-Zubayr used to say to his children, "O my children, none of you should make an offering to Allāh of that which he would be ashamed of offering to his benefactor, for Allāh is the Greatest of all benefactors, and deserves that the choicest thing be offered to Him". The Messenger of Allāh (God's peace and blessings be upon him) said in the case of slaves, when it was said to him which one of them has greater merit for emancipation, "The one that fetches the highest price and is the dearest to his masters".

There is no known limit for the number of offerings, and the offerings of the Messenger of Allāh (God's peace and blessings be upon him) were up to a hundred. The manner of driving them (to the place of offering) is by garlanding them and an indication (by incision) that it is an offering, "Because the Messenger of Allāh (God's peace and blessings be upon him) travelled in the year of al-Ḥudaybiya and on reaching Dhū al-Ḥulayfa he garlanded the offering, put distinguishing marks (by incision) on it, and then entered the *iḥrām*". When the offering is a camel or a cow, there is no dispute that it is made to wear one or two sandals around the neck, or whatever is similar for one who cannot find sandals. They disagreed about the garlanding of sheep.

Mālik and Abū Ḥanīfa said that sheep are not to be garlanded. Al-Shāfiʿī, Aḥmad, Abū Thawr, and Dāwūd said that they are to be garlanded on the basis of the tradition of al-Aʿmash from Ibrāhīm from al-Aswad from ʿĀʾisha "that the Prophet (God's peace and blessings be upon him) once took some sheep as an offering to the House and garlanded them". They considered it desirable to turn it toward the *qibla* while garlanding it. Mālik preferred the putting of distinguishing marks (by incision) on the left side, because of what he has related from Nāfiʿ from Ibn ʿUmar that when he made an offering, bringing them from Medina, he would garland them and place the distinguishing marks (by incision) on them at Dhū al-Ḥulayfa, and he garlanded them before placing the incisions. He would do this at one place when the offerings were turned toward the *qibla*. He would make them wear sandals (around the neck) and put the incisions on their left sides. He would then drive them down with them until he would stop with the people at ʿArafa, and then move with the people as they moved, and when they reached Minā in the early morning of the Day of Sacrifice he would sacrifice them before shaving his head or clipping his hair. He would sacrifice the offerings with his own hands, lining them up and making them face the *qibla*. He would then eat and feed others. Al-Shāfiʿī, Aḥmad, and Abū Thawr preferred the placing of incisions on the right side, because of the tradition of Ibn ʿAbbās "that the Messenger of Allāh (God's peace and blessings be upon him) observed *ẓuhr* at Dhū al-Ḥulayfa and then sent for his sacrificial animals. He made incisions on the right side of their humps (of the camels) after which he squeezed out the blood from them (the incisions). He garlanded them with two sandals. He then rode his mount and on reaching al-Baydāʾ pronounced the *talbiya* for *ḥajj*".

From where is the offering to be driven? Mālik said that the *sunna* for this is that it be driven from the outskirts of Mecca (*ḥill*), and because of this he maintained that the person who buys the offering from Mecca and did not bring it from the *ḥill* should take it with him for the stationing at ʿArafa, and if he does this he is liable for a substitute (*badal*). If he brought it along from the *ḥill* then it is desirable for him to take it along for the stationing at ʿArafa, which is the opinion of Ibn ʿUmar, and was upheld by al-Layth. Al-Shāfiʿī, al-Thawrī, and Abū Thawr said that the taking of the offering to ʿArafa is a *sunna*, but there is no penalty for the person who did not take it there, irrespective of his having driven it from the *ḥill*. Abū Ḥanīfa said that the taking of the offering to ʿArafa is not a *sunna*. The evidence of Mālik for the bringing of the offering from the *ḥill* into the Ḥaram is "that the Prophet (God's peace and blessings be upon him) did so and said, 'Acquire your rites from me'". Al-Shāfiʿī said that taking the offering to ʿArafa (*taʿrīf*) is a *sunna*, just like garlanding. Abū Ḥanīfa said it is not a *sunna*, and the

Messenger of Allāh (God's peace and blessings be upon him) did so as his residence was outside the Ḥaram. A choice in the matter of *taʿrīf* of the offering is related from ʿĀʾisha.

The destination of the offering is the Ancient House, as in the words of the Exalted, "And afterward they are brought to the Ancient House",[299] and His words, "As an offering to the Kaʿba".[300] The jurists agreed that no one is permitted to slaughter inside the Kaʿba, nor in al-Masjid al-Ḥarām, and that the meaning in the words of the Exalted, "As an offering to the Kaʿba",[301] is sacrifice in Mecca as a favor from Him for its needy and poor. Mālik used to say that the meaning of the words of the Exalted, "As an offering to the Kaʿba"[302] is Mecca; and he did not permit anyone who was slaughtering his offering in the Ḥaram to do it in a place other than Mecca. Al-Shāfiʿī and Abū Ḥanīfa said that slaughtering it in the Ḥaram outside Mecca is valid. Al-Ṭabrī said that the slaughter of the offering is permitted wherever the person making the offering desires, except for the offering of *qirān* and the killing of game, for they are not permitted in any place other than the Ḥaram. On the whole, the sacrificing at Minā is a point of consensus among the jurists; and at Mecca for the *ʿumra*, except for their dispute about the sacrifice made by the pilgrim who has been intercepted and prevented from completing *ḥajj*. In Mālik's view if the sacrifice is made for *ḥajj* at Mecca and for the *ʿumra* at Minā it is permitted. Mālik's evidence for stating that it is not permitted to sacrifice in the Ḥaram at a place other than Mecca is the saying of the Prophet (God's peace and blessings be upon him), "All the alleys of Mecca, and its streets are a place of sacrifice". Mālik exempted from this the offering due as ransom (*fidya*), and permitted it in a place other than Mecca.

With respect to the time of sacrifice, Mālik said that if the offering of *tamattuʿ* and of voluntary *ḥajj* are slaughtered before the Day of Sacrifice it is not valid, but Abū Ḥanīfa permitted it in the case of voluntary *ḥajj*. Al-Shāfiʿī said that it is permitted in both cases before the Day of Sacrifice.

There is no dispute among the jurists that the person who converts the offering into fasting may fast wherever he likes as there is no benefit in this to the residents of the Ḥaram nor to the residents of Mecca. They disagreed about the alms distributed in lieu of the offering. The majority of the jurists maintain that they are due to the needy of Mecca and the Ḥaram, as they are a substitute for the reparation of killing game, which is for them. Mālik said that feeding is like fasting and is valid outside Mecca.

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[299] Qurʾān 22 : 29.

[300] Qurʾān 5 : 95.

[301] Qurʾān 5 : 95.

[302] Qurʾān 5 : 95.

The jurists agree unanimously about the description of the sacrifice that commencement with the name of Allāh is desirable in it as it is slaughter (*dhakāh*). Some of them preferred the pronouncement of *takbīr* along with the *tasmiya*. It is preferred for the person making the offering to undertake the sacrifice with his own hands, but if he delegates this it is permitted. This is what the Messenger of Allāh (God's peace and blessings be upon him) did in the case of his offerings. One of his *sunnas* is sacrificing while the animals are standing, because of the words of the Exalted, "So mention the name of Allāh over them when they are drawn up in lines".[303] The description of the sacrifice has preceded in the Book of Slaughtered Animals.[304]

There are a number of well-known issues about what is permitted to the owner of the offering with respect to utilizing it and consuming its flesh. The first is whether it is permitted to him to ride the obligatory or voluntary offering. The Ẓāhirites maintained that riding it is permitted in the case of necessity and even otherwise. Some of them made this obligatory. The majority of the jurists of the provinces considered riding it as abominable other than in cases of necessity. The evidence of the majority is what is recorded by Abū Dāwūd from Jābir when he was asked about riding the offering. He said, "I heard the Messenger of Allāh (God's peace and blessings be upon him) saying, 'Ride it with care if you are compelled to until you can find a mount' ". By way of reasoning, utilizing a thing through which the nearness to Allāh is sought is not allowed by the spirit of the *sharīʿa*. The evidence of the Ẓāhirites is what is related by Mālik from Abū al-Zinād from al-Aʿraj from Abū Hurayra "that the Messenger of Allāh (God's peace and blessings be upon him) saw a man leading his sacrificial animal, so he said, 'Ride it'. He said, 'O Messenger of Allāh it is an offering'. He said, on the second or third time, 'Ride it, woe unto you' ".

They agreed that the voluntary offering, after it has reached its intended destination (and killed), may be consumed (in part) by the owner like the rest of the people, but if it becomes sick before reaching its destination he is to leave it to the people and is not to eat from it. Dāwūd added to this that the person is not to feed any of his associates with it, because of what is established from the Messenger of Allāh (God's peace and blessings be upon him) that he sent an offering with Nājiyat al-Aslamī and said to him, "If some of it is fatigued, sacrifice it and dye the sandals in its blood, then leave it to the people". This tradition is related from Ibn ʿAbbās and he added to it the following words: "(Neither) you nor your associates are to eat from it". This addition was adopted by Dāwūd and Abū Thawr. They disagreed about the liability of the person who does eat of it. Mālik said that if he eats of it, its substitute is due from him. Al-Shāfiʿī, Abū Ḥanīfa, al-Thawrī, Aḥmad, and Ibn Ḥabīb from the disciples of Mālik, said that he is liable for the value of what he has consumed or has ordered to be consumed in the shape of food that is to distributed as charity. This is related from ʿAlī, Ibn Masʿūd, Ibn ʿAbbās, and a group of the Tābiʿūn.

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[303] Qurʾān 22 : 36.

[304] The Book of *Ḥajj* was written last by the author. See the end of this section where this is mentioned.

The offering that is hurt (injured) inside the Ḥaram before reaching Mecca, has it reached its destination? There is a disagreement about this based upon the preceding dispute as to whether the destination is Mecca alone or it is the Ḥaram. If, however, the obligatory offering is injured before reaching its destination, the owner has the right to consume it as he is liable for its substitute. Some of them permitted the sale of its meat in order to assist him in obtaining the substitute, but Mālik disallowed this.

They disagreed about eating (by the owner) from the obligatory offering if it reaches its destination. Al-Shāfiʿī said that he is not to eat anything from the obligatory offering, and all its meat is for the needy, so also its saddle, if there is any, for the needy as well as the shoes with which it was garlanded. Mālik said that he may eat from every obligatory offering, except the offering in expiation for killing game, that which is due to a vow for the needy, and that which is due to the elimination of ailment. Abū Ḥanīfa said that he is not eat from the obligatory offering, except from the offering of *tamattuʿ* and the offering of *qirān*. The reliance of al-Shāfiʿī is on the similarity between all kinds of offerings that are obligatory due to expiation. Those who made a distinction argued that there are two meanings which are apparent in the offering. The first is that it is a worship *ab initio*, and the other is that it is an expiation. One of these two meanings may be more obvious in some kinds. Those who gave predominance to its similarity with worship over its similarity with expiation, in each individual kind of offering, like the offering in *qirān* and the offering in *tamattuʿ*, especially those who said that *qirān* and *tamattuʿ* have greater merit, did not lay down the condition of non-consumption, because such an offering in their view is a merit and not an expiation repelling a punishment. Those who gave predominance to its similarity with expiation said that he is not to eat from it, because of their agreement that the person making the expiation is not to eat from the substance of the expiation. Insofar as the offering in the reparation for killing game and the ransom of eliminating ailment are apparently expiations these jurists did not disagree that he is not eat from them.

The Qāḍī (Ibn Rushd) said: "We have discussed the *ḥukm* of the offering, its species, its age, the manner of leading it, the conditions of its validity with reference to time and place, the description of its slaughter, and the *ḥukm* of utilizing it, and this is what we intended. Allāh is the Grantor of the truth. With the completion of this discussion, in accordance with our arrangement, the discussions of this Book have been completed, in conformity with our aim. All thanks and praise are due to Allāh, many times over, for He has granted success and guidance, and bestowed completion and perfection.

It was finalized on Wednesday, the ninth of Jumādī al-Ūlā, which is in the year five hundred and eighty-four. It is a part of *Kitāb al-Mujtahid*, which I have been compiling for more than twenty years or close to it. All praise is for Allāh, the Lord of the Worlds.

He, may Allāh be pleased with him, decided at first, when he was compiling the book, not to include the Book of *Ḥajj*, but he then started working on it and compiled it".[305]

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[305] This is obviously the scribe's note.

X

THE BOOK OF *JIHĀD*

A comprehensive discussion of the principles of this subject is covered in two chapters. The first is about the identification of the elements of war. The second is about the *aḥkām* of the enemy's property when the Muslims come to own it.

10.1. Chapter 1 The Elements (*Arkān*) of War

There are seven sections in this chapter. The first is about the identification of the *ḥukm* of this activity and the persons for whom it is binding.. The second is about the identification of persons who are to be fought. The third is about the identification of each category of the enemy on whom harm may be inflicted, and those who are not to be hurt. The fourth is about the lawful conditions of war. The fifth is about the identification of the number (of opponents) from whom retreat is not permissible. The sixth relates to whether truce is permissible. The seventh deals with the question: why wage war?

10.1.1. *Section 1: Identification of the* ḥukm *of this activity*

With respect to the *ḥukm* of this activity, the jurists agreed unanimously that it is a collective and not a universal obligation, except for ʿAbd Allāh Ibn al-Ḥasan who said it is voluntary. The majority of the jurists adopted this view because of the words of the Exalted, "Warfare is ordained for you, though it is hateful unto you, but it may happen that ye hate a thing which is good for you, and it may happen that ye love a thing which is bad for you, Allāh knoweth, ye know not".[306] Its imposition as a communal obligation, that is, when some undertake it the rest are absolved of it, is based upon the words of the Exalted, "And the believers should not all go out to fight. Of every troop of them, a party only should go forth, that they (who are left behind) may gain sound knowledge in religion, and that they may warn their folk when they return, so that they may beware,[307] and on His words, "Unto each Allāh hath promised good, but he hath bestowed on those who strive a great reward above the sedentary".[308] Further, the Prophet (God's peace and blessings be upon him) never went out to battle unless he had left some of the people behind. Taken together all these (evidences) imply that this activity constitutes a collective obligation.

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[306] Qurʾān 2 : 216.

The activity is obligatory on men, who are free, have attained puberty, who find the means (at their disposal) for going to war, are of sound health, and are neither ill nor suffer from a chronic disease. There is no dispute about this because of the words of the Exalted, "There is no blame for the blind, nor is there blame for the lame, nor is there blame for the sick",[309] and His words, "Not unto the weak nor unto the sick nor those who can find naught to spend is any fault (to be imputed though they stay at home)".[310] With respect to the obligation being restricted to free men, I know of no disagreement. The jurists in general agreed that a condition for this obligation is the permission of parents, except when it becomes a universal obligation; for example, when there are not enough people to carry out the obligation unless all (present) undertake it. The basis for this is the established tradition which relates that "a person said to the Messenger of Allāh (God's peace and blessings be upon him), 'I wish to participate in the *jihād*'. He asked, 'Are your parents alive?' The man said, Yes'. He said, 'Then struggle in their cause'".

The jurists disagreed about the (need for the) consent of polytheist parents. Similarly, they disagreed about the consent of the creditor when a person is under debt because of the saying of the Prophet (God's peace and blessings be upon him), when a man asked him, "'Will Allāh pardon my sins if I die with forbearance sacrificing myself in the way of Allāh?' He replied, 'Yes, except for debts. That is what Jibrīl said to me lately'". The majority permit it, however, particularly when the person leaves something behind for the satisfaction of his debts.

10.1.2. *Section 2: Identification of the persons to be fought*

The jurists agreed, with respect to the people who are to be fought, that they are all of the polytheists (*mushrikūn*), because of the words of the Exalted, "And fight them until persecution is no more, and religion is all for Allāh",[311] except what is narrated from Mālik, who said it is not permitted to commence hostilities against the Ethiopians, nor against the Turks, because of the report from the Prophet (God's peace and blessings be upon him), "Leave the Ethiopians in peace as long as they leave you alone". Mālik was questioned about the authenticity of this tradition. He did not acknowledge it, but said, "People continue to avoid an attack on them".

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[307] Qur'ān 9 : 122.
[308] Qur'ān 4 : 95.
[309] Qur'ān 48 : 17.
[310] Qur'ān 9 : 91.
[311] Qur'ān 8 : 39.

10.1.3. *Section 3: Identification of the harm permitted to be inflicted upon the enemy*

Harm allowed to be inflicted upon the enemy can be to property, life, or personal liberty, that is enslavement and ownership. Harm that amounts to enslavement is permitted by way of consensus (*ijmāʿ*) for all categories of the polytheists, I mean, their men and women, old and young, and the common people and the élite with the exception of monks. One group of jurists maintained that they (the monks) are to be left alone and not to be captured; in fact, they are to be left unharmed and not to be enslaved because of the saying of the Messenger of Allāh (God's peace and blessings be upon him), "Leave them and that to which they have devoted themselves", and also because of the practice of Abū Bakr.

The majority of the jurists maintained that the *imām* has different types of choices regarding the prisoners of war including their pardon, enslavement, execution, demand for ransom, and the imposition of *jizya* (poll tax) on them. A group of jurists maintained that it is not permitted to execute the prisoners. Al-Ḥasan ibn Muḥammad al-Tamīmī has related that there is a consensus (*ijmāʿ*) of the Companions on this.

The reason for their disagreement stems from the conflict of the apparent meanings of the verses in this context, the conflict of the acts (of the Prophet), and the conflict of the apparent meaning of the Qurʾānic text with the acts of the Prophet Prophet (God's peace and blessings be upon him). This is because the apparent meaning of the words of the Exalted, "Now when ye meet in battle those who disbelieve, then it is smiting of the necks until, when ye have routed them",[312] is that after taking prisoners the *imām* can only pardon or take ransom. (This conflicts with) the words of the Exalted, "It is not for any Prophet to have captives until he hath made slaughter in the land",[313] and with the occasion of the revelation that indicates through the (case of the) prisoners of the battle of Badr that execution is better than enslavement. The Prophet (God's peace and blessings be upon him), however, executed the prisoners on some occasions, pardoned them (on others), and enslaved women.

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[312] Qurʾān 47 : 4.
[313] Qurʾān 8 : 67.

Abū ʿUbayd has related that he never enslaved free male Arabs. The Companions, after him, agreed upon the permissibility of enslavement of the People of the Book, both male and female.

Those who maintained that the verse, which is specific about the matter of captives (prohibiting execution), has abrogated the acts of the Prophet, said that the captive is not to be executed. Those who maintained that the verse neither mentions captives nor is its purpose the final disposal of the question of what is to be done to the captives, and that the act of the Prophet (God's peace and blessings be upon him) is an addition to what is in the verse, when they take into account the censure of the failure to execute the captives said that the execution of the captives is permitted.

Execution is permitted in cases where the guaranty of safe conduct (*amān*) is not available. There is no disagreement among Muslims on this; however, they differ as to who can grant safe conduct and who cannot. They agreed on the permissibility of safe conduct granted by the *imām*. The majority of the jurists permitted safe conduct granted by free Muslim males, except that Ibn al-Mājishūn was of the view that it is contingent upon the consent of the *imām*. They disagreed about the safe conduct granted by a slave or a woman. The majority permitted this while Ibn al-Mājishūn and Saḥnūn used to say that safe conduct granted by a woman is contingent upon the consent of the *imām*. Abū Ḥanīfa said that safe conduct granted by a slave is not permitted, unless he participates in fighting.

The reason for their disagreement is the conflict of a general implication with that of analogical reasoning. The generality is in the saying of the Prophet (God's peace and blessings be upon him), "The blood of the Muslims has equal value among themselves (among themselves with respect to protection). Even the humblest endeavors for their (collective) protection, and against outsiders they form a single (protecting) hand". This implies, through its generality, that safe conduct granted by the slave is valid. The conflicting analogy arises due to the fact that safe conduct is contingent upon full legal capacity while the capacity of the slave is deficient due to his servility. Thus it is necessary that his servility should be effective in invalidating his *amān* on the analogy of its effectiveness in suspending many of the legal *aḥkām* in his case. The general implication must then be restricted by this analogy.

Their disagreement about the effectiveness of the safe conduct granted by a woman is based on their dispute about the meaning of the saying of the Prophet (God's peace and blessings be upon him), "We protect whom you have protected, O Umm Hānī", and on the analogy of women upon men (i.e. their equality). Those who understood from his saying, "We protect whom you have protected, O Umm Hānī", an endorsement of safe conduct granted by her and not its validity by itself, for had it not been for his endorsement, her guaranty of safe conduct would be ineffective, said that a woman cannot grant safe conduct unless it is endorsed by the *imām*. Those who understood from this that his endorsement of her (guaranty of *amān*) was with the view that *amān* had already been concluded and had taken effect, and not with a view that it was his endorsement that granted validity to its conclusion said that safe conduct guaranteed by a woman is permitted. Likewise, those who considered her equal to a man by way of analogy, and made no distinction between them, permitted safe conduct granted by her, while those who considered that she had a defective legal capacity as compared to a man did not permit such safe conduct.

Whatever the nature of the *amān* it is not effective (in affording protection) against enslavement, but only against execution. It is possible for us to relate this disagreement to their dispute about the words used for the masculine plural, whether they include women, that is,in accordance with legal usage.

The harm aimed at life is by killing, and there is no disagreement among the Muslim jurists that it is permitted in war to slay the male polytheists, who have attained puberty and are waging war. There is, however, disagreement about execution after captivity, as we have already discussed. Similarly, there is no dispute among them that it is not permitted to slay minors or women, as long as they are not waging war. If a woman fights the shedding of her blood becomes permissible. This was established as "the Prophet (God's peace and blessings be upon him) prohibited the killing of women and children, and said when he saw a slain woman, 'She was not one who would have engaged in fighting'".

They disagreed about the case of hermits cut off from the world, the blind, the chronically ill, the old who cannot fight, the idiot, and the peasants and serfs. Mālik said neither the blind nor idiots nor hermits are to be slain, and enough of their wealth is to be left to them by which they may survive. Similarly, the old and decrepit are not to be slain, in his view, and this was also the view of Abū Ḥanīfa and his disciples. Al-Thawrī and al-Awzāʿī said that only the old are to be spared. Al-Awzāʿī added that the peasants are not to be slain either. According to al-Shāfiʿī's most authentic opinion, all of these categories (of people) are to be put to death. The basis for their disagreement stems from the conflict of the specificity in some traditions with the general implication of (some verses of) the Qurʾān, and also the generality of the authentic saying of the Prophet (God's peace and blessings be upon him), "I have been commanded to fight mankind until they say, 'There is no God but Allāh.'" The words of the Exalted, "Then, when the sacred months have passed, slay the idolaters wherever ye find them",[314] imply the slaying of every nonbeliever whether or not he is a monk, and so does the saying of the Prophet (God's peace and blessings be upon him), "I have been commanded to fight mankind until they say, 'There is no God but Allāh'".

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[314] Qurʾān 9 : 5.

The traditions laid down about the sparing of all these categories include the traditions related by Dāwūd Ibn al-Ḥuṣayn from ʿIkrimah from Ibn ʿAbbās "that the Prophet (God's peace and blessings be upon him) used to say while sending out his armies, 'Do not kill hermits'". There is also the tradition related from Anas Ibn Mālik from the Prophet (God's peace and blessings be upon him), "Do not slay the old and decrepit nor young children nor women, and do not purloin [the booty]". It is recorded by Abū Dāwūd. There is also among these the tradition related by Mālik from Abū Bakr that he said, "You will come across a people who will claim that they have devoted themselves to Allāh, so leave them and that to which they have devoted themselves", and it includes the words, "Never kill women, children, and the old weakened with age".

It appears that the chief source of disagreement in this issue springs from the apparent conflict between the words of the Exalted, "Fight in the way of Allāh against those who fight you, but begin not hostilities. Lo, Allāh loveth not aggressors",[315] and His words, "Then when the sacred months have passed, slay the idolaters wherever ye find them".[316] Those who held that the latter verse has abrogated the (meaning of the) words "Fight in the way of Allāh those who fight you",[317] as fighting is prescribed primarily against those who fight, said that the latter verse stands unrestricted upon its generality. On the other hand, those who maintained that the former verse is the governing verse, and that it includes all categories not involved in fighting, exempted it from the generality of the latter (in other words restricted the latter to those who do or can provide hostility, thus excluding children, old and decrepit etc). Al-Shāfiʿī argued on the basis of the tradition of Samura that the Prophet (God's peace and blessings be upon him) said, "Kill the old among the polytheists and keep alive their young". It appears that the effective underlying cause for slaying, in his view, is *kufr* (disbelief). It is necessary then that this cause be applied to all the non-believers.

Those who maintained that the peasants are not to be slain argued on the basis of what is related from Zayd Ibn Wahb, who said, "We received a letter from ʿUmar, may Allāh be pleased with him, saying, 'Do not misappropriate (the spoils), do not be perfidious, do not kill infants, and fear Allāh in the case of the peasants'". A prohibition has been laid down in the tradition of Rabāh

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[315] Qurʾān 2 : 190.

[316] Qurʾān 9 : 5.

[317] Qurʾān 2 : 190.

Ibn Rabīʿ about the slaying of non-believing serfs, that "he went out with the Messenger of Allāh (God's peace and blessings be upon him) for a battle which he fought and he (Rabāh) and the Companions of the Messenger of Allāh passed by a slain woman. The Messenger of Allāh stopped near her and then said, 'She was not the one to be engaged in fighting'. He then turned to face the group and said to one of them: 'Hurry and go to Khālid Ibn al-Walīd (and convey to him) that he must not slay infants, serfs or women'".

The reason leading to their disagreement, on the whole, arises from their dispute about the effective underlying cause of slaying. Thus, those who maintained that the effective underlying cause for this is disbelief (*kufr*), did not exempt anyone out of the polytheists, while those who maintained that the underlying cause in it is the ability to fight, there being a prohibition about the killing of women though they be non-believers, exempted those who do not have the ability to wage war, or those who have not affiliated themselves with it, like the peasants and the serfs.

The proscription of mutilating the bodies (*muthla*) of the enemy is fully established. The Muslim jurists agreed on the permissibility of slaying them with weapons, but disagreed about burning them with fire. A group of jurists disallowed burning them with fire or even attacking them with it, and this is the opinion of ʿUmar and is also narrated from Mālik. Sufyān al-Thawrī permitted this, while some of them said: "If the enemy initiates this it is permitted, otherwise not".

The reason for their disagreement stems from the conflict of a general implication with a specific rule. The generality lies in the words of the Exalted, "Slay the idolaters wherever ye find them".[318] This does not make an exception for any kind of slaying. The specific implication was established when the the Prophet (God's peace and blessings be upon him), said about a man, "If you seize him, kill him, but do not burn him with fire for no one punishes (has the right to) with fire except the Lord of the Fire".

The majority of the jurists agreed about the permissibility of attacking fortresses by means of mangonels, irrespective of women or children being in them, because of the report that the Prophet (God's peace and blessings be upon him), positioned mangonels against the people of Ṭāʾif. If there are Muslim captives and Muslim children in the fortress then, according to a group, mangonels should not be used, and that is the opinion of al-Awzāʿī. Al-Layth permitted this. The reliance of those who do not permit this is on the words of the Exalted, "If they (the believers and the disbelievers) had been clearly separated We verily had punished those of them who disbelieved with painful punishment".[319] It appears that those who permitted this relied on jurisprudential interest (*maṣlaḥah*).

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[318] Qurʾān 9 : 5.

This, then, is the extent of harm that is allowed to be inflicted upon their life and liberty. The harm that is permissible in the case of their property, that is, buildings, animals, and crops, is a matter of controversy among them. Mālik permitted cutting of trees, picking of fruit, and destruction of inhabited buildings, but did not allow the slaughter of cattle and the burning of date-palms. Al-Awzāʿī disallowed the cutting of fruit-bearing trees and the demolishing of buildings – churches or other. Al-Shāfiʿī said that houses and trees may be set on fire if the enemy used them as fortresses, otherwise the destruction of houses and the cutting of trees is disapproved.

The reason for their disagreement springs from the conflict between the practice of Abū Bakr and that of the Prophet (God's peace and blessings be upon him). It is established that "the Prophet (God's peace and blessings be upon him) set fire to the date-palms of Banū al-Naḍīr", and it is also established that Abū Bakr ordered his troops: "Do not cut trees, do not destroy buildings". Those who maintained that the act of Abū Bakr was based on his knowledge about the abrogation of the act of the Prophet (God's peace and blessings be upon him)—as it cannot be conceived that Abū Bakr would act contrary to the practice of the Prophet when he was well aware of it—or that (the act of the Prophet) was restricted to the case of Banū al-Naḍīr due to their undue aggression against the Muslims, adopted the opinion of Abū Bakr. Those who relied on the act of the Prophet (God's peace and blessings be upon him), and did not consider the act of another as binding proof against it, adopted the view that trees are to be burnt. Mālik distinguished between animals and trees, as the killing of animals amounts to mutilation and the Prophet (God's peace and blessings be upon him) prohibited that. Further, it is not reported about the Prophet (God's peace and blessings be upon him) that he killed animals. This, then, is the identification of the harm that may be inflicted upon the disbelievers with respect to their life and property.

10.1.4. *Section 4: The condition for the declaration of war*

The condition for the declaration of war, by agreement, is the communication of the invitation to Islam, that is, it is not permitted to wage war on them unless the invitation has reached them. This is something upon which the Muslim jurists agreed because of the words of the Exalted, "We never punish until We have sent a messenger".[320] They disagreed on whether the repetition of the invitation was required on the recurrence of war. Some of them made this obligatory, some considered it desirable, while some of them neither considered it obligatory nor desirable.

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[319] Qurʾān 40 : 25.

[320] Qurʾān 17 : 15.

The reason for their disagreement arises from the (apparent) conflict of words (of the Prophet) with (his) acts. It has been established that the Prophet (God's peace and blessings be upon him) used to say to the commander upon sending a detachment, "When you come to face your enemy, the polytheists, invite them to opt for three choices or inclinations, and whichever of these they agree to, accept, and withhold the attack. Invite them to Islam, and if they agree refrain from attacking them. Call on them, then, to move from their territory to the territory of the Emigrants, and inform them that if they do this they shall have the rights granted to the Emigrants. If they refuse to do this, and choose their own abode, let them know that their status will be that of the Muslim Bedouin. The law of Allāh, which is applicable to the Believers, would be applicable to them, and they would have no share in the booty or in the spoils, unless they fight along with the Muslims. If they, then, refuse call on them to pay the *jizya* (poll tax). If they agree, accept it from them and refrain from (fighting) them, but if they refuse, seek support from Allāh and fight them".

It is, however, established from the Prophet (God's peace and blessings be upon him) that he used to ensnare the enemy and ambush them during the wars. Some of the jurists, and these are the majority, maintained that the acts of the Prophet (God's peace and blessings be upon him) abrogated his words, and that (the implication in his words) used to be valid in the early days of Islam before the Islamic movement had become widespread, on the evidence that there is an invitation to migrate. Some of the jurists preferred the words over the acts, by construing the acts to apply to specific cases. Those who preferred extending the invitation did so through an element of reconciliation (between evidences).

10.1.5. *Section 5: Identification of the number from whom retreat is not permissible*

With respect to the identification of a number from whom retreat is not permissible, it is double (the number of Muslims), and this by agreement, because of the words of the Exalted, "Now hath Allāh lightened your burden, for He knoweth that there is weakness in you. So, if there be of you steadfast hundred they shall overcome two hundred, and if there be of you a thousand (steadfast) they shall overcome two thousand by permission of Allāh".[321] Ibn al-Mājishūn held, and he also narrated from Mālik, that doubling here is to be related to strength and not to number, and that it is (therefore) permitted for one Muslim warrior to retreat from a single enemy if he has a better trained mount than his, has better weapons, or is superior to him in strength.

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[321] Qur'ān 8 : 66.

10.1.6. *Section 6: The permission for truce*

Is truce permissible? A group of jurists permitted this initially (without warfare) without necessity, if the *imām* considered it to be in the interest of the Muslims. Another group of jurists did not permit it, except on the basis of a compelling necessity, such as the avoidance of disturbances or for gaining from them some concessions for the Muslim community, which are not in the nature of *jizya* as the condition for *jizya* is that they be subject to the laws of the Muslims, or even without taking anything from them. Al-Awzāʿī permitted that the *imām* may negotiate a truce with the disbelievers on the basis of something that the Muslims would give to the disbelievers if that is required as a necessity for avoiding (greater) trials, or on the basis of any other necessity. Al-Shāfiʿī said that the Muslims are not to make any concession to the disbelievers, unless they fear that they would be overwhelmed by the sheer number of the enemy (in relation to) their own small numbers, or because of a severe ordeal that they are subjected to.

Those who upheld the permission of making a truce when the *imām* saw an interest (of the Muslims) in this are Mālik, al-Shāfiʿī, and Abū Ḥanīfa, except that al-Shāfiʿī stipulated that the duration of the truce should not be for a period greater than the one transacted by the Messenger of Allāh (God's peace and blessings be upon him) with the disbelievers in the year of al-Ḥudaybiya.

The reason for their disagreement over the permissibility of truce without a necessity stems from the conflict of the apparent meaning of the words of the Exalted, "Then, when the sacred months have passed, slay the idolaters wherever ye find them",[322] and His words, "Fight those who do not believe in Allāh nor the Last Day",[323] with His words, "And if they incline to peace, incline thou also to it, and trust in Allāh".[324] Those who maintained that the verse commanding fighting unless they believe or pay the *jizya* has abrogated the verse implying peace said that truce is not permitted, except in the case of necessity. Those who maintained that the verse implying peace has restricted the other said that truce is permitted if the *imām* considers it proper. They supported this interpretation with the act of the Prophet (God's peace and blessings be upon him) in this case, because his (God's peace and blessings be upon him) truce in the year of al-Ḥudaybiya was not based upon necessity.

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[322] Qur'ān 9 : 5.

[323] Qur'ān 9 : 29. Pickthall's translation has been changed here. His translation of this verse reads, "Fight against such of those who have been given the Scripture as believe not in Allāh nor the Last Day". This translation is correct, but only when the complete verse is taken into account. The translation of the complete verse appears a few paragraphs below.

[324] Qur'ān 8 : 61.

The principle for al-Shāfiʿī is the command to fight until they believe or pay *jizya*, and this, in his view, was restricted by the act of the Prophet (God's peace and blessings be upon him) in the year of al-Ḥudaybiya. He therefore did not approve that the period be in excess of what was negotiated by the Messenger of Allāh (God's peace and blessings be upon him). They disagreed about this period. It was said that it was for four years and it was said that it was for three years. It was also said that it was for ten years, and this was upheld by al-Shāfiʿī.

Those who permitted that the Muslims may conclude a truce with the polytheists on the terms that the Muslims would give them something, if this was required by necessity of avoiding tribulation or (the fulfilment of) some other pressing need, did so on the basis of the report that the Prophet (God's peace and blessings be upon him) was prepared to give part of the produce of Medina to some of the disbelievers who were among the forces mustered to attack Medina, but the Medinese did not agree, but Allāh granted him success (without his having made a concession to the unbelievers). Those who did not permit this unless the Muslims feared that they would be overwhelmed did so on the analogy drawn from their consensus on the permissibility of paying ransom for Muslim captives, the point being that Muslims in such a (weak) position are like prisoners.

10.1.7. *Section 7: Why wage war?*

Why wage war? The Muslim jurists agreed that the purpose of fighting the People of the Book, excluding the (Qurayshite) People of the Book and the Christian Arabs, is one of two things: it is either for their conversion to Islam or the payment of *jizya*. The payment of *jizya* is because of the words of the Exalted, "Fight against such of those who have been given the Scripture as believe not in Allāh or the Last Day, and forbid not that which Allāh and His Messenger hath forbidden, and follow not the religion of truth, until they pay the tribute readily being brought low".[325] The majority of the jurists also argued about the taking of *jizya* from the Magians, because of the saying of the Prophet (God's peace and blessings be upon him), "Establish with them the practice adopted for the People of the Book". They disagreed about the polytheists other than the People of the Book, whether *jizya* is to be accepted from them. A group of jurists said that *jizya* is to be charged from all polytheists. This is Mālik's opinion. Another group exempted from this the Arab polytheists. Al-Shāfiʿī, Abū Thawr, and a group of jurists said that *jizya* is only to be imposed upon the People of the Book and the Magians.

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[325] Qurʾān 9 : 29.

The reason for their disagreement stems from the conflict between the general and the specific implication. The general implication is in the words of the Exalted, "And fight them until persecution is no more, and religion is all for Allāh",[326] and in the saying of the Prophet (God's peace and blessings be upon him), "I have been commanded to fight mankind until they say, 'There is no God but Allāh'. If they say this their lives and wealth are protected from me, unless there is another claim on them, and their reckoning is with Allāh". The specific meaning is in the directive of the Prophet (God's peace and blessings be upon him) to the commanders of troops when he sent them to Arab polytheists who, it is known, were not the People of the Book, "When you come to face your enemy, the polytheists, invite them to opt for three choices", and he mentioned *jizya* as one of them. The tradition has already been mentioned.

Those who maintained that if a general command comes after the specific command it abrogates it, said that *jizya* is not to be accepted from polytheists other than the People of the Book. The reason is that the verses containing general commands for fighting them are later in time than this tradition, because the command to fight the polytheists is general and it occurs in *sūrat Barāʾa*, which was (revealed in) the year of the conquest of Mecca, while the tradition is dated before the conquest on the evidence of the invitation to them to emigrate. Those who maintained that the general meaning is to be construed in terms of the specific, whether it is earlier or later or whether their being earlier or later with reference to each is not known, said that *jizya* is to be accepted from all the polytheists. With respect to the singling out of the People of the Book from all the polytheists, this exemption from the general meaning occurred, by agreement, in the the specific terms of the words of the Exalted, "Fight against such of those who have been given the Scripture as believe not in Allāh or the Last Day, and forbid not that which Allāh hath forbidden by His Messenger, and follow not the religion of truth, until they pay the tribute readily being brought low".[327] The discussion of the *jizya* and its *aḥkām* will be coming up in the next chapter of this Book.

These, then, are the elements of war. One of the well-known issues related to this chapter is the proscription of travelling to the land of the enemy with (a copy of) the Qurʾān. The majority of the jurists maintain that this is not permitted because it was established from the Messenger of Allāh (God's peace and blessings be upon him). Abū Ḥanīfa said that it is permitted if it stays within the safety of military camps. The reason for their disagreement is whether the proscription is general having a general import or whether it is general with a specific implication.

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[326] Qurʾān 8 : 39.
[327] Qurʾān 9 : 29.

10.2. Chapter 2 The *Aḥkām* of Enemy Property

A comprehensive discussion of the fundamentals of this chapter is also covered in seven sections. The first is about the *ḥukm* of the fifth. The second is about the *ḥukm* of the four-fifths. The third is about the *ḥukm* of *anfāl* (prize money, reward). The fourth is about the wealth of the Muslims found in the possession of the polytheists. The fifth is about the *ḥukm* of the two kinds of land. The sixth is about the *ḥukm* of *fay*ʾ (booty). The seventh is about the *aḥkām* of *jizya* and the wealth acquired from them through a truce.

10.2.1. *Section 1: The* ḥukm *of the fifth of spoils*

The Muslim jurists agreed that a fifth of the spoils, other than the lands acquired by force from the possession of the Byzantines belonged to the *imām* and (the rest) four-fifths of it were for those who seized it, because of the words of the Exalted, "And know that whatever ye take as spoils of war, lo! a fifth thereof is for Allāh, and for the messenger and for the kinsmen (of the Prophet) and orphans and the needy and the wayfarer, if ye believe in Allāh and that which We revealed unto Our slave on the Day of Discrimination, the day when the two armies met. And Allāh is able to do all things".[328] They disagreed about the fifth; there are four well-known opinions in this regard. The first is that the fifth is divided (further) into five parts in accordance with the explicitly mentioned shares in the verse. This is al-Shāfiʿī's opinion. The second is that it is to be divided into four parts, and that the words, "is for Allāh", are only an opening statement and do not imply a fifth share. The third opinion is that it is to be divided, today, into three shares, and that the share of the Prophet and the kinsman was eliminated with the death of the Prophet (God's peace and blessings be upon him). The fourth is that the fifth is of the same category as *fay*ʾ (booty) to which both the rich and the poor are entitled. This is Mālik's opinion and of the jurists generally.

Those who maintained that it is to be subdivided into four or five parts disagreed as to what is to be done with the share of the Messenger of Allāh

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[328] Qurʾān 8 : 41. Pickthall's translation changed.

(God's peace and blessings be upon him) and that of the kinsmen after his death. One group of jurists said that it is to spread out proportionally among the remaining categories entitled to the fifth. Another group said that it is to be given to the rest of the army. A third group said that the share of the Messenger of Allāh (God's peace and blessings be upon him) belongs to the *imām*, and the share of the kinsmen is for the kinsmen of the *imām*. A fourth group said that it is to be used for arms and preparation. They disagreed as to who are the kinsmen? One group said that they are the Banū Hāshim alone, while another group said that they are Banū ʿAbd al-Muṭṭalib[329] and the Banū Hāshim.

The reason for disagreement over the question of whether the fifth is restricted to the stated categories or it can be extended to others besides them, stems from whether the purpose of mentioning these categories in the verse is the allocation of the fifth or the indication of their priority over others, in which case it would belong to a category of the specific with a general implication. Those who maintained that it is a category of the specific with a specific implication said that the fifth is not to be extended beyond these explicitly stated categories. This was adopted the majority of the jurists. Those who said that it is a category of the specific with a general implication said that it is permitted to the *imām* to spend it where he identifies the welfare of the Muslims.

Those who maintained that the share of the Prophet (God's peace and blessings be upon him) is for the *imām* after him argued on the basis of what is related from the Prophet (God's peace and blessings be upon him) that he said, "When Allāh provides the Prophet with a sustenance it goes to the successor after him". Those who would grant it to the remaining categories or to those who seized it do so on the basis of its similarity with the amount already earmarked for them.

Those who said that the next of kin are the Banū Hāshim and Banū al-Muṭṭalib argued on the basis of the tradition of Jubayr ibn Muṭʿim, who said, "The Messenger of Allāh (God's peace and blessings be upon him) divided the share of the kinsmen from the fifth among the Banū Hāshim and Banū al-Muṭṭalib". They said that the Banū Hāshim and the Banū al-Muṭṭalib are one category, while those who said that the banū Hāshim are a separate category did so on the grounds that *ṣadaqa* is not permitted to them.

The jurists disagreed about the share of the Prophet (God's peace and blessings be upon him) in the fifth. One group merely said that it is a fifth, and there is no dispute among them about the necessity (integrity) of his share irrespective of his being present or absent at the time of division. Another group said that it is a fifth (if he is present) and the *ṣafīy* (the Prophet's choice).

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[329] Banū (clan of) ʿAbd al-Muṭṭalib is a branch of the clan of Banū Hāshim.

Ṣafīy was a well-known share for the Prophet (God's peace and blessings be upon him), and it was something that he used to select from the undivided spoils, which could be a mare, a slave-girl, or a male slave. It is related that (the name) Ṣafiyya was from *ṣafīy*. They agreed that no one after the Messenger of Allāh (God's peace and blessings be upon him) is entitled to *ṣafīy*, except for Abū Thawr who held that it is to be treated in the same way as the share of the Prophet (God's peace and blessings be upon him).

10.2.2. *Section 2: The* ḥukm *of the four-fifths of the spoils*

The majority of the jurists agreed that four-fifths of the spoils are for those who seize them, if they acted with the permission of the *imām*. They disagreed about those who act without the permission of the *imām*, about the person entitled to a share in the spoils, about the time of the entitlement, how much, and also about the entitlement from the spoils before the division.

The majority of the jurists maintain that four-fifths of the spoils are for those who seize it whether they proceeded with the permission of the *imām* or without his permission, because of the general implication of the words of the Exalted, "And know that whatever ye take as spoils of war, lo! a fifth thereof is for Allāh, and for the messenger and for the kinsman (who hath need) and orphans and the needy and the wayfarer, if ye believe in Allāh and that which We revealed unto Our slave on the Day of Discrimination, the day when the two armies met. And Allāh is able to do all things".[330] A group of jurists said that if a detachment or an individual act without the permission of the *imām*, then, whatever either brings back is a reward (*nafl*) that is to be appropriated by the *imām*. Another group of jurists said that, in fact, all of it is to be taken by the person who seized it. The majority relied upon the apparent meaning of the verse, while the others relied upon the nature of the acts that occurred during the time of the Messenger of Allāh (God's peace and blessings be upon him). This is so as all troops used to proceed with the permission of the Prophet (God's peace and blessings be upon him), and it appears that they thought the permission of the *imām* was a requisite condition for it, but this is weak.

Who has a share in the spoils? They agreed that they are those who are males, free, and have attained puberty (among those who participated in the fighting). They disagreed about the case of the persons who have opposite characteristics, that is, women, slaves, and those who had not attained puberty but were nearing it. A group of jurists said that there is no share for women or slaves in the spoils, but some gifts are to be given to them. This was Mālik's opinion. Another group of jurists said that no presents are to be given to them nor is anything to be paid to them from the spoils. A third group said that they have the same share as the other sharers in the spoils. This was al-Awzāʿī's opinion. They also differed about the minor approaching the age of puberty (the adolescent). Some of the jurists said that a share is to be assigned to him. This was al-Shāfiʿī's opinion. Some of them stipulated that he should have the ability to fight. This was Mālik's opinion. Some said that he is to be given a gift.

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[330] Qur'ān 8 : 41.

The reason for their disagreement over slaves is whether the general communication of the law includes freemen and slaves together or only the freemen to the exclusion of the slaves. Further, the practice of the Companions is in conflict with the general implication of the verse. This is because it is was their general practice, may Allāh be pleased with them, that the slaves had no share. This is related from ʿUmar ibn al-Khaṭṭāb and Ibn ʿAbbās, and is related by Ibn Abī Shayba from them through various channels. Abū ʿUmar ibn ʿAbd al-Barr said that the most authentic report in this from ʿUmar is what is related by Sufyān ibn ʿUyayna from ʿAmr ibn Dīnār from Ibn Shihāb from Mālik ibn Aws ibn Ḥadthān, who said, "ʿUmar said, 'There is no one who does not have a right in this with the exception of those whom your right hands possess'".

The majority of the jurists decided that a woman is not entitled to a share, but to a gift, on the basis of the authentic tradition of Umm ʿAṭiyya, who said, "We used to fight alongside the Messenger of Allāh (God's peace and blessings be upon him) tending the wounded and nursing the sick, and he used to give us gifts from the spoils". The reason for disagreement arises from their dispute over whether a woman is similar to a man in being effective in battle, if she participates in it. They agreed that it is permitted to women to participate in war; therefore, those who held them to be similar to men granted them a share in the spoils, while those who held them to be less effective in battle than men in this context either did not grant anything to them or granted them what was less than a share, and these were gifts. It is better here to follow the tradition. Al-Awzāʿī believed that "the Messenger of Allāh (God's peace and blessings be upon him) granted a share to women at Khaybar".

They disagreed about whether traders and mercenaries are to be given a share. Mālik said that they are not to be given a share, unless they have fought. A group of jurists said that they are to be given a share if they were present during the battle. The reason for their disagreement here stems from the restriction of the general implication of the words of the Exalted, "And know that whatever ye take as spoils of war, lo! a fifth thereof is for Allāh, and for the messenger",[331] by means of analogy that dictates a distinction between these people and the rest of the fighters entitled to the spoils. Those who maintained that the *hukm* of the traders and the mercenaries is different from the rest of the soldiers, because they did not intend to fight, but intended either to trade or to be hired for wages (for fighting), excluded them from the general implication of the verse. Those who maintained that the general implication is stronger than analogy let the general implication govern the issue. An evidence for those who excluded them is what is recorded by ʿAbd al-Razzāq that ʿAbd al-Raḥmān ibn ʿAwf asked one of the *muhājirūn*, who was a learned man, to go out to battle with him. He agreed to do so. When the time for departure came he called him, but he declined on the pretext of the needs of his children and wife. ʿAbd al-Raḥmān then gave him three *dīnārs* so as to make him accompany him. When they had routed the enemy the man asked ʿAbd al-Raḥmān for his share of the spoils. ʿAbd al-Raḥmān said to him, "I will mention your affair to the Messenger of Allāh (God's peace and blessings be upon him)". When he did mention it to him, the Messenger of Allāh (God's peace and blessings be upon him) said, "These three *dīnārs* are his share and portion from the battle with respect to this world as well as for the hereafter". Abū Dāwūd has recorded a similar tradition from Yaʿla ibn Munabbih.

Those who permitted them a share in the division held their case to be similar to the employment of hirelings, which is the assistance provided by some members of the *dīwān* to others, that is, like a person standing aside to support the warrior. The jurists disagreed about such hirelings, with Mālik permitting it and the others disallowing it. Some of the jurists permitted this if granted by the *sulṭān* alone, or when there was a necessity. This was the opinion of Abū Ḥanīfa and al-Shāfiʿī.

With respect to the condition which entitles a Muslim to a share of the spoils, most of the jurists said that it is his presence at the battle, even if he did not fight. If he arrives after the battle is over, he does not get a share of the spoils. This was upheld by the majority, while another group said that if he joins up with them before they move back into the *dār al-Islām* he is entitled to a share if he was employed somehow in its management. This is Abū Ḥanīfa's opinion.

There are two reasons for their disagreement: analogy and a tradition. The analogy is whether the role of the warrior in the preservation (and protection of the spoils) is similar to his role in its acquisition. This is so as the active participation of the person in the battle is effective in its acquisition, that is, in the acquisition of the spoils, because of which he is entitled to a share. The role of the person who arrives late, but before the Muslim army moves to the land of Islam, is effective in preserving (the spoils). Those who held his role in preservation to the role in acquisition said that he is entitled to a share even if he was not present at the battle. Those who said that such a role for purposes of preservation is weak (for analogy) did not consider him to be entitled to it.

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[331] Qurʾān 8 : 41.

There are two relevant traditions in this, but they conflict with each other. The first is related on the authority of Abū Hurayra, who said "that the Messenger of Allāh (God's peace and blessings be upon him) sent Abān ibn Saʿīd with a detachment from Medina towards Najd. Abān and his companions joined up with the Prophet (God's peace and blessings be upon him) at Khaybar after they [the Prophet and his Companions] had conquered it. Abān said, "O Messenger of Allāh, give us a share (of the spoils)". The Messenger of Allāh (God's peace and blessings be upon him) did not grant them a share". The second tradition is in the report "that the Messenger of Allāh (God's peace and blessings be upon him) said on the day of Badr, "ʿUthmān has departed on the business of Allāh and the business of his Messenger". The Messenger of Allāh (God's peace and blessings be upon him) then allotted a share for him, but he did not do so for anyone else who was absent from the battle". They said that he was entitled to a share as he was busy on behalf of the *imām*. Abū Bakr ibn al-Mundhir said: "It is established that ʿUmar ibn al-Khaṭṭāb, may Allāh be pleased with him, said, 'The spoils are for those who were present at the battle'".

The troops that move out of the camps (for battle) are entitled to the spoils. The majority of the jurists maintain that the members of the camp participate with them in the spoils, even if they did not participate in the acquisition of the spoils or in the battle. This is because of the saying of the Prophet (God's peace and blessings be upon him), "The detachments (that went out to fight) should share (the spoils) with those (of them who are) stationed". It is recorded by Abū Dāwūd. Further, these people are also effective in the acquisition of the spoils. Al-Ḥasan al-Baṣrī said that if the detachment departs from the camp with the permission of the *imām* they divide the spoils into five parts, and what remains is for the members of the detachment, but if they went out without the permission of the *imām* they divide the spoils into five parts and what remains is for the rest of the troops. Al-Nakhaʿī said that the *imām* has a choice; if he likes he may divide into five parts what the detachment brought in or he may treat the whole as a reward (for the detachment). The reason for this disagreement also stems from the similarity of the effectiveness of the camp in the (acquisition of the) spoils by the detachment with the effectiveness of those who were present at the battle, and who are the members of the detachment.

A share in the spoils, then, in the view of the majority of the jurists, is given to the soldier on one of two conditions. He should either be one who had participated in the battle, or he should be one who had sheltered the fighting forces.

They disagreed about the share of the horse rider in the context of how much is due to the fighter. The majority said that the rider has three shares; one share for him and two for his horse. Abū Ḥanīfa said that only two shares are due to the rider, one for the horse and one for him. The reason for their disagreement arises from the conflict of the relevant traditions and the conflict of analogy with a tradition. Abū Dāwūd has recorded from Ibn ʿUmar "that *the Prophet (God's peace and blessings be upon him) allotted three shares for* a man and his horse, two shares for the horse and one for its rider". He also recorded a tradition from Mujammiʿ ibn Jāriyat al-Anṣārī that has the same import as the opinion of Abū Ḥanīfa. The analogy that conflicts with the apparent meaning of the tradition of Ibn ʿUmar is that the share of a horse should not be greater than that of a human being. This is why Abū Ḥanīfa preferred the tradition that conforms with this analogy over the tradition that opposes it. This analogy, however, does not hold, as it is the human being who is the rider of the horse and who is also entitled to the share of the horse, and it is not unlikely that the effectiveness of the rider riding a horse be thrice as much as the foot-soldier. This appears certain, along with the fact that the tradition of Ibn ʿUmar (maintaining this view) has greater authenticity.

The Muslim jurists, while considering how much a soldier is allowed to take from the spoils before division, agreed about the prohibition of purloining the spoils. This is based upon what is established from the Messenger of Allāh (God's peace and blessings be upon him) about this, like his saying, "Turn in the thread and the garment, for purloining is a shame and a disgrace, on the Day of Judgment, for those who practice it", along with other traditions that have been recorded on the subject.

They disagreed about the permissibility of consuming food seized by the fighters, while they are still on the battlefield. The majority of the jurists permitted this, while a group of jurists disallowed it, which is the opinion of Ibn Shihāb. The reason for their disagreement emanates from the conflict of traditions regarding the prohibition of purloining with those implying permissibility of eating food, like the traditions of Ibn ʿUmar, Ibn Mughaffal, and Ibn Abī Awfā. Those who restricted the traditions on the prohibition of purloining to these—which permitted the eating of food by warriors—held it to be permissible; those who preferred the traditions prohibiting purloining to these did not permit it. The tradition of Ibn Mughaffal is that he said, "I came upon a skin of fat on the day of Khaybar and whispered to myself, 'I will not give any of it (to anyone)'. I turned around and there was the Messenger of Allāh *(God's peace and blessings be upon him) smiling at me*". *It is recorded* by al-Bukhārī and Muslim. In the tradition of Ibn Abī Awfā, he said, "During our battles we came upon honey and grapes that we used to eat and did not turn them in". This is also recorded by al-Bukhārī.

They disagreed about the penalty of the person who purloins (the spoils). A group of jurists said that his baggage is to be set on fire, while others said that there is no penalty for him except reprimanding him. The reason for their disagreement arises from their dispute over the authenticity of the tradition of Ṣāliḥ ibn Muḥammad ibn Zā'ida from Sālim from Ibn ʿUmar that he said, "The Prophet (God's peace and blessings be upon him) said, 'Burn the baggage of the person who purloins'".

10.2.3. *Section 3*: *The* ḥukm *of* anfāl (*reward*)

The jurists agreed about the permissibility of the *imām*'s granting of a reward out of the spoils for whomsoever he likes, that is, to add to his share. They disagreed, however, about the items from which a reward is to be given, about its amount, and about whether it is permitted to promise it before the battle. Further, they disagreed whether a Muslim fighter is entitled to the possessions[332] of the disbeliever whom he has slain, or whether he is not entitled to it unless the *imām* grants it as a reward for him. These are four issues and they constitute the fundamentals of this section.

10.2.3.1. Issue 1

A group of jurists maintained that the ***nafl*** *(reward) is to be paid from the* ***khumus*** (fifth), which is due to the Muslim treasury. This was Mālik's opinion. Another group of jurists said that the reward is due from the fifth of the *khumus* alone, which is the exclusive share of the *imām*. This view was taken by al-Shāfiʿī. A third group of jurists said that such favours are to be granted from the spoils as a whole (before division). This was the opinion of Aḥmad and Abū ʿUbayda. Some of these jurists (in the third group) permitted (even) the giving away of the entire spoils as reward.

The reason for their disagreement stems from the question of whether there is a conflict between the two verses laid down about the spoils or whether they indicate a choice. I mean, between the words of the Exalted, "And know that whatever ye take as spoils of war, lo! a fifth thereof is for Allāh, and for the messenger and for the kinsman (who hath need) and orphans and the needy and the wayfarer, if ye believe in Allāh and that which We revealed unto Our slave on the Day of Discrimination, the day when the two armies met. And Allāh is able to do all things",[333] and His words, "They ask thee (O

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[332] These would include his horse, sword, armour, clothes, and money.

[333] Qur'ān 8 : 41.

Muḥammad) of the spoils of war. Say: the spoils of war (*anfāl*) belong to Allāh and the messenger, so keep your duty to Allāh, and adjust the matter of your difference".[334] Those who maintain that the former verse, "And know that whatever ye take as spoils of war . . .", has abrogated the latter verse, "They ask thee (O Muḥammad) of the spoils of war . . .", said that the reward (*nafl*) is due from the fifth or the fifth of the fifth. Those who maintained that there is no conflict between the verses and that they indicate a choice, that is, the *imām* may grant a reward from the undivided spoils if he likes and he has choice of not granting any reward and of giving all four-fifths of the spoils to the persons acquiring them, said that he may grant the reward from the undivided spoils.

There are also two traditions on this issue. The first is related by Mālik from Ibn ʿUmar "that the Messenger of Allāh (God's peace and blessings be upon him) sent a detachment of troops toward Najd, and ʿAbd Allāh ibn ʿUmar was among them. They secured a large number of camels as spoils. Their two shares (of the spoils) came to twelve camels each, and they were also given a camel each as a reward". This indicates that the reward is given after the division from the fifth. The second is the tradition of Ḥabīb ibn Maslama "that the Messenger of Allāh (God's peace and blessings be upon him) used to grant an initial reward of a fourth [of the spoils] to the troops, upon their departure, after excluding the fifth, and thereafter he used to grant them a third as reward upon their return after excluding the fifth", that is, initially at the beginning of his battle and at the time of departure.

10.2.3.2. Issue 2

The second issue is about the amount that the *imām* may give away as reward. A group of those who permitted the giving of rewards from undivided spoils said that it is not permitted to grant more than a third or a fourth and this (prescription) is based on the tradition of Ḥabīb ibn Maslama. Another group of jurists said that the *imām* may grant a detachment all that it has acquired as spoils, and this is on the basis that the verse about *anfāl* is not abrogated and governs the issue, and that it is to be construed in its unrestricted general meaning. Those who maintained that it is restricted by this tradition said that it is not permitted to him to give as reward more than a fourth or a third.

10.2.3.3. Issue 3

Is the *imām* permitted to make a promise of reward before the battle? The jurists disagreed about this. Mālik disallowed this, while a group of jurists permitted it.

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[334] Qurʾān 8 : 1. This is an example of the legal use of a term. The term *nafl* (pl. *anfāl*) is translated in the verse in its literal sense as spoils or booty, but the jurists focus on another literal meaning, namely "present" or "reward". They determine the latter to be the legal use of the term.

The reason for their disagreement stems from the conflict between the meaning of the purposes of the war and the apparent meaning of the tradition. The purpose of war is to seek the favour of Allāh, the Majestic, and that the word of Allāh should reign supreme. Thus, if the *imām* offers a reward before the battle there is an apprehension that the warriors will spill their blood for a cause other than seeking Allāh's favour. The tradition which implies through its apparent meaning the permissibility of declaring a reward before the battle, is the tradition of Ḥabīb ibn Maslama that the Prophet (God's peace and blessings be upon him) "used to announce a reward in battles for troops moving out of the camps at a fourth (of the spoils they would capture) and a third from what they captured on their return". It is obvious that the purpose in this was the active pursuit of the enemy.

10.2.3.4. Issue 4

The fourth issue is whether the slayer is entitled to appropriate (of his own accord) the spoils of the person slain, or whether he may do so only if the *imām* has determined it as a reward. They disagreed about this. Mālik said that the (believing) killer is not entitled to appropriate the spoils of the person killed, unless the *imām* considers it, by way of *ijtihād*, to be a reward for him, and this too after the battle. This was also the opinion of Abū Ḥanīfa and al-Thawrī. Al-Shāfiʿī, Aḥmad, Abū Thawr, Isḥāq, and a group of the predecessors said that the killer is entitled to it, irrespective of the the *imām*'s saying so. Some of these (latter) jurists deemed appropriation to be his right under all circumstances and they did not stipulate any condition for this. Some of them said that he has this right only if he slays the person face to face (in combat) and not treacherously or when the disbeliever is in retreat. This was al-Shāfiʿī's opinion. Some of them said that the killer is entitled to appropriate the property if he slays the enemy before the battle and not in the thick of it, or if he does so after the battle. If he kills him in the thick of battle he does not have the right to appropriate his property. This was al-Awzāʿī's opinion. One group of jurists said that if the declared reward (property of the enemy slain) is excessive, it is permitted to the *imām* to give a fifth of it.

The reason for their disagreement stems from the probability of meanings in the saying of the Prophet (God's peace and blessings be upon him) on the day of Ḥunayn when there was a setback in the battle, "Whoever slays a person shall have his spoils". It is probable that he meant this as a reward, but it can also be interpreted as a right of the slayer. For Mālik (God bless him) the stronger probability was that it was by way of reward on the grounds that it was not proved for him that the Prophet (God's peace and blessings be upon him) ever said this or decided it except on the day of Ḥunayn, and also because of its conflict with the verse of spoils if it is interpreted to convey a right of the slayer, I mean, the verse, "And know that whatever ye take as spoils of war, lo! a fifth thereof is for Allāh, and for the messenger".[335] The reason is that when it is explicitly laid down in the verse that a fifth is for Allāh it becomes obvious that the four-fifths are a right of those acquiring the spoils, just as when He laid down explicitly a third for the mother in inheritance it became obvious that the remaining two-thirds were the right of the father. Abū ʿUmar said that this saying was recorded from him (God's peace and blessings be upon him) on the Day of Ḥunayn as well as on the Day of Badr. It is related from ʿUmar ibn al-Khaṭṭāb that he said: "We did not divide the spoils of the slain into five parts during the period of the Messenger of Allāh (God's peace and blessings be upon him)". It is recorded by Abū Dāwūd from ʿAwf ibn Mālik al-Ashjaʿī and Khālid ibn al-Walīd "that the Messenger of Allāh (God's peace and blessings be upon him) gave a decision for appropriating the spoils of the slain". Ibn Abī Shayba has recorded from Anas ibn Mālik that al-Barrā' ibn Mālik made a charge toward al-Marzubān, on the day of al-Dāra, and struck his saddlebow with his lance killing him. His spoils (in monetary value) came to thirty thousand. When this report reached ʿUmar ibn al-Khaṭṭāb he said to Abū Ṭalḥa: "We did not divide the spoils of the slain into five parts, but the spoils for al-Barrā' have reached an exorbitant figure, and I have no choice but to add it to the spoils which have to be divided into five portions." Ibn Sīrīn said that Anas ibn Mālik related that this was the first *salab* from a slain person that were divided into five parts in Islam. This was relied upon by those who made a distinction between small and excessive possessions of the slain.

They disagreed about the spoils of the slain that are due (to the slayer). A group of jurists said that the slayer is entitled to all that he finds on the person of the slain. Another group of jurists excluded gold and silver from this (as these have to be added to general spoils).

10.2.4. *Section 4: The* ḥukm *of the property of muslims found in the possession of disbelievers*

They disagreed about the case of the property of Muslims that is recovered from the possession of the disbelievers. There are four well-known opinions on this subject. The first is that the wealth of the Muslims that is recovered by the Muslims from the possession of the disbelievers is for the owners of that wealth, and the warriors who recovered it are not entitled to any of it. Those who held this opinion include al-Shāfiʿī, his disciples, and Abū Thawr. The second opinion is that what is recovered by the Muslims is treated as spoils for the army and the owners are not entitled to any of it. This opinion was held by al-Zuhrī and ʿAmr ibn Dīnār, and it is also related from ʿAlī ibn Abī Ṭālib. The third opinion is that the owner of the property is entitled, without any payment, to what is discovered of the property of Muslims before division, but what is discovered after the division is to be given to the owner after he pays its value. Those who hold this opinion are divided into two groups. Some of them maintained that this rule applies to all (Muslim property) that is recovered by the Muslims from the possession of the disbelievers, whatever the manner in which it came into the possession of the disbelievers and at whatever location. Those who held this opinion include Mālik, al-Thawrī, and a group of jurists, and it is also related from ʿUmar ibn al-Khaṭṭāb. Some of them made a distinction between what came into the possession of the disbelievers by the use of force, and which they carried off until they transported it to the land of the polytheists, and between what was taken back from them before they were able to seize and carry off into polytheist territory. They said that this (the first kind of) property, if it is identified by the owner before its division, belongs to him, but if he comes across it after the division he has a right to it after paying its price. They maintained, on the other hand, that the property that was not gathered by the enemy so as to be transported to their land belongs to the owner before the division and after the division; and this is the fourth opinion.

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[335] Qur'ān 8 : 41.

Their disagreement arises from their dispute about whether the disbelievers can legally own the property of the Muslims taken by force. And the reason for their disagreement on this issue arises from the conflict of the relevant traditions, and also the conflict of analogy. This is so as the tradition of ʿImrān ibn Ḥuṣayn (the text of which is to follow) indicates that the disbelievers cannot own anything extorted from the Muslims. The tradition says: "The polytheists raided the freely grazing animals around Medina and snatched al-ʿAḍbāʾ, a camel belonging to the Messenger of Allāh (God's peace and blessings be upon him) along with a Muslim woman. One night, when they had gone to sleep, the woman arose, but any camel she touched would bray, until she came to al-ʿAḍbāʾ. It behaved in a docile manner, so she mounted it and headed for Medina, making a vow that if she was saved by Allāh, she would certainly sacrifice the camel. When she arrived in Medina the camel was recognized and she was brought to the Messenger of Allāh (God's peace and blessings be upon him). She informed him of her vow. He said, 'What an ungracious reward. A vow is not operable in what the child of Adam does not own, nor is there a vow for an evil deed'". Likewise, the apparent meaning of a tradition related by Ibn ʿUmar conveys the same meaning. Its content is that his horse ran away and was snatched by the enemy, but the

Muslims came upon it and it was returned to him during the lifetime of the Messenger of Allāh (God's peace and blessings be upon him). Both traditions are authentic. The tradition, on the other hand, that indicates the opposite, namely, that the disbelievers can own Muslim property stems from the saying of the Prophet (God's peace and blessings be upon him), "Has ʿAqīl left a house for us?" He (God's peace and blessings be upon him) had sold his house that he owned in Mecca after migrating from there to Medina.

The analogy is that those who considered wealth to be similar to the person (of an individual for ownership) said that just as the disbelievers cannot own our persons, as is the case of a rebel in comparison to a law-abiding person, that is, he cannot own any of the two things to the detriment of the rights of the law-abiding person. Those who said that the disbelievers can own (our wealth) argued that the person who does not own the wealth is liable for it if its substance is destroyed, and they agreed that the disbelievers do not compensate the property of the Muslims. From this it follows that the disbelievers can own captured Muslim property, for had they not been owners they would have been held liable for compensation.

Those who made a distinction between the *ḥukm* before the division of spoils and after it, and between what the polytheists acquire from the Muslims by force and what they get without violence, like a runaway slave going over to them of his own accord and a horse going back to them, have no legal basis. The reason is that there is no middle ground between saying that the disbelievers can own Muslim property and saying that they can not, unless this is proved through a transmitted evidence. The proponents of this opinion, however, made this distinction on the basis of the tradition of al-Ḥasan ibn ʿUmāra from ʿAbd al-Malik ibn Maysara from Ṭāwūs from Ibn ʿAbbās "that a man found his camel that had been taken away by the polytheists. The Messenger of Allāh (God's peace and blessings be upon him) said to him, 'If you came upon it before the division (of the spoils) it belongs to you, but if you came upon it after the division you have to pay its value'". Al-Ḥasan ibn ʿUmāra is by agreement a weak narrator and reliance is not placed upon his narration for argument by the traditionists. What Mālik had recourse to in this, as far as I know, is the decision of ʿUmar on the issue, but he did not rule that he should pay its price if he took it back after the division, judging on the basis of the apparent meaning of his tradition.

The exemption made by Abū Ḥanīfa in the case of an *umm al-walad*[336] and a *mudabbar*[337] out of all kinds of wealth is meaningless. This is so as he ruled that the disbelievers come to own all other kinds of wealth in the face of the rights of the Muslims, except these two types. Likewise, Mālik's opinion requiring the *imām* to pay the ransom for the *umm al-walad* if her owner finds her after the division. If her master does not do so her master is to be compelled to pay the ransom, and if he does not have the money, she is to be handed over to him and the person from whose share she has been taken out of is to pursue him (the owner) for her value, which is considered a loan until his condition improves. This too is an opinion for which there is no basis in analogy. If the disbelievers did not own her he has the right to take her back without paying the price, but if they did come to own her he has no claim upon her. Further, there is no difference between her and the remaining types of property unless a transmitted evidence were to establish this.

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[336] A slave who bears a child of her master.

[337] A slave who becomes free upon the death of the master.

Under this principle, I mean, their dispute over whether the polytheist can come to own the property of Muslims, is the disagreement of the jurists about a disbeliever who converts to Islam and has in his possession the wealth of Muslims, whether his ownership is valid. Mālik and Abū Ḥanīfa said that it is validly owned by him, while al-Shāfiʿī, abiding by his principle, said it is not. Mālik and Abū Ḥanīfa disagree when a Muslim goes over to the side of the disbelievers by way of stealth and brings over property from their possession that belonged to Muslims. Abū Ḥanīfa said that he has a right to this property. If the original owner wants it back, he has to purchase it by paying the price. Mālik said that it belongs to the original owner, and here he did not maintain his principle.

Relevant to this topic is also their disagreement about a warring enemy who converts to Islam and migrates leaving behind in the *dār al-ḥarb* his children, his wife, and his wealth, whether there would be for what he left behind the same sanctity that is applied to the wealth of a Muslim, his wife and children, so that the Muslims cannot acquire them as spoils if they come to have dominion over them. Some of them said that all that he left behind has the protection of Islam, while others said that there is no sanctity whatsoever. Some of them made a distinction between his wealth, on the one hand, and his wife and children, on the other, saying that his wealth has no protection, but his children and wife stand protected. This runs contrary to analogy, and is the opinion of Mālik. The principle is that permissibility (absence of sanctity) of wealth arises because of disbelief, and the cause of sanctity is Islam. The Prophet (God's peace and blessings be upon him) said, "And when they pronounce it (the *shahāda*) their blood and wealth stand protected from me". This is an evidence against those who thought that there are factors other than Islam that make wealth permissible, like ownership by the enemy or other factors. Those making this claim need to adduce some evidence, and the fact is that there is no evidence on the basis of which they can oppose this principle, Allāh knows best.

10.2.5. *Section 5*: *The* ḥukm *of land conquered by the Muslims by the use of force* (ʿanwatan)

They disagreed about the land that is conquered by the Muslims by the use of force. Mālik said that the land is not to be divided and stays as a trust (*waqf*) with its *kharāj* (revenue) being spent for the interest of the Muslims, like the maintenance of those engaged in the defence of Islam, the construction of bridges and mosques, as well as other avenues of welfare. This is the case, unless the *imām* is at some time of the opinion that *maṣlaḥa* requires it to be divided, in which case he may do so. Al-Shāfiʿī said that conquered lands are to be divided like spoils, that is, into five parts. Abū Ḥanīfa said that the *imām* has a choice of dividing it or imposing *kharāj* on its disbelieving tenants leaving it in their possession.

The reason for their disagreement springs from what is thought to be a conflict between the verse of *sūrat al-Anfāl* and the verse of *sūrat al-Ḥashr*. This is so as the verse of *sūrat al-Anfāl* implies through its apparent meaning that anything acquired as spoils is to be divided, and these are the words of the Exalted, "And know that whatever ye take as spoils of war, lo! a fifth thereof is for Allāh, and for the messenger".[338] On the other hand, the words of the Exalted in the verse of *al-Ḥashr*, "And those who came after them say; Our Lord! Forgive us and our brethren who were before us in the faith, and place not any rancour toward those who believe",[339] when read in conjunction with the case of those to whom *fay*ʾ (booty) was granted may indicate that all people, those present and the posterity, are partners in the *fay*ʾ. It is related from ʿUmar (God be pleased with him) that he commented on the words of the Exalted, "And those who came after them say; Our Lord! Forgive us . . .", saying, "I do not think that this verse does anything but make it (the land) common for all the people, even for the shepherd at Kadāʾ", or words to that effect. He, therefore, did not divide up the lands of Irāq and Egypt that were conquered in his time by force of arms.

Those who maintained that both verses have been laid down in the same context and that the verse of *al-Ḥashr* restricts the verse of *al-Anfāl* exempted land from it. Those who maintained that the verses have not been laid down in the same context, but the verse of *al-Anfāl* is for spoils and the verse of *al-Ḥashr* is about *fay*ʾ (booty) as is apparent from the context said that the land is to be divided up, and this is a must, especially when it has been established that the Prophet (God's peace and blessings be upon him) divided the land of Khaybar among the warriors. They asserted that it is necessary that the land be divided on the basis of the general implication of the words of the Book and the acts of the Prophet (God's peace and blessings be upon him), which constitute, over and above the general implication, an elaboration of the unelaborated meanings.

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[338] Qurʾān 8 : 41.
[339] 59 : 10.

Abū Ḥanīfa, on the other hand, upheld a choice between division and leaving the disbelievers in possession of it in lieu of *kharāj* that they would pay, because of his belief in the report "that the Messenger of Allāh (God's peace and blessings be upon him) gave out Khaybar for part of the produce, and later he sent Ibn Rawāḥa, who divided it up". They (the Ḥanafites) said that it appears from this that the Messenger of Allāh (God's peace and blessings be upon him) did not divide up all of the land, rather he divided up a segment of the land and left a segment undivided. It is therefore clear, they said, that the *imām* has a choice between dividing it up and leaving it in the hands of the disbelievers. This is what ʿUmar (God be pleased with him) did. If they convert to Islam after the conquest the *imām* has a choice of granting it to them or dividing it up as the Messenger of Allāh (God's peace and blessings be upon him) did in Mecca, that is, he granted it to them. This, however, can be used as an evidence in this context in accordance with the opinion of those who believe that Mecca was conquered by force. The authorities, however, disagree about this, though the correct view is that it was conquered by force, for that is what is related by Muslim.

It is necessary to know that the opinion of those who maintained that the verse of *fay*ʾ and the verse of *ghanīma* are to be construed to convey a choice, and that the verse of *fay*ʾ has abrogated the verse of *ghanīma*, or that it has restricted it, is a very weak opinion, unless the terms *fay*ʾ and *ghanīma* carry the same meaning. If that is the case, then, the two verses conflict, as the verse of *al-Anfāl* imposes a division into five parts, while the verse of *al-Ḥashr* implies an unrestricted division, not limited to five parts. Thus, it becomes necessary that one of them is considered as abrogating the other, or that the *imām* be granted a choice between dividing into five parts or making a general distribution, and this would be for all the wealth acquired as spoils (land or other). Some of the learned have related that this is the opinion of some jurists, and I believe it is related from the School (Mālik's).

It is necessary for those who hold the opinion based upon a reconciliation between the two verses, deriving from it that land acquired as part of the spoils should be kept intact, undivided, but division should apply to whatever is besides land, to maintain that each of the two verses excludes part of what is in the other verse, or abrogates it. Thus, the verse of *al-Anfāl* excludes from the general implication of the verse of *al-Ḥashr* what is besides land imposing five-fold division in it, while the verse of *al-Ḥashr* excludes land from the verse of *al-Anfāl* so that the five-fold division is not carried out in it. This claim, however, is not valid in the absence of an evidence, along with the fact that the verse of *al-Ḥashr* apparently includes items of a kind that carry a different *ḥukm* from those that are included in the verse of *al-Anfāl*. This is so as the words of the Exalted, "And that which Allāh gave as spoil unto His messenger from them, ye urged not any horse or riding camel for the sake thereof, but Allāh giveth His messenger lordship over whom he please",[340] indicate the underlying cause for denying the army an exclusive entitlement to the exclusion of the people. Division (into five parts) is the opposite of this, as it applies to spoils acquired through "urging".

10.2.6. *Section 6: The division of* fayʾ *(booty)*

Fayʾ according to the majority of the jurists is all that moves from the possession of the disbelievers to that of the Muslims, because of intimidation and fear, without their having "urged any horse or soldier". The jurists disagreed about the avenues of its expenditure. A group of jurists said that *fayʾ* is for all Muslims, poor or rich, and the *imām* has the right to give from it to the fighters, to the administrators and governors, and to spend it on the places of frequent use by the Muslims like the construction of bridges and maintenance of mosques and other things, and there is to be no five-fold division in it. This was upheld by the majority, and it is established from Abū Bakr and ʿUmar. Al-Shāfiʿī said that there is *khumus* (one-fifth) in it, and this fifth is subdivided among the categories that have been mentioned in the verse of spoils. These are the same categories that have been mentioned for the division of the fifth of spoils (*ghanīma*). The remainder, he said, is to be spent in accordance with the *ijtihād* of the *imām*, and he may spend part of it upon himself and his family, and on whoever he deems rightly entitled. I think one group of jurists said that *fayʾ* is not subject to five-fold division and that it is to be divided among the five categories among whom the *khumus* is distributed. As far as I know, it is also one opinion of al-Shāfiʿī.

The reason for disagreement among those who maintained that all of it is to be divided among the five categories and those who said that it is to be spent according to the *ijtihād* of the *imām* arises from the same dispute as in the division of the *khumus* from the spoils, and this has already been discussed. I mean, those who considered the mentioning of the categories as an indication of some of those who have an entitlement to it said that it is for these categories as well as for others, while those who considered the mentioning of the categories as fixing the number of those who have an entitlement said that the expenditure is not to be extended beyond these categories, that is, they considered this to be a category of restriction (to these categories) and not an indication of their significance.

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[340] Qurʾān 59 : 6.

Taking a fifth out of *fayʾ* has not been maintained by anyone before al-Shāfiʿī, and he was led to this opinion because he held that in this verse it was *fayʾ* that was divided into the five categories among whom *khumus* is divided. He therefore believed that a fifth is to be taken from it, because he thought that this division is specific to the *khumus*, but this is not apparent. What is apparent is that this division is specific to the entire *fayʾ* not to a fifth of it, and that, as far as I know, was upheld by a group of jurists.

Muslim has recorded from ʿUmar that he said, "The wealth of Banū al-Naḍīr was bestowed by Allāh as *fayʾ* on his Messenger, and it was something for which the Muslims had not urged a horse or a riding camel. It was for the Prophet (God's peace and blessings be upon him) exclusively, and he spent from it on his family as maintenance for a year, and what was left he spent on horses and weapons in the way of Allāh". This supports Mālik's opinion.

10.2.7. *Section 7: Discussion of* jizya (*poll tax*)

A comprehensive discussion of the principles of this section is covered in six issues. The first is about the person from whom it is permissible to take *jizya*. The second is about the categories of people who are liable for *jizya*. The third is about the amount imposed. The fourth is about the time it is due and when it is waived. The fifth is about the types of *jizya*. The sixth is about the avenues of expenditure of *jizya*.

10.2.7.1. Issue 1

From who is it permissible to take *jizya*? The jurists agree unanimously that it is permissible to take it from the non-Arab People of the Book, and from the Magians, as has been mentioned. They disagreed about those who have no scripture, and about those who are the People of the Book but are Arabs, and this after they had agreed that it is not permissible to take it from a *Kitābī* who is from the tribe of Quraysh. The discussion of this issue has preceded.

10.2.7.2. Issue 2

This issue deals with the categories of people who are liable for it. They agreed that it is imposed on those who exhibit three characteristics: being a male, *bulūgh* [attainment of puberty], and being free. It is not imposed upon women or upon minors insofar as it is a substitute for being subject to slaughter, and slaying, by command, is directed at males who have attained puberty, and the slaying of women and minors is prohibited. Likewise, they agreed that it is not imposed upon slaves. They disagreed about some categories of such persons (i.e. those who are liable) including the insane and the crippled, the aged, and the monks, and the poor, whether they are to be considered as being liable for it when their condition improves. All these cases are a matter of *ijtihād* and there is no [specific] determination for them in the law. The reason for their disagreement arises their dispute about whether such a person can be lawfully slain (in war), that is, out of these types of persons.

10.2.7.3. Issue 3

What is the [annual] amount due? They disagreed over this. Mālik held that the amount due in this is what was imposed by ʿUmar (God be pleased with him), and this was four *dīnārs* for those who transact in gold and forty *dirhams* for those who transact in silver, along with provisions for Muslims and hosting them for three days, and is not to exceed this or to be less than this. Al-Shāfiʿī said that the minimum is fixed and it is one *dīnār* and the maximum is not fixed but depends on what they negotiate to pay. A group of jurists said that there is no determination in this and it is left to the *ijtihād* of the *imām*. This was maintained by al-Thawrī. Abū Ḥanīfa and his disciples said that *jizya* ranges between twelve *dirhams*, twenty-four *dirhams*, and forty-eight *dirhams*. The poor person is not to pay less than twelve *dirhams* and the rich person is not to pay more than forty-eight *dirhams*. The person of average means is to pay twenty-four *dirhams*. Aḥmad said that one *dīnār* or its equivalent in woven cloth (Yemeni), and it is neither to be increased nor decreased.

The reason for their disagreement springs from the variation in the traditions on the topic. It is related "that the Messenger of Allāh (God's peace and blessings be upon him) sent Muʿādh to Yemen and ordered him to take from every person over the age of puberty one *dīnār* or its equivalent in *muʿāfir*", which is cloth from Yemen. It is established from ʿUmar that he imposed *jizya* on those who transact in gold at (the rate of) four *dīnārs*, and on those who transact in silver at (the rate of) forty *dirhams* along with provisions for the Muslims and hosting them for three days. It is also related from him that he sent ʿUthmān ibn Ḥanīf and he imposed *jizya* on the residents of the *sawād* lands at the rates of forty-eight, twenty-four, and twelve (*dirhams*).

Those who interpreted all these traditions as granting a choice and adopted the general implication of the term *jizya*, as there is no tradition from the Prophet (God's peace and blessings be upon him) about its determination that is agreed upon for its authenticity, and the Book has mentioned it in general terms, said that there is no determination in this, and this appears to be the more obvious rule, Allāh knows best. Those who reconciled the tradition of Muʿādh and what is established from ʿUmar said that the minimum is fixed and there is no limit for the maximum. Those who preferred one of the traditions of ʿUmar either maintained that it is forty *dirhams* or four *dīnārs* or they held it to be forty-eight *dirhams*, twenty-four *dirhams*, and twelve *dirhams*, as has been mentioned. Those who preferred the tradition of Muʿādh, as it is *marfūʿ* (traced back to the Prophet) said that it is one *dīnār* or its equivalent in woven cloth (Yemeni) and is not to be increased beyond this nor is it to be decreased.

10.2.7.4. Issue 4

When is *jizya* due? They agreed that it does not become due except after the passage of one year, and it is to be waived for a person if he converts to Islam within the year. They disagreed over the case of one who converts after the passage of one year, whether he is to be charged *jizya* for the entire previous period of one year or for the portion that has passed. A group of jurists said that if he converts there is no *jizya* for him, whether the conversion was before the passage of the period or after it. This opinion was upheld by the majority of the jurists. One group of jurists said that if he converts after the passage of one year he is liable for *jizya*, but if he converts before the completion of the period of one year it is not imposed upon him.

They agreed that *jizya* does not become due before the passage of a year, as the *ḥawl* is a condition for its obligation, and if a cause for waiver is found, which is conversion to Islam, before the obligation is incurred, that is, before the existence of the condition of obligation, it is not to be imposed. They disagreed about the case after the passage of the *ḥawl*, for then it has become due. Those who maintained that Islam demolishes this obligation, just as it demolishes many other obligations, said that the liability against him is dropped even if his embracing of Islam occurs after the passage of the *ḥawl*. Those who said that embracing Islam does not demolish this obligation, just as it does not demolish many other claims like debts and other similar things, said that the liability is not dropped after the passage of the year. The reason for their disagreement stems from whether Islam eradicates the *jizya* that has become due.

10.2.7.5. Issue 5

What are the different types of *jizya*? *Jizya* in their view is of three types. The first is *jizya* resulting from conquest by force, and this is what we have discussed, that is, one that is imposed upon the warring enemy after they have been overpowered. The second type is *jizya* resulting from a negotiated settlement, and this is what they voluntary offer so that the Muslims may stay their hand against them. There is no fixing of amount in this type of *jizya*, neither in the obligation, nor with respect to the person on whom it is obligatory, nor in the time at which it becomes due. All these matters are dependent upon the agreement concluded between the Muslims and those opting for a peaceful settlement, unless someone were to say: "If the acceptance of the negotiated *jizya* is obligatory upon the Muslims it is necessary that there be for it some determined amount. When the disbelievers are paying it of their own accord and acceptance is binding upon the Muslims, there should be a fixed minimum and an undetermined maximum amount". The third type of *jizya* is related to *ʿushr*. The majority of the jurists maintain that there is no liability for *ʿushr* upon the *ahl al-dhimma* nor any liability for *zakāt* on their wealth, except what is related from one group among the jurists that the *ṣadaqa* required from the Christians of Banū Taghlab was doubled, that is, they were obliged to pay the double of what was imposed upon the Muslims, for each category of items on which *ṣadaqa* (*zakāt*) is charged from the Muslims. Those who held this opinion include al-Shāfiʿī, Abū Ḥanīfa, Aḥmad, and al-Thawrī, and it is also the decision of ʿUmar (God be pleased with him) in their case. There is no recorded statement from Mālik on this, in what they have related from him. All this has preceded in the Book of *Zakāt*.

They disagreed over whether *ʿushr* is to be imposed on them for the goods they trade in the land of the Muslims, and whether this becomes due automatically by the very act of trading—or through permission if they are warring enemies—or that this does not apply except through a stipulated condition. Mālik and many of the jurists held that in the case of traders from amongst the *ahl al-dhimma*, who enjoy peaceful stay in their own land on the payment of *jizya*, *ʿushr* must be charged to them on the goods freely traded all over the land, but only one-half of *ʿushr* on those goods that they send to a particular city. Abū Ḥanīfa agreed with him on the question of the imposition of the *ʿushr* by virtue of trade with permission or trade itself, but he differed with respect to the amount saying that their liability is for one-half of the *ʿushr*. Mālik did not stipulate for them the existence of a *niṣāb* nor the passage of a *ḥawl*, while Abū Ḥanīfa did stipulate for the obligation of one-half *ʿushr* the passage of a year and the same *niṣāb* that is laid down for the Muslims, and which is mentioned in the Book of *Zakāt*. Al-Shāfiʿī said that there is no obligation at all on them for *ʿushr*, nor for one-half *ʿushr*, because of trade, and there is nothing determined in this, except what is arrived at through a settlement or a condition. In this form the *jizya* based upon *ʿushr* becomes a type of negotiated *jizya*, and in conformity with the opinions of Mālik and Abū Ḥanīfa it becomes a third category of *jizya* that is not negotiated and is imposed upon individuals.

The reason for their disagreement is that there is no *sunna* on this from the Messenger of Allāh (God's peace and blessings be upon him) to which recourse can be had, but it is established that ʿUmar ibn al-Khaṭṭāb decided this for them. Those who maintained that this act of ʿUmar was based upon a precedent that he knew to be from the Messenger of Allāh (God's peace and blessings be upon him) held it to be their *sunna*, while those who maintained that this act of his was based upon a stipulation (between the parties), for had it been different from this he would have mentioned it, said that this is not binding on them, unless it is stipulated as a condition. Abū ʿUbayd has quoted in the *Kitāb al-Amwāl* one of the Companions of the Prophet (God's peace and blessings be upon him), whose name I do not remember at the moment, that it was said to him, "Why do you charge *ʿushr* from the polytheist Arabs?" He replied, "Because they used to charge *ʿushr* from us *when we entered their territory*". Al-*Shāfiʿī said that the minimum that is to* be stipulated in this is what was imposed by ʿUmar (God be pleased with him), and if they agree to more that is better. He said that the *ḥukm* of a *ḥarbī* if he enters upon *amān* is the *ḥukm* of the *dhimmī*.

10.2.7.6. Issue 6

On what is the *jizya* to be spent? They agreed that it is to be spent for the common interest of the Muslim without any limitations, as is the case with *fayʾ* according to the opinion of those who held that it is dependent upon the *ijtihād* of the *imām*, so much so that some of the jurists held that the term *fayʾ* is meant to apply to *jizya* in the verse of *fayʾ*. If that is the case, then, the revenue of the Muslims is of three types: *ṣadaqa*, *fayʾ*, and *ghanīma*.

This is sufficient for the discussion of the fundamentals of this book. Allāh is the Grantor of guidance against error.

XI

THE BOOK OF *AYMĀN* (OAṬHS)

This book is divided into two chapters. The first chapter is about the types of oaths and their *aḥkām*. The second is about the identification of things that remit binding oaths, and about their *aḥkām*.

11.1. Chapter 1 Types of Oaths (*Aymān*) and their *Aḥkām*

This chapter contains three sections. The first section is about permissible oaths and their distinction from those that are not permissible. The second is about the identification of ineffectual and effective oaths. The third is about oaths that are remitted by expiation and those that are not.

11.1.1. *Section 1: The identification of permissible oaths*

The majority of the jurists agreed that certain things can be objects of oaths in the law, while others cannot. They disagreed as to what things have these characteristics. One group of jurists said that swearing of an oath permissible in law is one sworn in the name of Allāh, and that the person swearing an oath by something other than Allāh is a sinner. Another group of jurists said that it is permitted to swear an oath naming anything that is venerated in the law (*sharʿ*). Those who maintained that permissible oaths are only those that are sworn in the name of Allāh, agreed about the permissibility of oaths sworn taking His (other) names, but they disagreed about oaths sworn naming His attributes and His acts.

The reason for their disagreement about an oath sworn taking a name beside Allāh's, but of a thing venerated in the law stems from the conflict between the apparent meaning of the (relevant words of the) Book and a tradition. This is so as Allāh has used oaths in the Book naming a number of things, as in His words, "By the heaven and the morning star"[341] and His words, "By the star when it setteth",[342] as well as other oaths occurring in the Qur'ān. It is established, however, that the Prophet (God's peace and blessings be upon him) said, "Allāh has prohibited you from swearing oaths in the names of your fathers, so he who has to take an oath should do so in the name of Allāh or remain silent". Those who reconciled the (meaning in the) Book and the tradition maintained that in the things mentioned in the Book the object of the oath is implied (though omitted in the text), and it is (the name of) Allāh, the Glorious and Exalted, therefore, the implied reading is, "the Lord of the star" or the "the Lord of the heaven". Thus, they said that permissible oaths are those that are sworn in the name of Allāh alone. Those who reconciled between them maintained that the purpose of the tradition is that the things not venerated by the law are not to be venerated, on the evidence of his (the Prophet's) saying, which includes the words, "Allāh has prohibited you from swearing oaths in the names of your fathers". They said that this is from the category of the specific by which a general meaning is implied. Thus, they permitted an oath in the name of anything venerated by the law. The reason for disagreement, then, springs from their dispute about the construction of the verse and the tradition.

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[341] Qurʾān 86 : 1.

The opinion of those who prohibited the swearing of oaths by taking the name of Allāh's attributes or by His acts is weak. The reason for the disagreement is whether to restrict the interpretation to the tradition by attaching the *ḥukm* with the name (of Allāh) alone or to extend it to apply to His attributes and acts as well. There is extreme rigidity in attaching the *ḥukm* to the name (of Allāh) alone, and it is similar to the attitude of the Ẓāhirites, though it was related from the School (Mālik's) as narrated by al-Lakhmī from Muḥammad ibn al-Mawwāz.

One group of jurists deviated (from all this) and prohibited an oath in the name of Allāh, the Majestic, but the tradition is explicit in opposition to this opinion.

11.1.2. *Section 2: Identification of ineffectual and effective oaths*

They agreed also that some of the oaths are ineffectual and some are effective, because of the words of the Exalted, "Allāh will not take you to task for that which is unintentional (*laghw*) in your oaths, but He will take you to task for the oaths that ye swear in earnest".[343] They disagreed about what is *laghw*. Mālik and Abū Ḥanīfa maintained that it is an oath that is sworn by naming a thing which the person swearing believes to be true, but it turns out to be the opposite of what he swore the oath for. Al-Shāfiʿī said that a *laghw* oath is one in which the intention cannot be associated with the object, like the habit of a person saying in every day speech of saying, "No by Allāh, No by Allāh" which is something that is uttered by habit without believing it to be binding. This interpretation has been related by Mālik in *al-Muwaṭṭaʾ* from ʿĀʾisha. The first interpretation is related from al-Ḥasan ibn Abī al-Ḥasan, Qatāda, Mujāhid, and Ibrāhīm al-Nakhaʿī. There is a third interpretation (of the *laghw*) oath, namely, that a person swears an oath when he is angry. This was maintained by Ismāʿīl al-Qāḍī, the disciple of Mālik. The fourth interpretation is that it is an oath sworn to undertake an unlawful act, and this is related from Ibn ʿAbbās. There is also a fifth interpretation that it is the case of a man swearing an oath not to eat a thing that is permitted to him by law.

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[342] Qur'ān 53 : 1.

[343] Qur'ān 5 : 89.

The reason for their disagreement arises from the equivocality that is found in the term *laghw*. This is so as *laghw* sometimes means an invalid statement, as in the words of the Exalted, "Those who disbelieve say: Heed not this Qurʾān, and drown the hearing of it [i.e. deem it invalid]; haply ye may conquer",[344] and it sometimes means speech with which the intention of the speaker cannot be associated. The use of *laghw* in the verse indicates this meaning, which is the opposite of an oath that is effective, that is, confirmed, and it is necessary that the *ḥukm* of an opposite be an opposite (*ḥukm*). Those who maintained that *laghw* indicates the swearing of an oath to which the law does not attach any consequences, held, in accordance with this belief, that *laghw* here indicates a meaning that has technical usage in the law, and this relates to oaths about which the law has made clear, on a number of other occasions, that their *ḥukm* is to be dropped, as in the report "There is no divorce under duress", as well as in other cases. The more obvious meanings, however, are as in the first two opinions, that is, Mālik's and al-Shāfiʿī's.

11.1.3. *Section 3: Identification of oaths remitted by expiation*

In this section there are four issues.

11.1.3.1. Issue 1

They disagreed about effective oaths sworn in the name of Allāh whether they are remitted by expiation, irrespective of their being oaths sworn for a thing that was supposed to exist in the past, but actually did not, and this is known as the *yamīn ghamūs*, because the person lied intentionally, or for a thing that was to occur in the future on the initiative of the person swearing the oath or on the initiative of another under his influence and it does not happen. The majority of the jurists said that there is no expiation (*kaffāra*) for the *yamīn ghamūs*, and expiation operates for oaths pertaining to the future when the person swearing goes against the oath. Those who held this opinion include Mālik, Abū Ḥanīfa, and Aḥmad ibn Ḥanbal. Al-Shāfiʿī and a group of jurists maintained that expiation operates in it, that is, it remits the sin associated with it as it does for oaths other than the *ghamūs*.

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[344] Qurʾān 41 : 26.

The reason for their disagreement stems from the conflict between the general implication (of a verse) of the Book and a tradition. The words of the Exalted, "Allāh will not take you to task for that which is unintentional [*laghw*] in your oaths, but He will take you to task for the oaths that ye swear in earnest. The expiation thereof is the feeding of ten of the needy",[354] in the verse imply that there be an expiation in the case of the *yamīn ghamūs* as it is an effective oath. The words of the Prophet (God's peace and blessings be upon him), "Allāh has prohibited *janna* for the person who severed the right of a Muslim with his oath, and has made the Fire his due" imply that there is no expiation in the *yamīn ghamūs*. Al-Shāfiʿī, however, excludes the *yamīn ghamūs* from the oaths that do not destroy the right of another, and these are oaths mentioned in the text, or he says that the oaths destroying the rights of others combine the two factors of injustice and violation of the oath. Expiation, therefore, should not be able to obliterate both of them, or that it is not possible that is should to do away with violation without involving injustice, as remittance of violation through expiation is a kind of repentance, and repentance cannot be split up for the same single sin. If he repents, remedies the injustice, and makes the expiation then the entire sin is remitted.

11.1.3.2. Issue 2

The jurists disagreed about the (case of the person) who says, "I do not believe in Allāh," or "I associate others with Allāh", or "I am a Jew", or "I am a Christian, if I commit such and such act", whether there is expiation for him. Mālik and al-Shāfiʿī said that there is no expiation for him nor is this an oath. Abū Ḥanīfa said that this is an oath and he is liable for expiation if he acts contrary to the oath. This is also the opinion of Aḥmad ibn Ḥanbal.

The reason for their disagreement emanates from their dispute over whether an oath is valid in the name of anything that has sanctity or whether it is not valid without the use of the name of Allāh. Further, does it become effective if sworn? Those who maintained that effective oaths (with legal effects), that is, those pronounced employing the forms of an oath, are the ones sworn in the name of Allāh, the Glorious and Exalted, or by using His other names, said that there is no expiation in it (the oath in question) as it does not amount to

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[345] Qur'ān 5 : 89.

an oath. Those who maintained that oaths become effective through all things whose sanctity is held in high esteem by the law said that there is expiation in this oath. The reason is that an oath for holding something in esteem is the same as an *oath relinquishing the veneration*, and because these things must be held in esteem it follows that their esteem is not to be negated. Thus, as the person who swears an oath about his owing a right of Allāh is bound by it, likewise, the person who swears to negate a due right is bound by it.

11.1.3.3. Issue 3

The jurists agreed about oaths that are not sworn by naming anything but are intended to be binding on the basis of a stipulated condition—like a person saying, "If I do such and such thing I am bound to walk up to the House of Allāh", or "If I do such and such thing my slave is free, or my wife stands divorced"—that they are binding in the case of an undertaking to worship, and also in what is binding by the law, like divorce and manumission. They disagreed over whether there is expiation for such oaths. Mālik held that there is no expiation in such oaths, and if he does not do what he undertook to do he has sinned without doubt. Al-Shāfiʿī, Aḥmad, Abū ʿUbayd, and others held that in this category of oaths there is expiation, except for divorce and manumission. Abū Thawr said that the person who took an oath of manumission must offer expiation. The opinion of al-Shāfiʿī is related from ʿĀʾisha.

The reason for their disagreement comes from whether this is an oath or a vow (*nadhr*). Those who said that it is an oath made expiation obligatory as it falls within the general implication of the words of the Exalted, "The expiation thereof is the feeding of ten of the needy".[346] Those who maintained that it is from the category of vows, that is, a category of things about which the law has stated that if a person imposes them on himself he becomes bound by them, said that there is no expiation in them. This, however, becomes difficult for the Mālikites for they designate these as oaths, but it is possible that they called them oaths in the figurative and wider sense. The truth, however, is that it is not necessary to call them oaths on the basis of the literal connotation, as oath in the usage of the Arabs has specific forms. Oaths are constituted by naming things that are venerated and the forms for stipulating conditions are not the forms for an oath. With respect to whether they have been designated oaths through legal usage and whether their *ḥukm* is the same as that for oaths, is a matter of investigation. This is so as it is established that the Prophet (God's peace and blessings be upon him) said, "The expiation of a vow is the expiation of an oath". The Exalted has said, "O Prophet! Why bannest thou that which Allāh hath made lawful for thee, seeking to please thy wives? And Allāh is Forgiving Merciful. Allāh hath made lawful for you (Muslims) absolution from your oaths (of such a kind), and Allāh is your Protector. He is *the* Knower, *the* Wise".[347] The *apparent meaning of this is that in* terms of the law a statement that was intended to be binding, without any stipulation or an oath, was called an oath. It is, therefore, necessary to construe all statement that run parallel to this as oaths, except those that have been specifically excluded by consensus from these, like divorce. The apparent meaning of the tradition conveys that a vow is not an oath, but its *ḥukm* is the same as that of an oath. Dāwūd and the Ẓāhirites held that such statements are not binding, that is, those expressed with a stipulation, except for those that have been deemed binding by consensus. The reason is that these are not vows so that they may be binding, nor are they oaths so that expiation may remit them. They, therefore, did not make it obligatory for the person who says "If I do such and such thing I am bound to walk up to the House of Allāh", either walk up to the House of Allāh or expiate. This is unlike the statement, "I am under an obligation to walk to the House of Allāh", for this is a vow by agreement. The Prophet (God's peace and blessings be upon him) has said, "One who vows to obey Allāh should obey Him, and one who vows to disobey Him should not disobey Him".

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[346] Qurʾān 5 : 89.

The reason for disagreement about statements that are expressed with a condition stems from whether these are considered oaths or vows, or whether they are considered neither oaths nor vows. Think over this so that it becomes evident, God willing.

11.1.3.4. Issue 4

They had three different opinions about the statement of a person who says, "I swear or I testify that if such and such happens . . ." as to whether it is an oath. It is said that it is not an oath. This is one of the two opinions of al-Shāfiʿī. It is said that it is an oath as opposed to the first opinion. This was held by Abū Ḥanīfa. It is said that if he intended to name Allāh it is an oath, but if he did not intend to name Allāh it is not an oath. This is Mālik's opinion.

The reason for the disagreement is what is to be taken into account: the form (style) of the words or the usual meaning or the intention. Those who gave consideration to the form of the words said that this is not an oath, as there is no mention of a name. Those who considered the form of words used in practice said that this is an oath, without doubt, with a word missing but implied, and that is the name of Allāh, the Exalted. Those who did not consider these two factors and took intention into account, as the words could be valid for both cases, made a distinction in this as has been discussed.

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[347] Qurʾān 66 : 1, 2.

11.2. Chapter 2 Remittance of Binding Oaths and their *Aḥkām*

This chapter is first divided into two parts. The first part is about exemptions. The second is about an examination of (the forms of) expiation.

11.2.1. Part 1: The Examination of Exemptions

There are two sections in this part. The first section is about the conditions that are effective in oaths. The second section is about the identification of oaths in which exemptions are operative and those in which they are not.

11.2.1.1. *Section 1: Conditions of exemptions effective in oaths*

They agreed that exemptions as a whole are effective in the absolution from oaths. They disagreed about the conditions of the exemptions for which such a *ḥukm* is operative, after they had agreed that there are three conditions for the effectiveness of the exemption: first, that it should accompany the oath; second, that it should be expressed; and third, that it should have the intention from the start that the oath will not be effective with the existence of the exemption. They disagreed on these three points, that is, if the exemption is separated from the oath, or when the person intends it but does not express it, or when he intends it to be an exemption later even when he pronounces it along with the oath.

11.2.1.1.1. Issue 1

This issue is about stipulating an exemption immediately after taking an oath. A group of jurists stipulated this condition, and it is the opinion of Mālik. Al-Shāfiʿī said that there is no harm in a brief silence between one and the other, like the silence of a man thinking or taking his breath or clearing his throat. A group of the Tābiʿūn (Successors to the Companions) said that it is permitted to the person swearing an oath to stipulate the exemption (at any time) as long as he has not moved away from the session (of the oath). Ibn ʿAbbās used to say that he has the right to introduce an exemption always, whenever he remembers. All of them agreed that the introduction of an exemption as the will of Allāh (saying if God wills) in the subject matter of the oath with reference to his act, if it is an act, or his relinquishment, if it is relinquishment, would absolve him from the oath, as an exemption does away with the binding nature of the oath. Abū Bakr ibn al-Mundhir said, "It is established that the Messenger of Allāh (God's peace and blessings be upon him) said, 'The person who swears an oath and says, "If God wills", has not violated the oath'".

They disagreed over whether the exemption is effective in an oath if it is not pronounced immediately following the oath; this is because of their dispute over whether an exemption does away with the effectiveness of the oath or whether it prevents the oath from taking effect. If we maintain that it prevents it from taking effect and does not eliminate it later, we would stipulate that it should immediately follow the oath, but if we maintain that it eliminates it, it would not be binding to make this stipulation. Those who agreed that it eliminates the oath disagreed over whether it absolves one from the oath if made shortly after it or even if it is (expressed) much later, as we have recounted. Those who maintained that it eliminates the oath if it follows shortly after, argued on the basis of what is related by Saʿd from Sammāk ibn Ḥarb from ʿIkrima, who said, "The Messenger of Allāh (God's peace and blessings be upon him) said, 'I swear by Allāh that I shall certainly fight the Quraysh'. He repeated this three times and then became silent. He then said, 'If Allāh wills'". This indicates that the exemption does away with the oath and does not prevent it from taking effect. They said that one of the evidences that it does away with the oath if it follows shortly after it is that if it was enough for absolution even if expressed much later, as has been maintained by Ibn ʿAbbās, the exemption would have done away with the need for making expiation (*kaffāra*). What they have said is evident.

11.2.1.1.2. Issue 2[348]

They disagreed about expressing the exemption in words. It is said that the exemption must be made in words, whatever words are used for (expressing) exemptions, and whether they are the words of exemption or those of restricting the generality of the oath or those qualifying an absolute oath. This is the well-known view. It is said that exemption is also valid through intention, only when it is not expressed using the word *illā*, that is, what is indicated by the word *illā*, but it is not valid in the case of other words. This distinction is weak. The reason for this disagreement stems from whether binding contracts become binding by virtue of intention alone to the exclusion of expressions, or by expressions and intention together, as in the case of divorce, manumission, oaths, and others.

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[348] The original text does not consider this as a separate issue and has listed only two issues under this section. The author's discussion at the beginning of the section, however, requires that there be three separate issues. An extra heading has therefore been introduced.

11.2.1.1.3. Issue 3

This issue relates to whether the intention of making the exemption is effective if it comes after the making of the oath. It is said in the School that it is valid if it occurs along with the exemption, and it is said that in fact it is valid if it occurs before the completion of the expression of the oath. It is also said that exemptions are of two kinds: exemption from a number, and exemption from the general implication by restriction or through the qualification of an unqualified meaning. The exemption from a number is not valid if the intention does not occur before the expression of the oath. The exemption from the general implication is valid even after the expression of the oath, if the exemption immediately follows the expression of the oath.

The reason for their disagreement springs from whether the exemption prevents the oath from taking effect or revokes it. If we say that it prevents it from taking effect, then, the stipulation of (the formation of) intention at the beginning of the oath is necessary, but if we say that it revokes it there is no need to stipulate this. ʿAbd al-Wahhāb denied that the (formation of) intention is to be stipulated at the beginning of the (expression) of oath so as to coincide, and he believed that the exemption acts in the same way as expiation for absolution from the oath.

11.2.1.2. *Section 2: Identification of oaths in which exemptions are effective*

They disagreed about oaths in which the stipulation of the will of Allāh as an exemption is effective, as distinguished from those in which it is not. Mālik and his disciples maintained that (the stipulation of) the will of Allāh (as an exemption) is only operative in those oaths that can be atoned through expiation, and these, in their view, are oaths sworn in the name of Allāh, as well as absolute vows that will be discussed in what follows. The exemption may be stipulated only in unconditional divorce and manumission, like saying, "She will be divorced, God willing", or "he will be free, God willing", for these are not oaths in their view. A stipulation of a condition, however, with divorce, like saying, "If such and such thing happens she is divorced, God willing" or "if this happens, he is manumitted, God willing" may also be made. There is no dispute in the school that in the first case the stipulation of the will of Allāh is not effective; but in the second case, which is an oath to divorce, there are two views in the school. The sounder view is that if he relates the exemption to the condition on which the divorce is contingent it is valid, but if he relates it to the divorce itself it is not valid. Abū Ḥanīfa and al-

Shāfiʿī said that the exemption is effective in all these cases, whether he has linked to statement made as a stipulation or to the statement that is expressed as a report.

The reason for disagreement, as we have stated, comes from whether the exemption revokes the oath or prevents it from taking effect. If we say it prevents it from taking effect, and the exemption is associated with the expression of an unconditional divorce, it has no affect on it, since the divorce is effective, I mean, in the case where the man says to his wife that she is divorced, God willing; this is so because the prevention, for a future happening, operates as long as the divorce does not take place. If we maintain that it revokes the oath, it is necessary that it be effective in the divorce even if it occurs. Think over this, for it is evident. The opinion of the Mālikites, that an exemption here is improbable as the divorce has occurred, is meaningless unless they believed that the exemption prevents the oath from taking effect and does not revoke it. Ponder over this, for God willing, it will be evident.

11.2.2. Part 2: The Examination of *Kaffārāt* (Forms of Expiation)

This part has three sections dealing with the fundamentals. The first section is about the cause of violation of the oath, its conditions and *aḥkām*. The second section is about atonement for the violation, and these are the various forms of expiation. The third section is about the time for atonement and the amount that achieves it.

11.2.2.1. *Section 1: The cause of violation, its conditions, and* aḥkām

They agreed that the cause of violation is opposition to the object of the oath. This is either an act that the person swearing the oath was to avoid or it is the failure to do what he swore to do, knowing that he has delayed the commission of the sworn act to a time in which it is not possible for him to perform it. This occurs in the oath of unqualified relinquishment, like his saying that he would certainly eat a particular loaf, which is then eaten by someone else, or he may postpone the act till a time that is not the time that he stipulated for its fulfilment. This occurs in an act for which a limited time has been stipulated, like his saying, "By Allāh, I will perform such and such act today", and if the day is over and he has not done so he has certainly violated the oath.

They disagreed over this subject on four points. The first is when he (the person swearing the oath) does the opposite of what he swore to do, out of forgetfulness or under duress. The second is whether the object of the oath is related to the minimum to which its name applies or to the whole. The third point is whether the oath relates to a synonym of the word expressed in the oath or to its specific connotation, and whether it extends beyond it. The fourth point is whether the oath is construed in accordance with the intention of the person swearing it or the intention of the person for whom it is sworn.

11.2.2.1.1. Issue 1

Mālik maintained that the person forgetting, and the person coerced, have the same status as the person acting intentionally, while al-Shāfiʿī maintained that there is no liability for violation for the person forgetting or for one coerced. The reason for their disagreement stems from the conflict of the general implication of the words of the Exalted, "But He will take you to task for the oaths that ye swear",[349] where no distinction has been made between a person acting intentionally or one forgetting, and between the general implication of the saying of the Prophet (God's peace and blessings be upon him), "Liability for forgetfulness and what they have been coerced to do has been lifted from my *umma*". It is quite possible that these two general implications restrict each other.

11.2.2.1.2. Issue 2

This is the case of a person who swears that he would not perform a certain act, and then does part of it, or that he would perform an act but does not perform part of it. In Mālik's view if he said, "I will certainly eat this loaf", and then eats part of it he is not absolved unless he eats the whole of it, and if he said, "I will not eat this loaf", he violates the oath if he ate part of it. According to al-Shāfiʿī and Abū Ḥanīfa he does not violate the oath in either case, on the basis that the word is applicable to part of its meaning. Mālik's distinction between the commission and omission in this is not based upon a single principle, as he adopted for omission the minimum to which the name applies and adopted in the commission the application of the name to the whole. It appears that he was being cautious.

11.2.2.1.3. Issue 3

This is the case where a person swears to perform a specific act, but the implied intention is understood as meaning something wider than the specified act, or it is understood as implying a narrower meaning, or he swears to perform an act but forms an intention for a wider, or for a narrower, implication, or that the act specified is referred to by two different terms one of them being literal and the other technical, where one of them is more restricted than the other. Now, if he swore to perform a specific act he does not violate the oath, in the view of al-Shāfiʿī and Abū Ḥanīfa, except by doing the opposite with respect to this act, which is the subject-matter of the oath, even when the implied meaning is wider or narrower in terms of the technical meaning. Likewise, insofar as I know, they do not take into account an intention contrary to the specified act, and they take into account the expressed words alone.

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[349] Qurʾān 5 : 89.

The well-known opinion from Mālik is that the primary consideration, in his view, is for intention, for oaths in which no decision is to be rendered on their basis against the person swearing the oath. If that (the intention) is missing the context is to be taken into account, and in its absence the technical meaning of the expressed words is considered, and when that is absent the literal meaning is taken into account. It is, however, said that consideration is to be given to intention alone or to the apparent meaning of the words. It is also said that only the intention and the obvious circumstances are to be taken into account and no consideration is to be given to the technical meaning. In oaths, on the basis of which a decision may be rendered for the deponent, if the deponent comes seeking a verdict, the *ḥukm* for the oath is that of the oath in which a decision is not to be rendered against the deponent (that is) with respect to the consideration given to these things in that order. If the oaths are those on the basis of which a decision is to be rendered against him (when he is not the plaintiff) nothing but the apparent meaning is to be taken into account, unless there is corroborating evidence in the accompanying circumstances or in the technical meaning, for an intention contravening the apparent implication, which he claims to have formed.

11.2.2.1.4. Issue 4

They agreed that in claims (litigation) oaths are to be construed in conformity with the intention of the person seeking the oath (the opponent). They disagreed about other cases, like oaths in the case of promises, with a group of jurists saying that they are construed according to the intention of the deponent, and another group saying that they are construed in accordance with the intention of the person seeking the oath. It is established that the Messenger of Allāh (God's peace and blessings be upon him) said, "The oath is to conform to the intention of the person seeking the oath", and he (God's peace and blessings be upon him) also said, "Your oath is for what your companion will attest (as being the truth from you)". These two traditions have been recorded by Muslim. Those who maintained that the (construction of the) oath is dependent upon the intention of the deponent took into account the meaning assigned to the oath itself in the mind (of the deponent) and not the apparent meaning arising from the words.

In this topic there are a number of individual cases, but these four issues serve as the principles of the topic, as all the disagreement occurring in the topic can be referred back to them. For example, their disagreement about the case of the person who swears that he will not eat heads and then eats heads of whales, whether he has violated the oath. Those who took into account the technical meaning said that he has not, while those who took into account the connotations of the words said he has. Another example is that of the person who says that he will not eat meat and then eats fat. Those who considered the literal meaning of the word said that he has not violated the oath, while those who gave weight to the metaphorical meanings said that he has violated the oath.

Their disagreement, on the whole, in individual cases that fall under this heading refers to their disagreement over the four issues that we have mentioned, and also refers to their disagreement about the meanings of words used in the oath, as some of these are imprecise (*mujmal*), some apparent (for one out of several meanings), and some are unequivocal.

11.2.2.2. *Section 2: The remittance of violation*

They agreed that expiation for an oath has four forms that have been laid down by Allāh in His Book, in the words of the Exalted, "The expiation thereof is the feeding of ten of the needy with the average of that wherewith ye feed your own folk, or the clothing of them, or the liberation of a slave, and for him who findeth not (the wherewithal to do so) then a three days' fast".[350] The majority maintain that if the person swearing the oath violates it he has a choice between three of them, that is, feeding, clothing, and manumission, and that it is not permitted to him to fast unless he is unable to undertake (any of) these three, because of the words of the Exalted, "And for him who findeth not (the wherewithal to do so) then a three days' fast".[351] It is, however, related from Ibn ʿUmar that when the oath was for a solemn affair he used to set free a slave or provide clothing, and when it was not for something important he used to provide food.

They disagreed in this over seven well-known issues. The first issue is about the quantity of food to be given to each of the ten needy persons. The second is about the kind of clothing, when he chooses to provide it, and about the number (of garments). The third is about the stipulation of consecutive observance of the fasts of three days. The fourth is the stipulation of the number of the needy. The fifth is about the stipulation of being a Muslim and free as their qualifications. The sixth is about the stipulation of absence from defects in the manumitted slave. The seventh is about the stipulation of belief (an Islam) for the slaves.

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[350] Qurʾān 5 : 89.

[351] Qurʾān 5 : 89.

11.2.2.2.1. Issue 1

About the quantity of food, Mālik, al-Shāfiʿī, and the jurists of Medina said that each needy person is to be given one *mudd* of wheat in accordance with the *mudd* used by the Prophet (God's peace and blessings be upon him), except that Mālik said that the (restriction of one) *mudd* is specific to the people of Medina because of the restricted means of their livelihood, and all other cities are to base it upon the average quantity and quality of their food. Ibn al-Qāsim said that the *mudd* is to be used in each city, and this was the same as al-Shāfiʿī's opinion. Abū Ḥanīfa and his disciples maintained that they are to be given one-half *ṣāʿ* of wheat, or one *ṣāʿ* of barley or dried dates. They said that if he chooses to feed them lunch and dinner it is valid.

The reason for their disagreement over this stems from their dispute about the interpretation of the words of the Exalted, "The average of that wherewith ye feed your own folk",[352] whether it means one meal or the food of one day, which is lunch and dinner. Those who maintained that it is one meal said it is a *mudd* to satisfy the average appetite, while those who maintained that it is lunch as well as dinner said that it is one-half *ṣāʿ*. There is another reason for their dispute and that arises from the vacillation of this expiation between being the expiation of the intentional breaking of a fast during Ramaḍān and between the expiation for the elimination of an ailment (from the head during *ḥajj*). Those who held it to be similar to the expiation for breaking the fast said that it is one *mudd*, while those who held it to be similar to the expiation for removing an ailment said that it is one-half *ṣāʿ*.

They disagreed over whether there should be with bread something appetizing that is eaten with it (*idām*), and if it is to be there what is its quantity? It is said that plain bread is valid. Ibn Ḥabīb said that it is not valid. It is said that the average kind of *idām* is oil, while it is said that it is milk, butter, and dates.

Mālik's disciples differed about the people to whom average food has been attributed, in the words of the Exalted, "The average of that wherewith ye feed your own folk".[353] It is said that it is (the average for) the people of the person making the expiation, and on these grounds the average is to be worked out on the basis of the thing that forms his livelihood, if it is some sort of pulse, like peas, beans, or lentils, it is to be based upon it, and if it is wheat it is to be based upon wheat. It is also said that the average food is that of the residents of the land in which he lives, and on this basis the consideration for what is due from him is given to the living standard of the land, generally, and not his own standard of living. On the basis of these two opinions the average quantity of food, that is "the average of that wherewith ye feed your own folk", is interpreted to be the average for his folk, or the average for the residents of the land of his folk, except in the specific case of Medina.

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[352] Qur'ān 5 : 89.

[353] Qur'ān 5 : 89.

11.2.2.2.2. Issue 2

This issue is about the kind of clothing that is deemed sufficient. Mālik said that the obligation in this is to clothe them with garments in which prayer can be validly performed. Thus, if he gives men clothing comprising one garment and to women clothing comprising two garments covering their body and acting as a veil (it is valid). Al-Shāfiʿī and Abū Ḥanīfa said that the minimum to which the term is applied as being valid is a loincloth or shirt or trousers and a turban. Abū Yūsuf said that neither a turban nor trousers is valid. The reason for their disagreement stems from whether the obligation is to adopt the minimum literal implication or to adopt the technical meaning in the law.

11.2.2.2.3. Issue 3

This issue is about their disagreement over whether the observance of the fasts for three days is to be consecutive. Mālik and al-Shāfiʿī did not stipulate consecutive observance for this, though they considered it desirable, but Abū Ḥanīfa did stipulate it. There are two reasons for their disagreement over this. The first is whether it is permitted to act upon a variant reading that is not in the (popular and unanimously sound) *muṣḥaf*?[354] This is so as the reading of Ibn Masʿūd contains the words, "then three days of consecutive fasts". The second reason arises from their dispute over whether an unqualified command for fasting can be interpreted to mean consecutive fasting, as the principle in obligatory fasting prescribed by law is consecutive observance.

11.2.2.2.4. Issue 4

This is about the stipulation of the number of needy persons. Mālik and al-Shāfiʿī said that expiation is not valid for him unless he feeds ten (separate) needy persons. Abū Ḥanīfa said that it is valid if he feeds one needy person for ten days. The reason for their disagreement is whether there is in expiation a claim of the stated number of needy persons or whether it is a duty of the person making the expiation so that he may estimate the food for the number. If we say that it is a duty owed to a number like those in a bequest, then, it is necessary to stipulate the number, but if we say that it is the duty of the person making the expiation and if he estimated according to the number it is valid for him to feed one person with the amount required for the stated ten. The issue, however, is subject to interpretation.

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[354] The written copy of the Qurʾān.

11.2.2.2.5. Issue 5

The fourth issue is about the stipulation of being a Muslim and free (as qualifications) for the needy persons. Mālik and al-Shāfiʿī stipulated both conditions, but Abū Ḥanīfa did not. The reason for their disagreement arises from whether the entitlement to charity is on the basis of poverty alone, or because of Islam? The transmitted texts have indicated that there is reward for charity (not the *zakāt*) given to a poor person who is not a Muslim. Those who held expiation to be similar to *zakāt* and being obligatory for the Muslims stipulated that the alms of the expiation are to be given to a needy person who is a Muslim. Those who held it to be similar to voluntary alms permitted that it be given to non-Muslims.

The reason for their disagreement over the case of the slaves is whether need applies to them, as they are provided for by their masters in the usual cases, or whether they are to be counted amongst those who are to be provided for. Those who took into account poverty alone said that freemen and slaves are equal in this respect, for there could be slaves who are kept hungry by their masters. Those who upheld his obligatory right over others by law said that it is obligatory for the master to take care of his slaves, and this is to be enforced against him, and if he is hard up he is to be forced to sell his slave; therefore, the slaves are not in need of support from the alms of expiation and other similar alms.

11.2.2.2.6. Issue 6

Whether the slave (whose emancipation is an alternative form of expiation) is to be free from defects. The jurists of the provinces stipulated that freedom from defects is a condition as this influences the price. The Ẓāhirites said that this is not one of the conditions. The reason for their disagreement is whether it is necessary to adopt the minimum of what is implied by a noun or whether to apply it to the perfect form indicated by it.

11.2.2.2.7. Issue 7

This issue is about the stipulation of belief in Islam (as a qualification) for the slave. Mālik and al-Shāfiʿī stipulated this, while Abū Ḥanīfa permitted that the slave be a non-believer. The reason for their disagreement stems from whether an unqualified meaning is to be construed in the qualified sense for things that are similar with respect to the *aḥkām* although they have different causes, as in the case of this expiation in comparison with the expiation for imprecation (*ẓihār*). Those who maintained that the absolute is to be construed in its qualified meaning in this case stipulated belief in this by construing this through its stipulation in the case of the expiation of *ẓihār*, in the words of the Exalted, "Then (the penance) is to set free a believing slave".[355] Those who maintained that it is not to be qualified retained the implication of the word in its absolute meaning.[356]

11.2.2.3. *Section 3: The time for the remittance of the oath and its violation*

They disagreed about the time when the expiation remits the violation and erases its effect. Al-Shāfiʿī said that when he makes the expiation, whether he does so after the violation or before it, the sin is remitted. Abū Ḥanīfa said that the violation is not remitted except by the expiation that is made after the violation not before. Both opinions have been related from Mālik on the issue.

There are two reasons for their disagreement. The first is the variation in the narration of the saying of the Prophet (God's peace and blessings be upon him), "He who swears an oath [for doing something] and then sees something that is better than it he should do that which is better and make expiation for his oath". One group narrated it in this form, while another related it as, "He should make an expiation for his oath and do that which is better". The apparent meaning in the second narration is that expiation may be made before the violation, and the contrary meaning is found in the first version. The second reason arises from their dispute over whether the advancement of a duty before its due time is valid, as it is obvious that expiation becomes due after the violation, like (the payment of) *zakāt* becomes obligatory after the passage of a year. It may be said that expiation becomes due with the intention of violation and the determination to undertake it, as is the case in the expiation of *ẓihār*, therefore, no contradiction is found from this aspect.

The reason for disagreement by way of reasoning was whether expiation remits the sin after it occurs or it prevents it from taking effect. Those who said that it prevents it from taking effect permitted its advancement over the violation, while those who said that it remits it (after its occurrence) did not permit it, except after its occurrence.

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[355] Qurʾān 4 : 92. This verse does not apply to *ẓihār*, but to homicide (*qatl*). The verse governing *ẓihār* is 58 : 3, which reads, "(The penalty) in that case (is) the freeing of a slave before they touch one another". What the author points out here is that despite the verse of *ẓihār* some jurists tried to extend the stipulation of the "belief" of the slave over to the issue of *ẓihār*. In other words, they attempted to qualify the unqualified meaning in the verse of *ẓihār*. What he appears to be saying is that a disagreement similar to the one existing over the faith of the slave in the case of imprecation is also to be found in this case. The source for the qualified meaning is found in the verse of homicide, which the author quotes. Please refer to the section on *ẓihār*.

[356] That is, in the Qurʾānic verse 5 : 89.

They agreed, as far as I know, about the number of expiations arising from swearing a number of oaths, that the person who swears to do different things through a single oath is to make expiation for a single oath. Likewise, as far as I think, there is no dispute amongst them that if he swears different oaths for doing the same thing the obligatory expiations for this correspond to the number of oaths, like the person swearing different oaths for different things. They disagreed, however, when he swears many times to do the very same thing. A group of jurists said that the expiation is that which applies to one single oath. Another group of jurists said that there is to be expiation for each of the oaths sworn, unless the intention was to emphasize the fact. This is Mālik's opinion. A third group of jurists said that there is a single expiation for it, unless he wanted to attach solemnity to the oath.

The reason for the disagreement derives from whether the cause for the multiplicity of expiations is the multiplicity of oaths by category or by count. Those who maintained that the distinction is based on count said that for each oath there is expiation if it is repeated. Those who maintained that the distinction is based upon category said that in this (disputed) issue there is a single expiation.

They disagreed over when he swears a single oath by using more than one attribute out of the attributes of Allāh as to whether the number of expiations should correspond to the number of attributes included in the oath or whether there is a single expiation for this. Mālik said that the expiations in this oath vary according to the number of attributes. Thus, the person who swears by "The Hearer", "The Knower", and the "The Wise", is liable for three expiations in his view. A group of jurists said that if he intends it to be a continuous expression and enumerates these as a single statement there is a single expiation for him if there was one oath.

The reason for their disagreement is the criterion for judging single or multiple oaths and this refers to the form of speech or to the number of things enumerated in the speech that is expressed as an oath. Those who took into account the form of speech said that there is one expiation, while those who considered the number of things included in the expression which can be sworn to individually, said that the expiations vary according to the number.

This is sufficient for stating the fundamentals of this book and for the reasons for disagreement in it. Allāh provides support through His mercy.

XII

THE BOOK OF *NUDHŪR* (VOWS)

There are three sections in this book. The first section is about the types of vows. The second section is about vows that are binding and those that are not, and about their *aḥkām* generally. The third section is about the identification of the duty that becomes binding through them and about its *aḥkām*.

12.1. *Section 1: The types of vows (nudhūr)*

Vows are divided into two categories. One category is (considered) from the aspect of expressions and the other from the aspect of things (objects) for which a vow is made. From the aspect of the form of the expression used it is of two types: absolute, and this is expressed in the form of a report, and qualified, which is expressed as a conditional statement. The absolute is of two sub-types: manifest in terms of the object of the vow and that which is not manifest. The first is like the statement of a person: "For Allāh, I vow to perform the *ḥajj*". The second is like the statement, "For Allāh, I am bound by a vow", in which the object of the vow is not stated. It is possible that in the first he may not mention the word "vow" or he may mention it, like his statement: "For Allāh, I am bound to perform *ḥajj*". When the object is qualified through a condition it is like the statement, "If such and such happens, I am bound by a such and such vow for Allāh, and I undertake to do such and such thing". In this he might make it contingent upon an act of Allāh, like saying that if Allāh cures his illness he would be bound by a certain vow, or he might make it contingent upon his own act, like saying that if he performed a certain act he would be bound by a certain vow. These are what the jurists term as oaths, and it was stated in our discussion that preceded that these are not (real) oaths. These are the vows with respect to the forms of expression used.

The types (of *nadhr*) from the aspect of things that constitute the category of objects of vows are of four sub-types: a vow for things that belong to the category of worship; a vow for things that belong to the category of disobedience; a vow for things that belong to the disapproved category; and a vow for things belonging to the permissible category. These four sub-types are divided into two kinds: vows for omission of the act and vows for the commission of the act.

12.2. *Section 2: Binding and non-binding vows*

With respect to what is binding and what is not binding out of these vows, they agreed upon the binding nature of the absolute vow for worship, except what is related from some disciples of al-Shāfiʿī that an absolute vow is not valid. They agreed about the binding form of the absolute vow when it is made willingly and not under pressure, and when the word *nadhr* is used explicitly in it, irrespective of whether the object of the vow is explicitly mentioned in it. Likewise, they agreed about the binding nature of the vow that is made contingent upon a condition, when it is a vow related to worship.

They agreed about the binding nature of vows on the basis of the general implication of the words of the Exalted, "O ye who believe! Fulfil your undertakings",[357] and also because Allāh has declared it commendable, as in His words, "(Because) they perform the vow and fear the day whereof the evil is wide-spreading".[358] Further, He has threatened to inflict punishment for its violation, saying, "And of them is he who made a covenant with Allāh (saying): If He give us of His bounty We will give alms and become of the righteous. Yet when He gave them of His bounty, they hoarded it and turned away, averse; So He hath made the consequence (to be) hypocrisy in their hearts until the day when they shall meet Him, because they broke their word to Allāh that they promised Him, and because they lied".[359]

The reason for their disagreement over the express use of the word *nadhr* in the absolute vow stems from their dispute whether a vow becomes operative because of intention as well as the expression taken together or by intention alone. Those who maintained that it becomes obligatory with both taken together (said that) if he says, "I am obliged to do such and such for Allāh", and he does not mention the words "as a *nadhr*", he is not bound by anything, as it is merely a report about the obligation of a thing that Allāh has not made obligatory for him, unless he expressly mentions it as an obligation. Those who maintained that the (express use of the) words is not a condition for it said that the vow is constituted even if he does not mention the words explicitly. This is Mālik's opinion, that is, if he does not use the word *nadhr* explicitly. He maintained that this vow is binding, although it is his opinion that a vow is not binding without words and intention, however, he held that the absence of the word *nadhr* in the statement is of no consequence, as the purpose of statements that are expressed as vows (is obvious) even though the word *nadhr* has not been used. This is the opinion of the majority of the jurists, while the first opinion is that of Saʿīd ibn al-Musayyab.

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[357] Qurʾān 5 : 1.
[358] Qurʾān 76 : 7.
[359] Qurʾān 9 : 75.

It appears that those who did not uphold the binding nature of an absolute vow did so because they construed the command for compliance to imply a recommendation. The same is the case for those who stipulated consent in it, as they stipulated it because the desire to attain nearness to Allāh is fulfilled by way of choice and liberty, and not under pressure. This is al-Shāfiʿī's opinion. In Mālik's view, on the other hand, a vow is binding in whatever way it is made.

This is what they disagreed about with respect to its binding nature from the aspect of the words used. The disagreement that they had with respect to its binding nature from the aspect of the things (acts) that are the object of the vow is covered in two fundamental issues.

12.2.1. Issue 1

They disagreed about the person who vows to undertake an act of disobedience. Mālik, al-Shāfiʿī, and the majority of the jurists said that he is not bound by it in any way. Abū Ḥanīfa, Sufyān, and the Kūfīs said that it is binding, and the binding part in this for them is the expiation for an oath, not the commission of the act of disobedience.

The reason for their disagreement springs from the conflict of the apparent meaning of the traditions on the topic. Two traditions have been related in this subject. The first is the tradition of ʿĀʾisha from the Prophet (God's peace and blessings be upon him), who said, "He who vows to obey Allāh should obey Him, but he who vows to disobey Him should not disobey Him". The apparent meaning of this tradition is that the vow of disobedience is not binding. The second is the authentic[360] tradition of ʿImrān ibn Ḥuṣayn and the tradition of Abū Hurayra from the Prophet (God's peace and blessings be upon him), that he said, "There is no vow in disobeying Allāh and its expiation is the expiation for an oath". This is explicit in the sense of being binding. Those who reconciled the two for this meaning said that the first tradition contains the directive that disobedience is not binding, and this second tradition includes the obligation of expiation. Those who preferred the apparent meaning of ʿĀʾisha's tradition, as the traditions of ʿImrān ibn Ḥuṣayn and Abū Hurayra did not prove to be authentic for them, said that there is no obligation in a vow of disobedience. Those who adopted the method of reconciliation imposed in it the expiation for an oath. Abū ʿUmar ibn ʿAbd al-Barr said: The traditionists deemed this particular tradition related through both ʿImrān ibn Ḥuṣayn and Abū Hurayra to be weak, saying, "Because (the *isnād* of) the tradition of Abū Hurayra revolves around Sulaymān ibn Arqam and his traditions are rejected, while (the *isnād* of) the tradition of ʿImrān ibn Ḥuṣayn revolves around Zuhayr ibn Muḥammad from his father, and his father is unknown from whom none besides his son have related. Zuhayr himself relates *munkar* (denied) traditions. Muslim, however, has recorded this tradition from ʿUqba ibn ʿĀmir".

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[360] The author contradicts this himself a few lines down. It is apparently an error on the part of the scribe as this is the usual terminology used by the author for all authentic traditions unless the text reads as "attributed to" instead of "authentic", which appears more likely.

It was the practice of the Mālikites to argue on the basis of what he related "that the Messenger of Allāh (God's peace and blessings be upon him) saw a man standing in the sun and asked, 'What is his problem?' They said, 'He made a vow that he would not speak, nor seek the shade, nor sit, and he would continue to fast'. He said, 'Go and order him to speak and sit and complete his fast'. They said that he ordered him to perform what was in obedience to Allāh and to relinquish what was disobedience". It is, however, not apparent that giving up speech (as in this tradition) is an act of disobedience. Allāh has communicated (in the Qurʾān) that this was a vow made by Maryam. It also appears that standing in the sun is not an act of disobedience, except insofar as it is related to the infliction of pain on the self. If it is claimed that there is disobedience in this it can only be so by way of analogy and not on the basis of the text. It is originally a permissible act.

12.2.2. Issue 2

They disagreed about the person who prohibits for himself things that are permissible. Mālik said that this is not binding on him, except in the case of a wife. The Ẓāhirites said that there is no rule for this. Abū Ḥanīfa said that there is the obligation of the expiation of an oath in this case.

The reason for their disagreement arises from the conflict of juristic reasoning with the apparent meaning of the words of the Exalted, "O Prophet! Why bannest thou that which Allāh hath made lawful for thee, seeking to please they wives?"[361] This is so as a vow is not constituted in opposition to the *ḥukm sharʿī*, that is, as regards prohibiting what is permissible and permitting what is prohibited, because the jurisdiction over this belongs to the Lawgiver. It, therefore, follows from such an understanding that whoever prohibits for himself something that Allāh has permitted by law is not bound by it, just as he is not bound by a vow permitting something that has been prohibited by the law. The apparent meaning of the words of the Exalted, "Allāh hath made lawful for you (Muslims) absolution from your oaths (of such a kind), and Allāh is your Protector. He is the Knower, the Wise",[362] is that the affect of censure on prohibition gives rise to expiation for absolution from this declaration. If that is the case such a vow is not binding.

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[361] Qurʾān 66 : 1.

The first group interpreted the prohibition mentioned in the verse to mean that it was the swearing of an oath. They disagreed over the occasion for which this verse was revealed.[363] In the book by Muslim this was in the case of drinking honey, and there is a report from Ibn ʿAbbās, who said, "If a person prohibits his wife on himself it amounts to an oath that is remitted by expiation". He said, "There is for you in the example of the Messenger of Allāh an excellent model".

12.3. *Section 3: Things that become binding in vows and their* aḥkām

There is extensive disagreement among the jurists over what becomes binding in each individual vow, but we will only point out the well-known issues in this, and most of these are related to express provisions of the law, as has been our practice in this book. There are five issues here.

12.3.1. Issue 1

They disagreed about the obligation in an unqualified vow, in which the person making it does not identify any act except for saying, "I am bound by a vow for Allāh". Many of the jurists have held that there is expiation for an oath in this and nothing more. A group of jurists said that in fact there is for this the expiation of *ẓihar*. One group of jurists said that the minimum to which this name (*nadhr*) applies is the fast of one day or observance of two *rakʿas* of prayer.

The majority of the jurists decided in favour of the obligation of expiation in this because of the authentic tradition of ʿUqba ibn ʿĀmir that the Prophet (God's peace and blessings be upon him) said, "The expiation for a vow is the expiation for an oath". It has been recorded by Muslim. Those who maintained that the obligation is for a day's fast or prayer of two *rakʿas* did so by adopting the opinion that the valid performance is based upon the minimum implication of the term, and praying two *rakʿas* or fasting for one day is the minimum to which the term *nadhr* applies. Those who said that the obligation here is for the expiation of *ẓihār* has asserted something outside the ambit of analogy and the transmitted texts.

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[362] Qurʾān 66 : 1.

[363] This appears to be the reason why the author did not use this verse in the previous issue concerning the obligation of expiation for vowing to commit an act of disobedience. The reasoning may be that if there is expiation for the remittance of a vow for prohibiting something that is permitted; then surely there must be expiation for vowing to commit an act of disobedience, an act which appears to be more grievous. The answer, as the author is indicating, is that this is the case of an oath, while that was the case of a vow.

12.3.2. Issue 2

They agreed about the binding nature of a vow for walking to the House of Allāh, that is, if the person vows to go on foot. They disagreed over when he is unable to do so for part of the way. One group of jurists said that there is no obligation upon him, while another said that there is. The latter disagreed over his liability and had three opinions. The jurists of Medina said that he is to walk a second time from the place where he was unable to continue, and if he likes he may ride, which would be valid but he would be liable for atonement by sacrificing an animal (*dam*). This is related from ʿAlī. The jurists of Mecca said that he is liable for making an offering but not for making further attempts to walk. Mālik said that he is liable for both, that is, he is to return and walk from where it is obligatory and he is also to make an offering. The offering in his view is a she-camel or a cow, but if he does not find a cow or she-camel then a goat.

The reason for disagreement stems from the clash of principles and the conflict of traditions. This is so as those who held the person walking a second time to be similar to the *mutamattiʿ* or *qārin* (in *ḥajj*), because the *qārin* does in one journey what he was required to do in two and this person does in two journeys what he was obliged to do in one, said that he is liable for the offering made by the *mutamattiʿ* or the *qārin*. Those who held his case to be similar to all other acts of *ḥajj* that may be compensated by slaughtering an animal said that he is liable for *dam*. Those who adopted the traditions laid down on the subject said that if he is unable to do so there is no liability for him. Abū ʿUmar said that the authentic *sunan* laid down on this are an evidence for the avoidance of hardship, and one of these, as he said, is the tradition of ʿUqba ibn ʿĀmir al-Juhanī, who said, "My sister vowed to walk to the House of Allāh, the Lofty the Glorious, so she directed me to seek a ruling for her from the Messenger of Allāh (God's peace and blessings be upon him). I sought the ruling for her from the Prophet (God's peace and blessings be upon him), and he said, 'She may walk and she may ride'". It is recorded by Muslim. The tradition of Anas ibn Mālik is "that the Messenger of Allāh (God's peace and blessings be upon him) saw a man leaning on his two daughters. He asked about him and they said, 'He made a vow to walk'. The Prophet (God's peace and blessings be upon him) said, 'Allāh is not in need of this man's tormenting himself.' He then ordered him to ride". This too is an authentic tradition.

12.3.3. Issue 3

After agreeing about the obligation of walking during *ḥajj* and *ʿumra*, they disagreed over the case of the person who vows to walk to the Mosque of the Prophet (God's peace and blessings be upon him) or to the *Bayt al-Maqdis* (in Jerusalem) with the intention of praying there. Mālik and al-Shāfiʿī said that walking there is binding upon him. Abū Ḥanīfa said that it is not binding upon him and wherever he prays is counted as a valid substitute. In his view the same is the case about vowing to pray in the *Masjid al-Ḥarām*, but he upholds the obligation of walking to the *Masjid al-Ḥarām* for purposes of *ḥajj* or *ʿumra*. Abū Yūsuf, his disciple, said that the person who vows to pray in the *Bayt al-Maqdis* of in the Mosque of the Prophet (God's peace and blessings be upon him) is bound by his vow, but if he prays in *al-Bayt al-Ḥarām* it is to be considered sufficient (as a substitute). Most of the jurists maintain that vows for praying in mosques other than these three are not binding, because of the saying of the Prophet (God's peace and blessings be upon him), "A journey should not be undertaken except for three", and he mentioned *al-Masjid al-Ḥarām*, his own mosque, and the *Bayt al-Maqdis*. Some of the jurists maintain that a vow for visiting mosques in which greater merit is to sought is binding. They argued for this on the basis of the verdict issued by Ibn ʿAbbās for the son of a woman, who vowed to walk up to the mosque at Qubāʾ (close to Medina) but died, that he should do it on her behalf.

The reason for their disagreement over vows for mosques other than *al-Masjid al-Ḥarām* derives from their dispute over the meaning of undertaking a journey to these three mosques whether this is for observing obligatory prayers or supererogatory prayers in them. Those who maintained that this is for obligatory prayers and obligatory prayers in their view cannot be the object of a vow, as they are obligatory by law, said that a vow for walking up to these two mosques is not binding. Those for whom a vow can be made for an obligation or that the person can also vow to observe supererogatory prayers in these two mosques, because of the saying of the Prophet (God's peace and blessings be upon him), "A prayer in this mosque of mine is better than a thousand prayers in other mosques, except for *al-Masjid al-Ḥarām*", and because the term *ṣalāh* includes both obligatory and supererogatory prayers, said it is obligatory. Abū Ḥanīfa, however, interpreted this tradition to mean obligatory prayers, deciding on the basis of a reconciliation between this (tradition) and the saying of the Prophet (God's peace and blessings be upon him), "A prayer by one of you in his house is better than his prayer in this mosque of mine, except for the prescribed prayers", otherwise a contradiction would arise between these two traditions. This issue, though it is related to the second section, is better discussed here.

12.3.4. Issue 4

They disagreed about the case of a person who vows to sacrifice his son at the station of Abraham. Mālik said that he is to sacrifice a camel as reparation for him (his son). Abū Ḥanīfa said that he is to sacrifice a sheep, and this is also related from Ibn ʿAbbās. Some of the jurists said that he is to sacrifice a hundred camels, while others said that he is to make an offering of his blood-money (*diya*), and this is related from ʿAlī. Some of them said that he is to perform *ḥajj* together with his child. Abū Yūsuf and al-Shāfiʿī said that there is no liability for him, as it is an act of disobedience and there is no vow for disobedience.

The reason for their disagreement stems from the story of Ibrāhim (God's peace and blessings be upon him), that is, whether the way Ibrāhīm made his offering is binding upon all Muslims. Those who maintained that this is a law that was specific to Ibrāhīm said that the vow is not binding. Those who maintained that it is binding for us said that the vow is binding. The disagreement is the well-known dispute over whether the law for those before us is binding on us, but another disagreement impinges upon this. The apparent meaning of this act is that it was specific to Ibrāhīm and it was not a law for the people of his age, and on the basis of this it is not necessary that there be a dispute whether it is law for us. Those who maintained that it is law for us differed over the obligation arising from it with reference to the dispute whether the obligation in it is to be considered an obligation for Ibrāhīm or it is to be interpreted to mean one of the Islamic ways of attaining nearness (to Allāh). This would be (achieved) by making a charity of his blood-money, or by performing *ḥajj* with the child, or by an offering of a *badana*. Those who said that there are one hundred camels for it adopted the tradition of ʿAbd al-Muṭṭalib (when he vowed to offer his son ʿAbd Allāh, but was advised to offer one hundred camels instead).

12.3.5. Issue 5

They agreed that the person who vows to give his entire wealth in the way of Allāh or in a manner that denotes piety is bound by it, and there is no remittance for it through expiation. This is the case when the vow is in the form of a report and not a stipulation, which is what they call oath. They disagreed about the person who vows to do this contingent upon something, like his saying, "My wealth is for the needy if I do such and such thing", and then he does it. A group of jurists said that this is binding like a vow in the form of a report and there is no expiation for it. This is Mālik's opinion in the case of vows that are expressed in such forms, that is, there is no expiation in them (for remittance). Another group of jurists said that the obligation in this case is only for the expiation of an oath. This is al-Shāfiʿī's opinion for vows that are made contingent upon other acts, as he linked them to the *ḥukm* for oaths. Mālik, however, linked them to the *ḥukm* of vows, as has preceded in our discussion in the Book of Oaths.

Those who upheld the obligation of his spending his wealth in the manner that they adopted, disagreed about the extent of his liability. Mālik said that he is to give away only one-third of his wealth. A group of jurists said that in fact he is under an obligation to give away his entire wealth. This was maintained by Ibrāhīm al-Nakhaʿī and Zufar. Abū Ḥanīfa said that he is to give away all his wealth that is subject to *zakāt*. Some of them said that if he gives away an amount equal to the *zakāt* levied on his wealth it is sufficient. There is a fifth opinion on this, namely that if his wealth is abundant he is to pay a fifth, if it is average he is to give a seventh, and if it is a small amount he is to pay a tenth of it. The limit they fixed for abundant wealth was two thousand, for average wealth one thousand, and for a meagre sum it was five hundred. This is related from Qatāda.

The reason for their disagreement on this issue, that is, among those who said that all the wealth is to be given away in its entirety or one third of it, arises from the conflict of a principle of this topic with a tradition. It is related in the tradition of Abū Lubāba ibn ʿAbd al-Mundhir who sought the forgiveness of Allāh and decided to give in charity all his wealth. The Messenger of Allāh (God's peace and blessings be upon him) said, "A third of it is sufficient for you", and that is the governing opinion in Mālik's school. The principle requires that he is bound to give all his wealth in the light of the remaining vows, that is, it is obligatory for him to abide by it in the manner that he intended. It is necessary, however, to exempt this issue from this principle, as the text has exempted it, except that Mālik did not follow his principle in this issue. This is so as he said: If he swears an oath or vows to do a specific thing it is binding upon him, even if it is his entire wealth. Likewise, it is binding for him if he specified a part of his wealth that is more than a third. This is in conflict with the text related in the tradition of Abū Lubāba, and also with the saying of the Messenger of Allāh (God's peace and blessings be upon him) "to the person who came with gold equal to the weight of an egg. He said, 'I came across this in a mine, so take it, it is *ṣadaqa* and I do not own anything else'. The Messenger of Allāh (God's peace and blessings be upon him) looked away from him, but he came at him from his right, from his left, and from his back. The Messenger of Allāh (God's peace and blessings be upon him) took it from him and flung it at him, and had it hit him he would have been hurt. The Prophet (God's peace and blessings be upon him) said, 'One of you comes with all that he owns and says this is *ṣadaqa*. He then sits down begging from people. The best charity is that which leaves enough to fall back on'". This is explicit on the point that it is not binding to give determined wealth if it is offered as charity when it is the entire wealth of the person. Perhaps, these traditions did not prove to be authentic for Mālik.

The remaining opinions that have been advanced on the issue are weak, especially the opinions of those who fixed a limit other than a third. This is sufficient for explaining the principles of this book. Allāh guides to the truth.

XIII

THE BOOK OF *ḌAḤĀYĀ*[364] (SACRIFICES)

The principles of this book are covered in four chapters. The first chapter is about the *ḥukm* of sacrifices and the person to whom the command is addressed. The second chapter is about the kinds of sacrifices, their characteristics, ages (based on teeth), and their number. The third chapter is about the *aḥkām* of slaughtering them. The fourth chapter is about the *aḥkām* of the meat of the sacrificed animals.

13.1. Chapter 1 The *Ḥukm* of the Sacrifices and the Person Addressed

The jurists disagreed about sacrifices whether they are obligatory or are a *sunna*. Mālik and al-Shāfiʿī held that it is one of the *sunan muʾakkada* (emphatic *sunna*). Mālik made an exemption in the case of the pilgrims for relinquishing it at Minā.[365] Al-Shāfiʿī did not make a distinction between pilgrims and others. Abū Ḥanīfa said that sacrifice is obligatory for those residents of the cities who can afford it, and that it is not obligatory for travellers. He was opposed in this by his two disciples Abū Yūsuf and Muḥammad who maintained that it is not obligatory (but is a *sunna*). The same opinion as Abū Ḥanīfa's is also related from Mālik.

There are two reasons for their disagreement. The first is whether the act of the Prophet (God's peace and blessings be upon him) in this is to be construed as implying an obligation or a recommendation. This is so as the Messenger of Allāh (God's peace and blessings be upon him), in what is related from him, never gave up the offering of sacrifices even while travelling, as is laid down in the tradition of Thawbān, who said, "The Messenger of Allāh (God's peace and blessings be upon him) slaughtered his sacrificial animal and said, 'O Thawbān carve out the meat of this sacrificed animal'. I continued to feed him [the Prophet] from its meat [to people] until he reached Medina". The second reason is their dispute about the traditions that lay down the *aḥkām* of sacrifices. It is established from the Prophet (God's peace and blessings be upon him) in the tradition of Umm Salama that he said, "When the first ten days (of Dhū al-Ḥijja) begin and one of you intends to make a sacrifice, he should not clip his hair or nails [until he makes the sacrifice]".[366] They said that his words, "one of you intends to make a sacrifice", contains an evidence that sacrifice is not obligatory. When the Prophet (God's peace and blessings be upon him) ordered Abū Burda to repeat his sacrifice for he had slaughtered it before the prayer, a group of jurists understood this to imply obligation. The opinion of Ibn ʿAbbās is that there is no obligation. ʿIkrima said that Ibn ʿAbbās sent him with two *dirhams* to buy meat, and said: Tell the person you meet that this is the sacrifice of Ibn ʿAbbās. It is related from Bilāl that he sacrificed a rooster. Arguing on the basis of a tradition that has not been laid down on the specific issue is weak.

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[364] The blood sacrifices offered on the Day of *ʿĪd al-Aḍḥā*.

[365] That is, when they are staying at Minā, busy with the concluding rites of the pilgrimage.

They disagreed about whether it is binding upon a person, who intends to make a sacrifice, not to clip his hair and nails in the first ten days (of Dhū al-Ḥijja). The tradition about it is authentic.[367]

13.2. Chapter 2 The Categories of Sacrifices, Their Characteristics, Ages, and Number

In this chapter there are four well-known issues. The first is about the distinctive categories. The second is about the distinction of characteristics. The third is about the identification of age. The fourth is about their number.

13.2.1. Issue 1

The jurists agreed about the sacrifice of animals included in (the category of) cattle. They disagreed about what has greater merit out of these. Mālik maintained that there is greater merit in sacrificing rams followed by cows followed by camels, which is the opposite of his view in the case of offerings (*during ḥajj*). *It is said, on his authority, that first come camels then* cows and then rams. Al-Shāfiʿī maintained the opposite of what Mālik held, that is, first are camels then cows then rams. This was also the opinion of Ashhab and Shaʿbān.

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[366] An implication of this tradition, though not directly related to the discussion here, is that the person who intends to make a sacrifice should not clip his nail or hair, even when he is not on the pilgrimage. The majority of the jurists do not consider this to be prohibited. Al-Shāfiʿī considers it disapproved, as does Mālik in one opinion. Abū Ḥanīfa deems it permissible.

[367] It might be possible to interpret the tradition in a different way by considering the third person pronoun in the tradition to apply to the sacrficial animal rather than the person making the sacrifice. Allāh knows best.

The reason for their disagreement stems from the conflict of analogy with the evidence adduced from acts (of the prophet). This is so as it is not related from the Prophet (God's peace and blessings be upon him) that he made a sacrifice of anything other than a ram. This is an evidence of the fact that there is greater merit in sacrificing a ram, and it conforms with the narrations of some scholars. In al-Bukhārī there is a report from Ibn ʿUmar which indicates the opposite of this, and in which it is said, "The Messenger of Allāh (God's peace and blessings be upon him) used to slaughter and sacrifice (the animals)[368] at the place of prayer". The analogy is that as offerings (during *ḥajj*) are made in the same kind of animals, so it is necessary that those that have greater merit here should have greater merit there. Al-Shāfiʿī argued for his opinion on the basis of the general implication of the saying of the Prophet (God's peace and blessings be upon him), "He who goes out [for Friday prayer] in the early hour is like one who has made the offering of a camel, he who goes out in the next hour is like one making an offering of a cow, and he who goes out in the third hour is like one making an offering of a ram".[369] The obligation it appears is to construe this for all kinds of offerings in animals. Mālik, however, interpreted it to apply to offerings (during *ḥajj*) alone, so that the saying should not conflict with the acts (of the Prophet), and this is preferable.

It is possible that there be another reason for their disagreement, which is whether the great sacrifice (the tremendous victim) that was made by Ibrāhīm as ransom (for) his son Ismāʿīl persists as a *sunna* up to this day, and that was a sacrifice (of a ram), and whether this is the meaning of the words of the Exalted, "Then we ransomed him with a tremendous sacrifice. And We left for him among the later folk (salutation and the *sunna* of sacrifice)".[370] Those who adopted this meaning said that the sacrifice of a ram has greater merit, while those who maintained that this *sunna* does not prevail today did not consider it to be an evidence for assigning merit to the sacrifice of a ram. Further, it is established "that the Messenger of Allāh (God's peace and blessings be upon him) made a sacrifice in both ways". If that is the case then it is necessary to rely upon al-Shāfiʿī's opinion.

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[368] It is difficult to convey the exact meaning of the tradition by using the words "slaughter and sacrifice". The words *dhabḥ* and *naḥr* have been used in the tradition. The word *naḥr* is used for slaughtering an animal by striking at the base of the neck. This method is used for animals with long necks, like the camel. The author provides the details in the next book. The tradition, therefore, goes against the first insofar as it indicates that both types of animals were sacrificed.

[369] The tradition has preceded in the Book of Prayer, in the section on the Friday prayer.

[370] Qurʾān 37 : 107, 108.

All the jurists agreed unanimously that it is not permitted to make a sacrifice of an animal that is not in the category of cattle, except what is narrated from al-Ḥasan ibn Ṣāliḥ, who said that it is permitted to sacrifice a wild buffalo for seven participants, and a gazelle for one person.

13.2.2. Issue 2

As regards the condition of sacrificial animals, the jurists agreed about avoiding a lame animal with an obvious limp, the diseased animal that is obviously sick, and the emaciated animal that is not wholesome[371] on the basis of the tradition of al-Barrāʾ ibn ʿĀzib "that the Messenger of Allāh (God's peace and blessings be upon him) was asked about what should be left out in selecting sacrificial animals. He pointed with his hand and said, 'Four'. Al-Barrāʾ used to point with his hand saying, 'My arm is shorter than the arm of the Messenger of Allāh (God's peace and blessings be upon him). The lame animal with an obvious limp; the one-eyed animal with an obvious loss of one eye; the diseased animal with an obvious disease; and the emaciated animal that has no marrow in its bones'". Likewise, they agreed that a slight defect in these four types is not effective in denying their validity (for sacrifice).

They disagreed on two points. The first is about defects that are more acute than the four laid down in the text, like blindness and a broken leg. The second is about those that are equal in terms of the defect and disfigurement, that is, defects in the ears, eyes, tails, teeth, and in other limbs, (defects) that are not considered slight. On the first point, the majority of the jurists maintained that defects that are more grievous than the four mentioned in the text have a greater priority for avoidance in terms of their validity (for sacrifice). The Ẓāhirites maintained that these defects to not prevent such validity, and as a whole, nothing more than the four defects mentioned in the tradition should prevent sacrifice.

The reason for their disagreement derives from whether these words (in the text) are specific cases with a specific implication or that they are specific cases with a general implication. Those who maintained that they have a specific implication, and that was why a number was mentioned, said that only these four prevent their acceptance. Those who said that these are specific cases with a general application, and these are categories in which the minimum has been mentioned to indicate all that is more grievous, said that what is more grievous than the mentioned categories has a higher priority for rejection.

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[371] The editor of the original text gives a note that this is an animal having no marrow in its bones.

On the second point, that is, defects in the remaining limbs that are the equivalent of the defects mentioned in the text, they disagreed holding three different opinions. The first is that they are to be rejected like the cases mentioned. This is the prevalent opinion in Mālik's school as mentioned in the well-known books. The second opinion is that they do not prevent acceptance, even though it is desirable to avoid them. This was upheld by Ibn al-Qaṣṣār and Ibn al-Jallāb, and a group of the disciples of Mālik from Baghdād. The third opinion is that they are neither to be rejected nor is it desirable to avoid them. This is the opinion of the Ẓāhirites.

There are two reasons for their disagreement. The first is their dispute over the meaning of the preceding tradition. The second is the conflict of traditions on the subject. With respect to the preceding tradition, those who considered it to be a category of the specific applicable to the specific said that nothing is rejected except the four categories mentioned or what is similar to them or worse. Those who considered it to be a category of the specfic applicable generally, and these were the jurists, and considered such an application to be (intended) from a lower order meaning to a higher order meaning alone and not to equivalent meanings, said that those with more grievous defects are to be linked to these four cases, and the cases with equivalent defects are not to be linked to them, except by way of desirability. Those for whom it was an indication of both meanings, that is, what is more grievous than the categories mentioned and those that are equivalent said that the defects similar to those mentioned prevent acceptance, just as greater defects prevent its acceptance. This is one of the reasons of disagreement on the issue, and it belongs to the vacillation of (the meaning of a) word between being understood in a specific sense or in a general sense. Again, what kind of general implication is it, for those who understood it to be applicable in the general sense? Is it a general implication for more grievous defects or for those that are similar as well as the more grievous, as is the case (opinion) in Mālik's school.

The second reason is the existence of two conflicting traditions of the *ḥasan* category. Al-Nasā'ī has recorded from Abū Burda that he said, "O Messenger of Allāh, I detest the defect that is in the horns and ears [of the sacrificial animal]. The Prophet (God's peace and blessings be upon him) said, 'Leave what you detest, but do not forbid it for others'". 'Alī ibn Abī Ṭālib said, "The Messenger of Allāh (God's peace and blessings be upon him) ordered us to be careful about the eyes and ears, and not to sacrifice the *sharqā'* or the *kharqā'* or the *mudābara* or the *batrā'*". The *sharqā'* is an animal with a cut up ear; the *kharqā'* is one with a hole in its ear; and the *mudābara* is one with its ears split from two sides from the back (and the *batrā'* is one with its tail cut). Those who preferred the tradition of Abū Burda said that only the four defects cause avoidance or what is more grievous than them. Those who reconciled the two traditions by construing the tradition of Abū Burda to apply to minor defects which are not obvious, and the tradition of ʿAlī to more grievous defects, which are obvious, linked with the cases mentioned what was similar to them. It was for this reason that the followers of this opinion decided to determine what kind of loss of limbs prevents acceptance (for sacrifice). Some of them took into account the loss of one-third of the ears and tail, while others took into account more than this. The same is the case with the loss of teeth and the skin of the udder. About the horns Mālik said that a partial loss is not a defect, unless they should bleed, in which case it is a disease in his view. There is no dispute that disease prevents acceptance for sacrifice. Abū Dāwūd has recorded "that the Prophet (God's peace and blessings be upon him) proscribed the [sacrifice of an] animal with split ears and a broken horn".

They disagreed about the *ṣakkā*ʾ, which is an animal born without ears. Mālik and al-Shāfiʿī held that it is not permitted, while Abū Ḥanīfa maintained that if it is a birth defect it is permitted as in the case of one without horns. The majority of the jurists did not disagree that the cutting of the whole ear or part of it is a defect. All this disagreement refers to what we have already discussed. They disagreed about the animal with a cut off tail. a group of jurists permitted this on the basis of the tradition of Jābir al-Juʿfī from Muḥammad ibn Qaraẓa from Abū Saʿīd al-Khudrī, who said, "I bought a ram so as to sacrifice it, and a wolf ate up its tail. I asked the Messenger of Allāh (God's peace and blessings be upon him) about it and he said, 'Sacrifice it'". This Jābir is not relied upon by most traditionists for argument. Another group rejected this because of the tradition of ʿAlī that has preceded.

13.2.3. Issue 3

This issue is about the identification of the ages stipulated for the sacrificial animals. They agreed that the *jadha*ʿ (six-month-old) is not sufficient, and it is the *thaniyy* (one-year-old) and whatever is older it is permitted, because of the tradition of the Prophet (God's peace and blessings be upon him) from Abū Burda when he ordered him to make the sacrifice again (saying), "A *jadha*ʿ is valid in your case, but for no one other than you". They disagreed about the *jadha*ʿ (six-month-old) in sheep. The majority of the jurists approved of this, but a group of jurists insisted that a sheep has to be the *thaniyya* (one-year-old).

The reason for disagreement arises from the conflict between the general with the specific implication. The specific meaning is found in the tradition of Jābir, who said, "The Messenger of Allāh (God's peace and blessings be upon him) said, 'Do not slaughter anything less than a *musinna* (a full grown animal), unless that is difficult for you, in which case you may slaughter a *jadha*ʿ from sheep'". It is recorded by Muslim. The general meaning is in the tradition of Abū Burda ibn Niyār regarding the saying of the Prophet (God's peace and blessings be upon him), "The *jadha*ʿ is not valid for anyone after you". Those who preferred this general implication over the specific (said that it is not permitted), and this is the opinion of Abū Muḥammad ibn Ḥazm on this issue for he claimed that Abū Zubayr[372] commits *tadlīs* (using subtle means of cheating) in the narration of traditions. And a tradition narrated by a *mudallis* using the term *ʿan* (on the authority of) rather than the terms *samiʿtu* (I heard) and *ḥaddathana* (he related to us) does not, in their view, have the same authority or recognition. There is, however, no objection against the tradition of Abū Burda. Those who construed the meaning of the general in terms of the specific, which is the well-known method of (the majority of) the experts on *uṣūl*, exempted the *jadha*ʿ in sheep mentioned in the text from this general implication, which is preferable. This tradition was deemed authentic by Abū Bakr ibn Ṣaffūr,[373] who held that Abū Muḥammad ibn Ḥazm made an error in what he had attributed to Abū Zubayr in his statement, according to my conviction, in which he sought to reply to Ibn Ḥazm on this issue.

13.2.4. Issue 4

This issue is about the number of sacrifices required from those making them. The jurists disagreed about this. Mālik said that it is permitted that a man slaughter a ram or a cow or a camel as sacrifice on his own behalf and on behalf of the members of his family whose maintenance is binding on him by law. The same applies to an offering, in his view. Al-Shāfiʿī, Abū Ḥanīfa, and a group of jurists permitted that a man sacrifice a camel or a cow on behalf of seven, as a sacrifice or as an offering. They agreed unanimously that a ram is sufficient only for one person (and his dependents), except what is related from Mālik that it is valid if the person slaughters it for himself and for the members of his family, not by way of participation but when he buys it alone. This is based upon the report from ʿĀʾisha that she said, "We were at Minā when meat of a cow was brought in to us. We said, 'What is this'. They said, 'It is the sacrifice of the Messenger of Allāh (God's peace and blessings be upon him) for his wives'". Abū Ḥanīfa and al-Thawrī opposed him in this, by way of disapproval not the lack of validity.

The reason for their disagreement stems from the conflict of a principle with analogy based upon a tradition laid down about offerings. The principle is that only one animal is valid for one person, because of which they prohibited participation in sheep. We said that only one animal is valid for one person as the command for sacrifice cannot be split into parts as the person participating in the sacrifice is not covered by the designation "sacrificer", unless there is an evidence in law to this effect. The tradition on which the analogy, conflicting with this principle, has been constructed is what is related by Jābir, who said, "We slaughtered along with the Messenger of Allāh (God's peace and blessings be upon him) in the year of al-Ḥudaybiya a camel for seven persons". In some versions the words are: "The Messenger of Allāh (God's peace and blessings be upon him) established the *sunna* of [slaughtering] a camel for seven and a cow for seven". Al-Shāfiʿī and Abū Ḥanīfa constructed the analogy for sacrifices from offerings. Mālik preferred the principle over the analogy based upon this tradition, as he objected to the tradition on the grounds that this was when the polytheists prevented the Messenger of Allāh (God's peace and blessings be upon him) from reaching the House, and the offering of the person prevented (*muḥṣar*) was not yet obligatory in his view but was voluntary. Participation is possible in his opinion in a voluntary offering, but participation in an obligatory offering is not valid. On the basis of the opinion that sacrifices are not obligatory, however, it is possible to draw an analogy for them from these offerings. Ibn al-Qāsim related from him (Mālik) that participation is not permitted, either in voluntary offerings or in obligatory offerings. This appears to be the rejection of a tradition because of its opposition to a principle.

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[372] It appears that his name occurs in the *isnād* of Jābir's tradition.

[373] The editor of the original text points out that this is how this name occurs in the manuscripts.

They agreed, however, that it is not permitted for more than seven persons to participate in sacrificial animals (in the *ḥajj nusuk*), even though it is related in the tradition of Rāfiʿ ibn Khadīj and through Ibn ʿAbbās and others that a camel may be shared by ten (persons). Al-Ṭaḥāwī said that the consensus on *the point that more than seven persons cannot participate in sacrificial animals* is an evidence that the traditions (implying the contrary) are not authentic. Mālik decided in favour of a man and his family participating in a sacrificial animal or an offering on the basis of what he related from Ibn Shihāb, who said, "The Messenger of Allāh (God's peace and blessings be upon him) did not sacrifice more than one camel or more than one cow for his family". Mālik was opposed in the case of sacrifices in this sense, that is, in participation, because of the consensus over the prohibition of participation in it with strangers, from which it follows that relatives in this case fall within the ambit of the analogy for strangers. Mālik, however, made a distinction in this between strangers and relatives on the basis of his analogy for sacrifices drawn from offerings in the tradition on which he relied, that is, the tradition of Ibn Shihāb. Their disagreement on the issue is based upon the conflict of analogies in the topic, I mean, either by linking relatives with strangers, or by drawing an analogy for sacrifices from offerings.

13.3. Chapter 3 The *Aḥkām* of Slaughter

The study of slaughter specific to sacrifices is related to the time and slaughter (itself). They disagreed over it on three points: its commencement, termination, and the intervening nights.

13.3.1. Issue 1[374]

With respect to the time of its commencement they agreed that slaughter before prayer is not permitted, because of the authentic saying of the Prophet (God's peace and blessings be upon him), "One who slaughters before prayer has [on his hands] a goat's worth of meat [not a sacrifice]". He ordered the person who had slaughtered before prayer to sacrifice again. Further, there is his saying, "The first thing we shall do on this day of ours (*ʿĪd al-Aḍḥā*) is to pray, and then we shall make the sacrifice". Furthermore, there are other authentic traditions that convey the same meaning.

They disagreed about the case of a person who slaughters after the prayer, but before the *imām* has slaughtered (his animal). Mālik held that it is not permitted for any person to slaughter his sacrificial animal before the *imām* does. Abū Ḥanīfa and al-Thawrī said that it is permitted after prayer and before the *imām* has slaughtered his animal.

The reason for their disagreement derives from the conflict of the traditions in the topic. In some of these traditions it is related, "The Prophet (God's peace and blessings be upon him) ordered the person who slaughtered before prayer to make the sacrifice again", while in others (the words are), "He ordered the person who slaughtered before he [the Prophet] had to sacrifice again". The tradition is recorded in Muslim in the same meaning. Those who considered these (events) to be two separate incidents stipulated the prior slaughter by the *imām* as a condition for the validity of the slaughter (by the members of the congregation), while those who considered it to be a single incident took into account (the completion of) prayer alone for the validity of slaughter. The narration from Abū Burda ibn Niyār varies, as in some versions it reads, "he slaughtered before prayer so the Messenger of Allāh (God's peace and blessings be upon him) ordered him to make the sacrifice again", while in another versions "he slaughtered before the slaughter made by the Messenger of Allāh (God's peace and blessings be upon him), so he ordered him to make the sacrifice again". If this is the situation, then, it is preferable to interpret the versions about slaughter before prayer and slaughter before the slaughter undertaken by the Messenger of Allāh (God's peace and blessings be upon him) to be one incident, as the person who slaughtered before prayer did slaughter before the Messenger of Allāh (God's peace and blessings be upon him) had done so. It follows that the effective factor in the lack of validity is slaughter before prayer, as has been laid down in authentic traditions on the issue, like those of Anas and others "that he who slaughters before prayer has to make the sacrifice again". The reason is that the basis of the *ḥukm* from the Prophet (God's peace and blessings be upon him) conveys through the indirect implication of the text a strong evidence that slaughter after prayer is valid, for had there been an additional condition related to the validity of slaughter of the sacrificial animal the Messenger of Allāh (God's peace and blessings be upon him) would not have maintained silence when it was his duty to elaborate and explain. The text of this tradition of Anas is: "The Messenger of Allāh (God's peace and blessings be upon him) said on the Day of Sacrifice, 'He who slaughtered [his animal] before prayer should make the sacrifice again'".

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[374] There are no headings for the first two issues in the original text, but there is one for the third issue. Headings are inserted here for the first two issues.

They disagreed within this topic over a case that is not explicitly stated in the law, which is: when are the people in the remote countryside, who do not have an *imām* (in their locality), to slaughter their sacrificial animals. Mālik said that such people are to follow the *imāms* nearest their locality. Al-Shāfiʿī said that they are to wait for a length of time sufficient for the (*ʿĪd*) prayer and the sermon and are then to undertake the slaughter. Abū Ḥanīfa said that it is valid if anyone of these people should slaughter after the morning prayer, and he gave another opinion saying it is after sunrise.

Likewise, Mālik's disciples differed over another case, namely, when the *imām* does not slaughter his animal at the place of prayer. A group of jurists said that these people are to estimate the time for his slaughtering the animal after his departure, while another group said that this is not obligatory.

13.3.2. Issue 2

With respect to the end of the period determined for valid sacrificial slaughtering, Mālik maintained that the latest time is by sunset on the third day of the days of sacrifice. In his view slaughtering has to be undertaken on appointed days, which are the Day of Sacrifice and the following two days. This was also upheld by Abū Ḥanīfa, Aḥmad, and a group of jurists. Al-Shāfiʿī and al-Awzāʿī said that the time for sacrifice is four days, the Day of Sacrifice and the following three days. It is related from a group of jurists that they held the period of sacrifice to be a single day, which is the Day of Sacrifice specifically. It is also maintained by some that the period for slaughtering continues up to the last day of Dhū al-Ḥijja, but this is a deviant opinion and there is no evidence for it. All these opinions are related from the predecessors.

There are two reasons for their disagreement. The first comes from their dispute about the identification of the "appointed days" as to what are these in the words of the Exalted, "That they may witness things that are of benefit to them, and mention the name of Allāh on appointed days over the beast of cattle that He hath bestowed upon them. Then eat thereof and feed therewith the poor unfortunate".[375] It is said that these are the day of sacrifice and two days after it, and this is the well-known opinion. It is also said that it is the first ten days of Dhū al-Ḥijja. The second reason emanates from the conflict of the indirect indication of the text in this verse with the tradition of Jubayr ibn Mutʿim, as in this tradition the Prophet (God's peace and blessings be upon him) said, "Each alley of Mecca is the place of sacrifice, and all the days of *tashrīq* are the period of slaughter". Those who maintained that the appointed days in this verse are the Day of Sacrifice and two days after it preferred the indirect indication of the text over this tradition and said that there is to be no sacrifice except on these (three) days. Those who reconciled the tradition with the verse maintaining that there is no conflict between them as the tradition implies a *ḥukm* in addition to the one in the verse and also maintaining that the purpose of the verse is not to fix the days of slaughter, while the purpose of the tradition is to do so, said that it is permitted to slaughter on the fourth day because, by agreement, the fourth day is one of the days of *tashrīq*.

There is no disagreement among them that the *ayyām maʿdūdāt*[376] (the determined days) are the days of *tashrīq*, and they are the three days that follow the Day of Sacrifice, except what is related from Saʿīd ibn Jubayr who said that the Day of Sacrifice is one of the days of *tashrīq*. They disagreed, however, about defining the *ayyām maʿlūmāt* (appointed days) in accordance with the two preceding opinions. Those who said that it is the day of sacrifice alone did so on the basis that the "known days" are the first ten days (of the month of Dhū al-Ḥijja). They maintained that as a consensus has occurred that out of these (ten days) slaughter is not to be undertaken except on the tenth of that month, and this is the day of slaughter that is expressly stated, it follows that slaughter be undertaken on the day of sacrifice alone.

13.3.3. Issue 3

This relates to their disagreement about the nights intervening between the days of sacrifice. Mālik, in his well-known opinion, maintained that slaughter is not permitted during the nights between the days of *tashrīq*, nor is an offering. Al-Shāfiʿī and a group of jurists maintained that it is permissible. The reason for their disagreement is the equivocality that exists in the term *yawm*. It is sometimes used by the Arabs to mean day as well as night, for example, in the words of the Exalted, "Enjoy life in your dwelling-place for three days!"[377] and at other times it is applied to mean day and not the night, as in the words of the Exalted, "Which he imposed upon them for seven long nights and eight long days".[378] Those who determined that the word *yawm* includes both night and day in the words of the Exalted, "Remember Allāh through the appointed days",[379] said that slaughter is permitted during the day as well as the night in these days. Those who maintained that the term *yawm* in this verse does not include the nights said that neither slaughter for sacrifice nor for an offering is permitted during the nights.

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[375] Qurʾān 22 : 28.

[376] Qurʾān 2 : 203.

Whether one meaning is more obvious than the other in the term *yawm* here is a matter of examination. It appears that it is more obvious in the meaning of day than it is for night, but even if we concede that the implication in the verse is for day alone this would not prevent slaughter during the night, except on the basis of a feeble evidence that rests on the indirect indication of the text, which is the assigning of the opposite *ḥukm* to the contrary implication of the term. This kind of implication of the text is the weakest, so much so that they (were led to) maintain what is held by al-Daqqāq from amongst the *Mutakallimūn*. Yet, someone may claim that the initial rule for slaughter is (general) prohibition and its permissibility (during the daytime) has been established (as an exemption) through an evidence, in which case those who permitted it during the night have to come up with an evidence.

With respect to the person who performs the slaughter, the jurists considered it desirable that the sacrificer should undertake the slaughter of his sacrifice with his own hands. They agreed that it is permitted to him to authorize someone else to perform the slaughter on his behalf. They disagreed over whether the sacrifice is valid if someone else should slaughter it without his permission. It is said that it is not permitted, while a distinction is also made between whether the person is a friend, a child, or a stranger, that is, it is not permitted if it is a friend or a child. There is no dispute (in this case) in the School that if it is done by a stranger it is not valid.

13.4. Chapter 4 The *Aḥkām* of the Meat of Sacrificed Animals

They agreed that the sacrificer is commanded to eat (some) of his sacrifice and to give (some of) it away as charity, because of the words of the Exalted, "Then eat thereof and feed therewith the poor unfortunate",[380] and His words, "Eat thereof and feed the beggar and the suppliant".[381] There is also the saying of the Prophet (God's peace and blessings be upon him), "Eat, give it as charity, and store it". Mālik's school differed over whether the command is for eating and giving as charity together or whether the person has a choice to do one of the two things, that is, to eat all of it or to give it all away. Ibn al-Mawwāz maintained that he has the right to do either. A large number of jurists considered it desirable that he should divide it into three parts: a third for saving; a third for charity; and a third for eating. This is so because of the saying of the Prophet (God's peace and blessings be upon him), "Eat, give it as charity, and store it". ʿAbd al-Wahhāb maintained that eating from it is not obligatory in the School, as against a group of jurists who declared it obligatory. I believe the Ẓāhirites deem it obligatory to divide the meat into three parts that are included in the tradition.

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[377] Qur'ān 11 : 65.
[378] Qur'ān 69 : 7.
[379] Qur'ān 2 : 203.
[380] Qur'ān 22 : 28.

The jurists agreed, as far as I know, that the sale of this sacrificial meat is not permitted. They disagreed about (the sale of) its skin and wool and other parts besides these that can be of benefit. The majority said that their sale is not permitted, while Abū Ḥanīfa permitted their barter for things other than *dirhams* and *dīnārs*, that is, in exchange for goods (barter). ʿAṭāʾ maintained that their sale is permitted in exchange for anything, *dirhams*, *dīnārs* and other things. Abū Ḥanīfa made a distinction between money and goods as he held an exchange for goods to be a kind of utilization, because of their consensus that it is permitted to benefit from them.

This is sufficient for the fundamentals of this book. All praise is for Allāh.

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[381] Qurʾān 22 : 36.

XIV

THE BOOK OF *DHABĀʾIḤ* (SLAUGHTERED ANIMALS)

The comprehensive discussion of the fundamentals of this book are covered in five chapters. The first chapter is about the identification of the subject-matter of slaughter and sacrifice, and these are the slaughtered animal and the sacrificed animal. The second chapter is about the description of slaughter and sacrifice. The third chapter is about the identification of the instrument with which slaughter and sacrifice are undertaken. The fourth chapter is about the conditions of lawful slaughter (*dhakāh*).[382] The fifth chapter is about the persons who slaughter and sacrifice. The basic principles are (the first) four, and the conditions will possibly be covered in (all) four chapters, though it would have been easier to compile them in a separate chapter.

14.1. **Chapter 1** Identification of the Subject-matter of Slaughter and Sacrifice

Animals in terms of the stipulation of lawful slaughter (*dhakāh*) for their consumption are divided into two types: animals that are not lawful without lawful slaughter and animals that are permitted without slaughter. Included in these are some that the jurists agreed about and some over which they disagreed. They agreed that the animal whose meat becomes lawful for consumption is the warm-blooded land animal, which is neither prohibited by the law nor one with damaged vital organs nor that for which hope has been given up because of a fatal blow, goring, falling from a height, ravenous attack by a predator, or disease. And they agreed that the sea-animal[383] is not in need of *dhakāh.* They disagreed about animals (insects) that lack blood and whose consumption is permissible, like locust and similar creatures, whether they are in need of *dhakāh*, as well as about (amphibious) animals that bleed, but live partly on land and partly in water, like the turtle. They disagreed about the effect of *dhakāh* on the categories of animals that have been prohibited for consumption in the Qur'ān (like the pig) with the object of making permissible the use and purification of their skins.

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[382] *Dhakāh* includes two types of slaughter: *naḥr* and *dhabḥ*. *Naḥr* is the cutting of the jugular vein of the camel at the base of the neck. The details are explained by the author in what follows.

[383] This includes those in rivers, lakes, or any other reservoir or medium of water.

In this chapter then there are six fundamental issues. The first issue is about the effect of *dhakāh* on the five categories mentioned in the verse,[384] if they are caught alive. The second issue is about the effect of *dhakāh* on animals whose consumption is forever prohibited. The third issue is about the effect of *dhakāh* on a diseased animal. The fourth issue is whether the *dhakāh* of the fetus is achieved by the *dhakāh* of the mother. The fifth issue is whether there is *dhakāh* for locust. The sixth is whether there is *dhakāh* for (amphibious) animals that sometimes seek refuge on land and sometimes in water.

14.1.1. Issue 1

They agreed, as far as I know, about animals that have been choked, are struck by a blow, have fallen, are gored, or are attacked by a predator, that if the strangulation or fall (or any of the other threatening causes) has not left them in a state in which there is no hope (of survival) for them *dhakāh* will be effective (in making their consumption lawful), that is, if the animal seems most likely to survive, and this is when a vital organ has not been affected. They disagreed when there is a predominant probability that the animal will die, because of damage to a vital organ or some other reason. One group of jurists said that *dhakāh* is still effective in this case. This is the opinion of Abū Ḥanīfa and the well-known opinion of al-Shāfiʿī, and it is also the opinion of al-Zuhrī and Ibn ʿAbbās. Another group said that *dhakāh* is not effective in this case. Both opinions are related from Mālik, but the better-known opinion is that *dhakāh* is not effective in the case of an animal for which there is no hope of survival. Some of the jurists made an interpretation within the School that hopeless cases are of two types: desperate cases with some doubt, and hopeless cases whose death is certain, which is one with damaged vital organs, although there is a dispute about (the identification of the) vital organs. There are two well-known narrations in the School about the desperate case that is doubtful, but about the animal with damaged vital organs there is no transmitted dispute that *dhakāh* is not effective in it, even though a weak derivation can be made for its permissibility.

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[384] See the following note.

The reason for their disagreement stems from their dispute about the meaning of the words of the Exalted, "Saving that which ye make lawful by *dhakāh*",[385] whether they form a linked exemption so that some of the animals in the categories are moved out, as is usual in the case of a linked exemption, from those included under each name. These are "the strangled, and the dead through beating, and the dead through falling from a height, and that which hath been killed by (the goring of) horns, and the devoured of wild beasts". In the alternative, it is a detached exemption that has no effect on the preceding statement, as that is usual with the detached exemption in the usage of the Arabs.

Those who maintained that it is a linked exemption said that *dhakāh* is effective in these five categories, while those who maintained that it is a detached exemption said that *dhakāh* is not effective in them. Those who maintained that it is a linked exemption argued on the basis of the consensus that *dhakāh* is effective in the hopeful cases and said that this indicates the effectiveness of the exemption, which is therefore of a linked category. Those who maintained that it is a detached exemption argued that the prohibition is not related to the corpus of these five categories when they are alive, but is related to them after their death, and if that is the case the exemption is not linked. This means that the words of the Exalted, "Forbidden unto you (for food) are carrion", would imply carrion-flesh, and likewise, it would mean the flesh of the beaten animal, or the animal that has fallen, or one gored, and of the rest, that is, carrion flesh resulting from these causes besides natural death, which is usually referred to as carrion in the usage of the Arabs or in its actual application. They said that since it has become clear that the prohibition is related to the corpus of these categories after their death and not when they are alive, because the flesh of a living animal is prohibited when it is alive on the evidence of the stipulation of *dhakāh*, and on the evidence of the saying of the Prophet (God's peace and blessings be upon him), "What is cut off from an animal when it is alive is carrion", it follows that the words of the Exalted, "Saving that which ye make lawful by *dhakāh*", are a detached exemption.

The truth, however, is that whatever the nature of the exemption it is necessary that *dhakāh* be effective in these five categories. The reason is that if we attach the prohibition to these five categories in the verse after their death it is necessary that they be subject to *dhakāh* as long as they are alive—these five categories and others besides them—because as long as they are alive they have the same status as other (living) animals for this purpose, that they accept being made lawful by way of *dhakāh*, as death caused through it is the cause of lawfulness. *If, on the other hand, we say that the* exemption *is linked*, then, there is no obscurity about it. It can probably be said that the generality of the prohibition may be understood as including the corpus of these five categories after their death as well as before it, as is the case of the swine for which *dhakāh* is not effective. In this case the exemption would remove the prohibition from their corpora as it expressly lays down the effectiveness of *dhakāh* on them. If that is the case, the objection of the objector who argues that the exemption is detached has no (persuasive) force.

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[385] In the verse: "Forbidden unto you (for food) are carrion and blood and swine-flesh, and that which hath been dedicated unto any other than Allāh, and the strangled, and the dead through beating, and the dead through falling from a height, and that which hath been killed by (the goring of) horns, and the devoured of wild beasts, *saving that which ye make lawful*". Qur'ān 5 : 3 (emphasis added).

Those who made a distinction between the animal with damaged vital organs and the doubtful case would probably maintain that the exemption is detached, and relying on the consensus about the effectiveness of *dhakāh* in the hopeful case they would construct from it an analogy for the doubtful case. It is also likely that they would say that the exemption is linked, but would then exempt the case of the animal beaten (gored etc.) on the basis of analogy. This is so as *dhakāh* is effective by necessity when it is certain that it is causing death, but when there is doubt that the cause of death was *dhakāh* or beating or goring or the remaining reasons it is not necessary that it be effective, and this is the case of the animal with damaged vital organs. They could rightfully say that the animal with damaged vital organs carries the *ḥukm* of carrion and that a condition for *dhakāh* is that it does away with confirmed life and not life that is departing.

14.1.2. Issue 2

They also disagreed over whether *dhakāh* is effective in purifying the hides of animals whose consumption is prohibited. Mālik said that *dhakāh* is effective in predatory animals, but not in swine. This was also Abū Ḥanīfa's opinion. The school, however, differed about the predatory animal being prohibited or abominable (*makrūh*), as will be coming up in the book of Foods and Beverages. Al-Shāfiʿī said that *dhakāh* is effective in (purifying the skin of) the animals prohibited as food,[386] so it is permitted to sell all its parts and to utilize them, except for their meat.

The reason for the disagreement is the dispute whether all the parts of the animal are dependent upon the rule governing the consumption of their meat. Those who maintained that they are dependent upon the *ḥukm* of the meat said that *if dhakāh is not effective in their meat it is not effective in the other* parts. Those who held that they are not dependent said that even if it is not effective in the case of meat it is effective in all the remaining parts of the animal. This is so as the basic rule is that it is (originally) effective in all parts, and if on the basis of an evidence of prohibition of meat its effectiveness for meat has been removed, its effectiveness for all the other parts remains, unless an evidence were to indicate its elimination.

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[386] The editor in the original text says that this is not the well-known opinion from al-Shāfiʿī.

14.1.3. Issue 3

They disagreed about the effectiveness of *dhakāh* on an animal that is in the throes of death due to the severity of the disease, and this after their agreement about its effectiveness in case of an animal that is about to die (but not from disease). The majority maintain that *dhakāh* is effective in its case too. This is the well-known opinion from Mālik, but it is also related from him that *dhakāh* is not effective in this case.

The reason for disagreement stems from the conflict of analogy with a tradition. The tradition is in the report "that a slave-girl of Kaʿb ibn Mālik was tending the sheep near Salaʿ when she found that one of the sheep was about to die. She took hold of it and killed it with a stone. The Messenger of Allāh (God's peace and blessings be upon him) was asked about it and he said, 'Eat it'". It has been recorded by al-Bukhārī and Muslim. The analogy is that as *dhakāh* is known to be effective in a living animal, and this animal is almost dead, therefore, all those who upheld its slaughter agreed that *dhakāh* is not effective in it unless it exhibits some evidence of life. They disagreed about the the valid signs (of life). Some of them took (a minor) movement in the slaughtered animal to be a sufficient indication of the existence of life, while others did not. The first is the view of Abū Hurayra and the second of Zayd ibn Thābit. Some of them insisted upon the existence of three types of movement in it: movement of the eyes, movement of the tail, and the movement of the legs. This is the opinion of Saʿīd ibn al-Musayyab and Zayd ibn Aslam, and this is what was preferred by Muḥammad ibn al-Mawwāz, while some of them stipulated breathing along with this, which is the opinion of Ibn Ḥabīb.

14.1.4. Issue 4

They disagreed over whether *dhakāh* of the mother is effective for the *janīn* (fetus) also, because it is dead when it comes out after the slaughtered mother. The majority of the jurists maintained that the *dhakāh* of the mother is the *dhakāh* of the *janīn*. This was the opinion of Mālik and al-Shāfiʿī. Abū Ḥanīfa said that if it emerges alive it is to be slaughtered and (may then be) eaten, but if it emerges dead it is carrion. Those who maintained that the *dhakāh* of the mother is the *dhakāh* of the foetus stipulated its full growth and the appearance of hair, and this was Mālik's opinion, while some did not stipulate this, and this was al-Shāfiʿī's opinion.

The reason for their disagreement arises from the authenticity of the tradition that is related on the issue from Abū Saʿīd al-Khudrī, along with its conflict with the principles. The tradition of Abū Saʿīd is that he said, "We asked the Messenger of Allāh (God's peace and blessings be upon him) about a cow, a camel, or a sheep when one of us sacrificed it and found a foetus in it, as to whether we were to eat it or throw it away? He said, 'Eat it if you like for its *dhakāh* is the *dhakāh* of its mother'". A similar tradition has been recorded by al-Tirmidhī and Abū Dāwūd from Jābir. They disagreed about the authenticity of this tradition with some of them declaring it as unauthentic and some declaring it authentic. One of those who considered it authentic was al-Tirmidhī. The conflict of the principle with the tradition on the subject is that if the foetus is alive and then dies due to the death of its mother, it dies because of suffocation, and it therefore becomes one of those that die due to choking, which the (Qurʾānic) text has prohibited. Abū Muḥammad ibn Ḥazm upheld its prohibition and he did not agree with the chain of the tradition.

With respect to the dispute of those who declare it permissible with the stipulation of the growth of its hair or without it, the reason stems from the conflict of the general meaning with analogy. The general content of the saying of the Prophet (God's peace and blessings be upon him), "its *dhakāh* is the *dhakāh* of its mother", implies that there be no separation between them, while its being an object of *dhakāh* requires that the existence of life be stipulated in it, on the analogy of animals for which *dhakāh* is required, and life cannot exist in it unless there is a growth of hair on the foetus, and the foetus itself must have been fully created (formed). This analogy is supported by the fact that stipulation of this condition is related from Ibn ʿUmar and from a group of the Companions. It is related from Maʿmar from al-Zuhrī from ʿAbd Allāh ibn Kaʿb ibn Mālik, who said, "The Companions of the Messenger of Allāh (God's peace and blessings be upon him) used to say, 'When the *janīn* grows hair its *dhakāh* is the *dhakāh* of its mother'". It is related by Ibn al-Mubārak from Ibn Abī Laylā, who said, "The Messenger of Allāh (God's peace and blessings be upon him) said, 'The *dhakāh* of the foetus is the *dhakāh* of its mother, whether it has hair or it does not'". Ibn Abī Laylā, however, is held to have suffered from an imperfect memory. Analogy implies that its *dhakāh* be included within the *dhakāh* of its mother as it is a part of it. If this is the case, then, there is no sense in stipulating the existence of life in it (when it emerges). It is, therefore, to be deemed weak that the general meaning in the tradition laid down on this be restricted by analogy as has been mentioned about the disciples of Mālik in what has preceded.

14.1.5. Issue 5

They disagreed about locust. Mālik said that it is not to be eaten without *dhakāh*, and their *dhakāh* in his view is that they are to be killed either by cutting off their head or some other part. The *fuqahāʾ* in general held that they may be eaten dead. This was the opinion of Muṭarrif. The *dhakāh* of any other thing (insect) that lacks blood, in Mālik's view, is the same as that of locust.

The reason for disagreement over dead locust comes from whether it is included in the term *mayta* (carrion) in the words of the Exalted, "Forbidden unto you (for food) are carrion . . ."[387] There is another reason for their disagreement, and that is whether they are sneezed out by the whales (and therefore they are a species of fish not needing *dhakāh*) or creatures of land.

14.1.6. Issue 6

They disagreed about creatures that have a habitat on land as well as in water as to whether they are in need of *dhakāh*. Some of the jurists gave predominance in this to the *ḥukm* of land, while others gave predominance to the *ḥukm* of water. Another group took into account the place where it has its habitat most of the time.

14.2. Chapter 2 Discussion of *Dhakāh* (Kinds of Lawful Slaughter)

There are two issues about the fundamentals of this topic. The first issue is about the types of *dhakāh* specific to each category of animals in cattle. The second is about the description of *dhakāh*.

14.2.1. Issue 1

They agreed that *dhakāh* for the animals included in cattle is either *naḥr* (slaughter of a camel by cutting the jugular vein at the base of the neck) and *dhabḥ* (slaughter by cutting the throat in other cases). They agreed that the *sunna* for sheep and birds is *dhabḥ*, the *sunna* for camels is *naḥr*, and that both *dhabḥ* and *naḥr* are permitted for cows. They disagreed whether *naḥr* is permitted for sheep and birds and *dhabḥ* for camels. Mālik held that *naḥr* is not permitted for sheep and birds nor is *dhabḥ* for camels, and this for cases other than those of necessity. A group of jurists said that all this is permitted without any abomination. This was the opinion of al-Shāfiʿī, Abū Ḥanīfa, al-Thawrī, and a group of jurists. Ashhab said that if *naḥr* is performed upon a thing for which *dhabḥ* is prescribed or *dhabḥ* is performed in place of *naḥr* the animal may be eaten but this is considered abominable. Ibn Bakīr made a distinction between sheep and camels alone saying that a camel may be eaten after *dhabḥ*, but a sheep is not to be eaten after *naḥr*. They did not disagree, however, about its permissibility in case of necessity.

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[387] Qurʾān 5 : 3.

The reason for their disagreement derives from the conflict between an act (of the Prophet) and the general implication. The general implication is in the tradition of the Prophet (God's peace and blessings be upon him), which reads: "(An animal) whose blood has been caused to flow by something and on which the name of Allāh has been pronounced may be eaten". The act is established "that the Messenger of Allāh (God's peace and blessings be upon him) performed *naḥr* on the camels and cows and *dhabḥ* upon sheep". They agreed about the permissibility of performing *dhabḥ* on cows because of (its application to cows in) the words of the Exalted, "And when Moses said unto his people: Lo! Allāh commandeth you to slaughter (*tadhbaḥū*) a cow",[388] and about *dhabḥ* in the case of sheep, because of the words of the Exalted about the ram, "Then We ransomed him with a tremendous slaughtered sacrifice (*dhibḥin ʿaẓīm*)".[389]

14.2.2. Issue 2

They agreed on the description of (valid) *dhakāh* that *dhabḥ* (slaughter) in which the two jugular veins, the gullet (esophagus), and the throat (pharynx) are cut is permitted for eating. They disagreed over this over several points. The disagreement is over whether it is obligatory to cut all four things or some of them, and whether it is obligatory to cut (each of) them completely or up to a greater part. Whether it is a condition for cutting that the *jawza* (prominent cartilage of the larynx; Adam's apple in humans) is to be on the side of the head and not the body (with respect to the blade), and whether it is permissible for eating if the cut is placed on the nape of the neck. Is it permitted (to eat it) if he extends the cut so that the spinal cord is severed? Is it a condition of *dhakāh* that the person should not lift his hand until the *dhakāh* is complete? These are six sub-issues about the number of the things to be severed, the extent of the cut, its location, the termination of the cutting, its direction, that is, whether it is to be from the front or the back, and about its description.

14.2.2.1 & 2 Sub-issues 1 and 2

The well-known narration from Mālik is about the severance of the jugular vein and the pharynx, and that less than this is not valid. It is also narrated from him that all four have to be cut, and it is narrated that only the jugular veins are to be cut. There was no dispute in the School about the condition that the jugular veins be cut completely. They disagreed about the (extent of) cutting of the pharynx, in accordance with the opinion about its obligation. It is said that it is to be cut completely, while it is said that the major part is to be cut. Abū Ḥanīfa said that the obligation is to cut three undetermined things out of the four, either the pharynx and the two veins, or the gullet, pharynx, and one vein, or the gullet and the two veins. Al-Shāfiʿī said that the obligation is to cut only the gullet and the pharynx. Muḥammad ibn al-Ḥasan said that the obligation is to cut the larger part of each of the four things.

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[388] Qurʾān 2 : 67. Picktall uses the term sacrifice, which has been changed to slaughter in this case.

[389] Qurʾān 37 : 107. Pickthall's translation has been changed again slightly to focus on the meaning intended by the author. He translates it as "a tremendous victim".

The reason for their disagreement stems from the fact that no transmitted condition is laid down in this, but there are two (conflicting) traditions. The first requires the flow of blood alone, while the second requires the cutting of the jugular veins along with the flow of blood. In the tradition of Rāfiʿ ibn Khadīj the Prophet (God's peace and blessings be upon him) said, "If (an animal's) blood has been caused to flow by something, and the name of Allāh has been pronounced on it, eat it". It is a tradition that is agreed upon for its authenticity by al-Bukhārī and Muslim. On the other hand, it is related from Abū Umāma from the Prophet (God's peace and blessings be upon him) that he said, "Whatever has cut the jugular veins eat it, as long as it was not snapped by a tooth or split with a claw". The apparent meaning of the first tradition implies that only a part of the jugular veins needs to be cut, as a cut is enough to cause the blood to flow. The second requires the complete severance of the jugular veins. The traditions, Allāh knows best, agree on the cutting of the jugular veins, either one of them, or part of both, or part of one. The basis for reconciling the two traditions is to understand the definite article in the word *alawdā*, "the jugular veins", in the saying of the Prophet (God's peace and blessings be upon him), as implying a part and not the whole, as the definite article in Arabic sometimes indicates a part of the defined word.

Those who stipulated the cutting of the pharynx and the gullet do not have an argument based upon transmitted evidence, and more than this is the view of those who stipulate the cutting of the gullet and the pharynx to the exclusion of the jugular veins. It was for this reason that a group of jurists held that the obligation is to cut that which has been accepted unanimously. As ***dhakāh*** is a condition (they maintained) for making things lawful, and there is no text on what is to be done, it follows that the obligation in this is what has unanimously been agreed upon, unless an evidence were to indicate an exemption from it. This, however, is weak, because the point on which consensus has occurred is not necessarily a condition of validity.[390]

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[390] What he means is that even if something is agreed upon through the consensus of the jurists, it may not constitute a condition for the validity of an act. It does not mean that the consensus is being rejected. In other words, the act agreed upon may simply be a recommendation and not binding.

14.2.2.3. Sub-issue 3

This issue is about the location of the cut. The jurists in the school differed about when the *jawza* falls towards the body. Mālik and Ibn al-Qāsim said that the carcass is not to be eaten. Ashhab, Ibn ʿAbd al-Ḥakam, and Ibn Wahb said that it may be eaten. The reason for the disagreement is whether the cutting of the pharynx is a condition of *dhakāh*. Those who maintained that it is a condition said that it is necessary to cut the *jawza*, because cutting above the *jawza* would mean that the pharynx has remained in one piece. Those who maintained that it is not a condition said that if the cut is placed above the *jawza* it is permitted.

14.2.2.4. Sub-issue 4

This issue is about the cutting of the organs of *dhakāh* from the nape of the neck. There is no disagreement in the School that this is not permitted. This is the opinion of Saʿīd ibn al-Musayyab and Ibn Shihāb as well as others. Al-Shāfiʿī, Abū Ḥanīfa, Isḥāq, Abū Thawr permitted this. This is related from Ibn ʿUmar, ʿAlī, and ʿImrān ibn Ḥuṣayn.

The reason for their disagreement is whether *dhakāh* is effective in the case of an animal with ruptured vital organs, because the person cutting the organs of *dhakāh* from the nape of the neck cannot reach the organ of *dhakāh* except after cutting the spinal cord, which is one of the vital organs. *Dhakāh* in this case would be performed on an animal whose vital organ is damaged. The basis for disagreement on this has preceded.

14.2.2.5. Sub-issue 5

This is about the instance where a person who continues cutting until the spinal cord is cut. Mālik considered it abominable when the cutting is extended without initially intending to cut the spinal cord, because if he intended this form of slaughter from the start he would be making a resolve to perform *dhakāh* in an unlawful manner. Muṭarrif and Ibn al-Mājishūn maintained that the animal is not to be eaten if the person did this intentionally and without a lack of knowledge, but if he made a the cut by mistake or in ignorance it may be eaten.

14.2.2.6. Sub-issue 6

The sixth issue relates to whether it is a condition of *dhakāh* that it be performed in a single uninterrupted movement. The School did not disagree that this is a condition of *dhakāh*, and if the person raises his hand before the completion of the slaughter and then resumes cutting after an interval the *dhakāh* is not valid.

They disagreed over the instance of when he brings his hand back immediately and within a very short space. Ibn Ḥabīb said that if he brings his hand back immediately it is permitted, while Saḥnūn said that it is not to be eaten. It is said that if the person raises his hand to check whether *dhakāh* has been completed and brings it back immediately when he realises that it is not completed it may be eaten. This is one interpretation of Saḥnūn's, and his opinion is also construed to imply abomination. Abū al-Ḥasan al-Lakhmī has said that if the opposite of this was maintained it would have been better, I mean, (the opposite of the statement that) if the person lifts his hand thinking that he had completed the *dhakāh*, but it becomes obvious to him that he has not, and he brings it back, the animal may be eaten. The first action was on the basis of doubt and this (moving it back) is on the basis of his conviction. This is based upon the consideration that cutting of all the organs is a condition of *dhakāh*. When he lifts his hand before completing the *dhakāh* the animal becomes one whose vital organs have been cut, and moving his hand back is no longer effective, as it (now) amounts to the *dhakāh* of an animal with ruptured vital organs.

14.3. Chapter 3 With what instrument is *Dhakāh* Performed?

The jurists agreed that anything (instrument) causing the blood to flow and the jugular veins to bleed is valid, whether it is made from iron, rock, or wood, or a reed. They differed about three things: teeth, claws, and bones. Some of the jurists permitted *dhakāh* with bones, but prohibited it with teeth and claws. Some of those who prohibited it with teeth and claws made a distinction between their being detached or being attached, and they permitted *dhakāh* with them if they were detached, but they did not when they were attached. Some of them said that *dhakāh* with teeth and bones is abominable but not prohibited. There is no dispute in the School that *dhakāh* is permitted with bones if they cause blood to flow. They disagreed about teeth and bones holding three different opinions, I mean, about their absolute prohibition, about the distinction between their being detached or attached, and about (the *ḥukm* whether it entails) abomination and not prohibition.

The reason for their disagreement arises from their dispute about the meaning of the proscription laid down in the saying of the Prophet (God's peace and blessings be upon him) in the tradition of Rāfiʿ ibn Khadīj, who said, "O Messenger of Allāh, we shall be meeting the enemy tomorrow and we do not have knives, may we then slaughter (animals) with a (sharpened) cane?" The Prophet (God's peace and blessings be upon him) said, "Whatever causes the blood to flow, with the name of Allāh pronounced on it (the animal), as long as it is not a tooth or claw, and let me tell you about them. The tooth is a bone and the claw is the knife of the Abyssinians". Some of the jurists understood this to mean that it is not in the normal nature of these things to cause blood to flow, while some of them understood from this that this law has no underlying reason. Some of those who understood from it that the law has no underlying reason believed that the proscription indicates the invalidity of the thing proscribed, some believed that it does not indicate the invalidity of the thing proscribed, while some believed that the proscription is laid down by way of disapproval not as a prohibition. Those who understood the meaning to be that blood is not usually spilled with these things said that if one of these is able to cause blood to flow it is permitted. It is for this reason that some of them maintained that they be detached as the flow of blood can be caused when they are in this form. This is Abū Ḥanīfa's opinion.

Those who maintained that their proscription is a law without an underlying cause and that it indicates the invalidity of the thing proscribed said that if slaughter is performed with them *dhakāh* is not valid, even when blood has been made to flow. Those who maintained that the proscription does not indicate the invalidity of the thing proscribed said that if the person does it and causes the blood to flow he has sinned, but the slaughtered animal is permitted. Those who maintained that the proscription is laid down by way of disapproval considered it abominable but not prohibited. There is no substance to the opinion of those who made a distinction between bones and teeth, as the Prophet (God's peace and blessings be upon him) declared the underlying cause of the prohibition of teeth to be the fact that it is a bone.

There is no dispute in the School about the disapproval of using any sharp thing other than that made from iron with the availability of the iron instrument, because of the saying of the Prophet (God's peace and blessings be upon him), "Allāh has prescribed the doing of good deeds to everyone, therefore, when you kill do it in a decent manner, and when you slaughter do it in the best way, and let him who does it sharpen his knife and lay the animal on its side". It has been recorded by Muslim.

14.4. Chapter 4 Conditions of *Dhakāh*

There are three issues in this chapter. The first issue is about the stipulation of the *tasmiya* (saying "I begin with the name of Allāh"). The second is about turning the slaughtered animal toward the *qibla*.[391] The third is about the stipulation of intention.

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[391] There is an error in the original manuscript where the first issue is repeated for the second also. The discussion in the issue is about pointing the animal toward the *qibla*.

14.4.1. Issue 1

They disagreed about the *ḥukm* of *tasmiya* over the slaughtered animal and expressed three different opinions. It is said that it is an absolute obligation. It is said that it is an obligation when remembered, but is dropped in the case of forgetfulness. It is said that it is an emphatic *sunna* (*sunna muʾakkada*). The first opinion was held by the Ẓāhirites, Ibn ʿUmar, al-Shaʿbī, and Ibn Sīrīn. The second opinion was held by Mālik, Abū Ḥanīfa, and al-Thawrī. The third opinion was held by al-Shāfiʿī and his disciples, and is also related from Ibn ʿAbbās and Abū Hurayra.

The reason for their disagreement arises from the conflict between the apparent meaning of the Book on this and a tradition. In the Book it is the words of the Exalted, "And eat not of that whereon Allāh's name hath not been mentioned, for lo! it is an abomination".[392] The *sunna* opposing this verse is what has been related by Mālik from Hishām from his father, who said, "When the Messenger of Allāh (God's peace and blessings be upon him) was asked, 'O Messenger of Allāh, people from the desert bring us meat, and we do not know whether they have mentioned Allāh's name over it'. The Messenger of Allāh (God's peace and blessings be upon him) said, 'Mention the name of Allāh over it (the meat) and then eat it'". Mālik held that the verse abrogates the tradition and he interpreted the tradition as belonging to the first period of Islam. Al-Shāfiʿī did not uphold this, as the apparent implication of the tradition is that the incident occurred in Medina, while the verse about mentioning the name of Allāh is from the Meccan period. Al-Shāfiʿī adopted the method of reconciliation, because of this, by construing the (Qurʾānic) command for *tasmiya* to imply recommendation. Those who stipulated remembrance for the obligation did so on the basis of the saying of the Prophet (God's peace and blessings be upon him), "Liability has been lifted from my *umma* for (what they do by) mistake or forgetfulness and for what they are compelled to do".

14.4.2. Issue 2

A group of jurists considered it desirable to turn the animal brought to slaughter in the direction of the *qibla*. Another group of jurists permitted this. A third group considered it obligatory. A fourth group deemed it abominable when the animal was not made to point toward the *qibla*. The opinion about abomination as well as that about prohibition are found in the School, and it is an issue that is not expressly stated in the texts. The original rule in this is of permissibility, unless an evidence indicates this stipulation (of turning toward the *qibla*). There is no suitable case in the law from which an analogy can be drawn for this issue, unless *qiyās mursal* is adopted, which is analogy that does not rely on a specific rule, according to those who permit it, or a remote *qiyās al-shabah* may be adopted, and this indicates that *qibla* is a venerated direction and the act is a worship, therefore, it is necessary that this direction be adopted. This, however, is weak, because it is not every worship for which the assumption of this direction is stipulated, except for *ṣalāh*, and the analogy for *dhakāh* drawn from *ṣalāh* is weak, as well as that drawn from the taking of the direction of *qibla* for the dead.

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[392] Qurʾān 6 : 121.

14.4.3. Issue 3

The stipulation of intention (*niyya*) is deemed obligatory in the School, and I do not recall at the moment the dispute over it outside of the School. It appears, however, that there are two opinions about this. An opinion upholding its obligation, and an opinion dropping the obligation. Those who upheld its obligation said that it is a worship in which attributes and number are stipulated, therefore, it follows that intention be a condition. Those who did not deem it obligatory said that it is a rational act that leads to the taking of life, which is its purpose; therefore, intention should not be stipulated for it as a necessity, and it is just like the washing of impurities that leads to the removal of their substance (without the stipulation of intention).

14.5. Chapter 5 The Person who Can Validly Perform *Dhakāh*

There are three categories mentioned in the law: a category about the performance of whose *dhakāh* they agreed, a category about the invalidity of whose performance they agreed, and a category over which they disagreed. The category about the performance of whose *dhakāh* they agreed is one that gathers in it five qualifications: Being a Muslim, being a male, the age of puberty, sanity, and regular observance of prayer. The category whose performance of *dhakāh* is prohibited are the polytheists who worship the idols, because of the words of the Exalted, "And that which hath been immolated unto idols",[393] and His words, "And that which hath been dedicated unto any other than Allāh".[394] The category about which they disagreed comprises many sub-categories, but the well-known are ten: the People of the Book, the Magians, the Sabians, a woman, a minor, and insane person, an intoxicated person, one who neglects prayer, a thief, and one who misappropriates the property of others.

[393] Qur'ān 5 : 3.
[394] Qur'ān 5 : 3.

The jurists are agreed unanimously about the permissibility of the slaughtered animals of the People of the Book, because of the words of the Exalted, "The food of those who have received the Scripture is lawful for you, and your food is lawful for them",[395] but they disagree about the details. They agreed that if they were not from the Christians of (the Arab tribe of) Banū Taghlab nor from the apostates and they slaughtered the animals for themselves when it was known that they mentioned the name of Allāh over them and the slaughtered animal was one that was not prohibited for them in the Torah, nor did they prohibit it for themselves, it is permitted, except for fat. They disagreed about the opposites of these characteristics, that is, when they slaughter for a Muslim, who has authorized them, or when they are the Christians of Banū Taghlab or the apostates, and when it is not known that they have mentioned the name of Allāh, or when the purpose of the slaughter by them is unknown, or when it is known that they have mentioned the name of other than Allāh in what they slaughter for their synagogues or churches and for their feasts, or the slaughtered animal is one that is prohibited for them by the Torah, as in the words of the Exalted, "Unto those who are Jews We forbade every animal with claws",[396] or it is one that they have prohibited for themselves, like the slaughtered animals that are not permitted to the Jews because of a shortcoming with which the animal is created.[397] They also disagreed about fat.

14.5.1. Issue 1[398]

In the case where they slaughter under authorization from a Muslim, the narration in the School from Mālik is that it is permitted, and it is also said that it is not permitted. The reason for disagreement stems from whether the belief in the permissibility of the slaughtered animal, in accordance with the Islamic conditions, is a prerequisite for the slaughter performed by a Muslim. Those who held that intention is a condition for this said that the slaughter undertaken by *Kitābī* for a Muslim is not valid, as Islam is a condition for the validity of intention. Those who maintained that it is not a condition, and who gave predominance to the general implication in the Book, that is, the words of the Exalted, "The food of those who have received the Scripture is lawful for you",[399] said that it is permitted. The same is the case for those who believe that the intention of the person authorizing (Muslim) is enough. This is the basis for Ibn Wahb's opinion.

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[395] Qur'ān 5 : 5.

[396] Qur'ān 6 : 146.

[397] See Leviticus 29—41.

[398] The heading for the first issue does not appear in the manuscript.

[399] Qur'ān 5 : 5.

14.5.2. Issue 2

This issue relates to the animals slaughtered by the Christians of Banū Taghlab and the apostates. The majority of the jurists maintain that the *ḥukm* of the slaughtered animals of the Christian Arabs is the same as that for the People of the Book. This is the opinion of Ibn ʿAbbās. Some of them did not permit their slaughtered animals. This is one of the two opinions of al-Shāfiʿī, and is also related from ʿAlī (God be pleased with him). The reason for disagreement is whether the Arab Christians and Jews are both included in the meaning of the term *ahl al-Kitāb* meaning "those who have been given the Book", just as it primarily includes those nations specifically attributed with the possession of the Book, and these are the Banū Isrāʾīl, the Romans, and the Byzantines.

With respect to the apostates, the majority maintain that animals slaughtered by them are not to be eaten. Isḥāq said that animals slaughtered by them are lawful, while al-Thawrī said that they are disapproved (*makrūh*). The reason for disagreement is whether the apostate is included within the meaning of the People of the Book. Thus, he may or may not have the sanctity provided to the People of the Book.

14.5.3. Issue 3

In the case where it is not known that the People of the Book have mentioned the name of Allāh over the slaughtered animal, Mālik said that it may be eaten, which is also related from ʿAlī, and I do not remember a disagreement about it at the moment. It can probably be said that the principle is that their slaughtered animals are not to be consumed except those which conform to the conditions of Islam, and if it is agreed that *tasmiya* is a condition for *dhakāh* it follows that they should not be eaten because of doubt.

Some jurists considered it abominable to eat the animals that they slaughter for their feasts and places of worship, and this is Mālik's opinion. Some of them declared it permissible, which is the opinion of Ashhab. Some prohibited it, and that is al-Shāfiʿī's opinion. The reason for their disagreement arises from the conflict of two general implications in the Book on this subject. The words of the Exalted, "The food of those who have received the Scripture is lawful for you",[400] may be interpreted to have restricted His words, "And (forbidden is) that which hath been dedicated unto any other than Allāh",[401] as each of these can validly make an exemption from the other. Those who considered the words "dedicated unto any other than Allāh" to have restricted the words "The food of those who have received the Scripture is lawful for you" said that what has been dedicated to their houses of worship and feasts is not permitted. Those who deemed it to be the other way around said that it is permitted.

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[400] Qurʾān 5 : 5.

[401] Qurʾān 5 : 3.

When an animal that is prohibited for them is slaughtered by them, it is said that it is permitted, and it is also said that it is not permitted. A distinction is also made between what is prohibited to them by the Torah and that which they prohibited for themselves, that is, by permitting what they prohibited for themselves and prohibiting what is prohibited for them by Allāh. It is also said that it is considered abominable and not prohibited. All four opinions are found in the School. The prohibition is related from Ibn al-Qāsim, permissibility from Ibn Wahb and Ibn ʿAbd al-Ḥakam, and the distinction from Ashhab. The basis for the disagreement stems from the conflict between the general implication of the (relevant) verse and the meaning of the stipulation of intention, that is, the belief in the permissibility of the slaughtered animal because of *dhakāh*. Those who maintained that it is a condition for *dhakāh* said that these slaughtered animals are not permitted, as they believed that they would become permissible with *dhakāh*. Those who maintained that it is not a condition for it relied upon the permitting general implication of the verse and said that these slaughtered animals are permitted.

This (reason for disagreement) is the very basis for the disagreement they have about eating fat (tallow) from their slaughtered animals, and no one disagreed over it except Mālik and his disciples. Some of them said that this fat is prohibited, and it is the opinion of Ashhab. Some said that it is abominable. Both opinions are related from Mālik himself. Some said that it is permissible. In the case of fat another reason, from among others, intervenes, besides the conflict between the general implication and the stipulation of the belief that the slaughtered animal becomes permissible through *dhakāh*. That reason is whether *dhakāh* can be viewed in separate segments. Those who maintained that it can be viewed in parts said that (this) fat is not to be eaten, while those who maintained that it is not to be split up said that the fat may be eaten. The permissibility of fat from their slaughtered animals is indicated by the tradition of ʿAbd Allāh ibn Mughaffal when he came upon a skin (leather bag) of fat on the day of Khaybar. It has been mentioned in the Book of *Jihād*.[402] Those who made a distinction between what was prohibited to them out of these by their original law and what was prohibited by them of their own accord said that what was prohibited for them was the truth and *dhakāh* cannot be effective in it, but what they prohibited for themselves is based on falsehood and *dhakāh* is effective in it.

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[402] The tradition of Ibn Mughaffal is: "I came upon a skin (leather bag) of fat on the day of Khaybar and said to myself, 'I will not give any of it [to anyone]'. I turned around and there was the Messenger of Allāh (God's peace and blessings be upon him) smiling at me".

The Qāḍī (Ibn Rushd) said: The truth is that what was prohibited for them and what they prohibited for themselves became, at the time of the *sharīʿa* of Islam, a nullity, as it (the *sharīʿa* of Islam) abrogates all preceding laws. It is, therefore, necessary not to take into account their belief about it, nor should it be stipulated that their belief about the permissibility of slaughtered animals be the same as the belief of the Muslims or that of their (own) laws, because if this is stipulated the eating of their slaughtered animals would not be valid from any aspect, for their belief in their *sharīʿa* in this respect stands abrogated, and their belief based upon our *sharīʿa* is not valid. This is a *ḥukm* that Allāh, the Exalted, has laid down specifically for them. Thus, their slaughtered animals are permitted to us, Allāh knows best, without qualification, otherwise the *ḥukm* of the verse permitting this would stand lifted completely. Think over this, for it is evident, Allāh knows best.

The majority of the jurists maintain that the slaughtered animals of the Magians are not permitted, for they are polytheists. A group of jurists permitted them and relied for their permissibility upon the saying of the Prophet (God's peace and blessings be upon him), "Establish with them the practice adopted for the People of the Book". With respect to the Sabians, the disagreement is based upon the dispute whether they are from the People of the Book.

In the case of a (Muslim) woman and a (Muslim) minor, the majority of the jurists maintain that animals slaughtered by them are permitted and are not disapproved. This is Mālik's opinion. Ibn al-Muṣʿab considered them disapproved. The reason for their disagreement is the deficient legal capacity of the woman and a minor. The majority did not disagree in the case of a woman because of the tradition of Muʿādh ibn Saʿīd "that a slave-girl of Kaʿb ibn Mālik was tending the sheep near Salaʿ when she found that one of the sheep was about to die. She took hold of it and slaughtered it with a stone. The Messenger of Allāh (God's peace and blessings be upon him) was asked about it and he said, 'There is no harm, so eat it'". This is regarded as an authentic tradition.

Mālik did not permit the animal slaughtered by the insane and the intoxicated person, but al-Shāfiʿī did. The reason for disagreement derives from the stipulation of intention in *dhakāh*. Those who stipulated intention for this disallowed it, as it (intention) is not valid when formed by the mentally ill or the intoxicated person, especially the mentally ill.

The majority of the jurists permit the *dhakāh* performed by the thief and the usurper, but some of them disallow this and hold it to be similar to carrion, and this was upheld by Dāwūd and Isḥāq ibn Rāhwayh. The reason for their disagreement stems from whether the proscription indicates the invalidity of the thing proscribed (i.e., the object of the act proscribed, which is the stolen property). Those who maintained that it does indicate this said that the thief and the usurper are prohibited from slaughtering it, consuming it, or owning it; thus, if they subject it to *dhakāh* the *dhakāh* becomes invalid. Those who maintained that it does not indicate this, unless the forbidden act is a condition for (the validity of) such an act, said that their *dhakāh* is valid as the validity of ownership is not one of the conditions for *dhakāh*. In the *Muwaṭṭa'* of Ibn Wahb (his narration) it is related that "The Messenger of Allāh (God's peace and blessings be upon him) was asked about it, and he did not raise any objection against it". Its permissibility, along with abomination, is laid down in what is related from the Prophet (God's peace and blessings be upon him) about the sheep slaughtered without the permission of the owner. The Messenger of Allāh (God's peace and blessings be upon him) said, "Feed it to the prisoners (of war)".

This is sufficient for the fundamentals of this book, Allāh knows best.

XV

THE BOOK OF *ṢAYD* (HUNTING)

In this book too the fundamentals are covered in four chapters. The first chapter is about the *ḥukm* of hunting, and about its object. The second is about tools with which hunting is undertaken. The third is about the description of the *dhakāh* of game and the conditions stipulated for undertaking *dhakāh* in game. The fourth is about the person who can hunt lawfully.

15.1. Chapter 1 The *Ḥukm* of Hunting and its Object

The majority of the jurists maintain that hunting is permissible, because of the words of the Exalted, "To hunt and to eat the fish of the sea is made lawful for you, a provision for you and for the seafarers; but to hunt on land is forbidden you so long as ye are on the pilgrimage. Be mindful of your duty to Allāh, unto Whom ye will be gathered;"[403] after this He said, "But when ye have left the sacred territory, then go hunting (if ye will)".[404] The jurists agreed that the command for hunting in this verse after the proscription indicates permissibility, in the same way that they agreed it does in the words of the Exalted, "And when the prayer is ended, then disperse in the land and seek of Allāh's bounty", that is, the purpose of the issuance of the command after the proscription is to indicate permissibility, although they did differ as to whether a command after a proscription implies permissibility or whether it indicates an obligation in accordance with its original application.

Mālik considered wasteful hunting to be abominable. The later jurists in his School go into its details and the summary of their views is that some of its types are obligatory for some people, prohibited for some, recommended for some, and disapproved for others. This kind or reasoning in law delves deep into analogy and is far removed from the principles expressly stated in the law, and it does not suit this book of ours, as our purpose is to mention those

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[403] Qur'ān 5 : 96.
[404] Qur'ān 5 : 2.

(issues) that are expressly stated in the law or are closely related to those so stated.

With respect to the object of hunting, the jurists agreed that its object is the different types of fish among the creatures of the sea (water) and the permissible non-domesticated animals from among the animals on land. They disagreed about the domesticated animals that have turned wild so that it is not possible to catch them nor to subject them to *naḥr* or *dhabḥ*.[405] Mālik said that they are not to be eaten unless those that are subject to *naḥr* are killed by *naḥr* and those subject to *dhabḥ* are slaughtered, or unless they are subject to either method, if they belong to a category that is subject to both. Abū Ḥanīfa and al-Shāfiʿī said that if a runaway camel cannot be subject to *dhakāh* it is to be killed like game.

The reason for their disagreement stems from the conflict of the principle in this matter with a report in this regard. The principle in this topic is that a domesticated animal is not to be eaten except after *dhabḥ* or *naḥr* and that the wild animal is eaten after shooting it down. The report opposing these principles is the tradition of Rāfiʿ ibn Khadīj, in which he said, "One of the camels bolted and there were few horses with the group. They chased it but it exhausted them, so a man shot an arrow at it and Allāh prevented it from running away. The Prophet (God's peace and blessings be upon him) said, 'In some of these animals are untamed ones like the untamed wild animals, so if any of them bolts this is what you do to it'". It is preferable to base the opinion on this tradition because of its authenticity, for it does not necessarily amount to an exemption from the principle. It could, however, be said that it is in conformity with the relevant principle, because the underlying cause for wounding (*ʿaqr*) being the *dhakāh* in some of the animals is nothing more than not being able to catch it. Analogy and transmission (of a tradition), therefore, conform with each other.

15.2. Chapter 2 The Things with which Hunting is Undertaken

The sources of this chapter are two verses and two traditions. The first verse contains the words of the Exalted, "O ye who believe! Allāh will surely try you somewhat (in the matter) of the game which ye take with your hands and your spears".[406] The second contains the words of the Exalted, "Say (all) good things are made lawful for you. And those beasts and birds of prey which ye have trained as hounds are trained, teaching them what Allāh taught you; so eat of that which they catch for you and mention Allāh's name upon it, and observe your duty to Allāh, Lo! Allāh is swift to take account".[407] Among the two traditions, the first is the tradition of ʿAdiyy ibn Ḥātim, in which the Messenger of Allāh (God's peace and blessings be upon him) said to him, "If you dispatch your trained dogs after mentioning the name of Allāh over them, then, eat what they catch for you. If the dog eats (part of) what it catches do not eat it, for I am afraid that it has then caught for itself. If other dogs mix up with them do not eat it, as you have taken the name of Allāh over your dog and not on dogs besides it". He (also) asked him about *miʿrāḍ* (a featherless arrow)[408] and he replied, "If it hits it with the broad side, do not eat it, for it has died with a blow". This tradition is the fundamental source for most of what is in this book. The second tradition is that of Abū Thaʿlaba al-Khushanī, and in this the words of the Prophet (God's peace and blessings be upon him) are, "Eat what you hunt with your bow when you take the name of Allāh over it. Eat what you catch with your trained dog after taking the name of Allāh over it, but eat what you catch with your untrained dog after you have been able to slaughter it". These traditions are recorded by the compilers of the *ṣaḥīḥ* traditions.

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[405] The distinction between *naḥr* and *dhabḥ* has already been explained by the author in the previous book.

[406] Qurʾān 5 : 94.

The instruments (weapons) used for hunting include those over which they agreed as a whole, and also those over which, and about whose description they disagreed, and these are three: predatory animals, sharp instruments, and blunt weapons. They agreed about instruments sharpened to kill, like spears, swords, and arrows, because they are mentioned explicitly in the Book and the *sunna*. Likewise, they agreed about things similar to those used for wounding, except for the things whose effectiveness they disagreed about in the case of the *dhakāh* of domesticated animals, like teeth, claws, and bones. The discussion of these has preceded and there is no sense in repeating it.

With respect to the blunt weapon, they disagreed about hunting with it, like hunting with *miʿrāḍ* and stones. Some of the jurists did not permit this, except for those animals that were caught alive and slaughtered. Some of them permitted it without qualification. Some made a distinction about animals killed by *miʿrāḍ* or with the sharp or blunt part of a stone when these tore the body of the prey. They permitted it when the body of the animal was torn, and they did not permit it when it was not. This opinion was held by the famous jurists of the provinces, al-Shāfiʿī, Mālik, Abū Ḥanīfa, Aḥmad, al-Thawrī, and others besides them, and it refers to the principle that there is no *dhakāh* without a sharpened instrument.

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[407] Qurʾān 5 : 4.

[408] Causing death by the shock of a blow, like hitting with the broad side of a spear or arrow, and not by causing a wound that bleeds.

The reason for the disagreement is based on the conflict of some principles of this topic with others, and on the conflict between a tradition and the principles. It is a principle of this topic that an animal killed with a blow is prohibited by the Book and by consensus. Another principle is that *ʿaqr* (wounding with a cut) is the *dhakāh* for game. Those who held that what is killed by the blunt edge of a weapon is killed by a blow prohibited it absolutely. Those who held it to be *ʿaqr* of a kind permitted it absolutely. Those who made a distinction between what causes a rupture and what does not decided on the basis of the tradition of ʿAdiyy ibn Ḥātim that has preceded, and this is correct.

With respect to (using) predatory animals, the agreement and disagreement about them relates to the species and the condition, and in the case of some only to the condition. The species over which they agreed is that of dogs with the exception of a black dog; a group of jurists, including al-Ḥasan al-Baṣrī, Ibrāhīm al-Nakhaʿī, and Qatāda disapproved of black dogs. Aḥmad said that he knew of no one who made an exemption in the case of a jet-black dog. This was also the opinion of Isḥāq. The majority of the jurists permitted the game hunted by it, if it was a trained to do so.

The reason for the disagreement arises from the conflict of analogy with a general implication. This is so as the words of the Exalted, "And those beasts and birds of prey which ye have trained as hounds are trained, teaching them what Allāh taught you",[409] implies the inclusion of all kinds of dogs in it, while "the command of the Prophet (God's peace and blessings be upon him) to kill the jet-black dog" implies by way of analogy (for this case) that game hunted by it is not permitted in accordance with the opinion of those who believe that a proscription indicates the unsuitability of the thing related to the proscribed act.

The other kinds of predatory animals over which they disagreed, include the birds of prey and other predatory animals. Some of them permitted hunting with all of them if they were trained, even a cat as is held by Ibn Shaʿbān, and this is the opinion of Mālik and his disciples, as well as that of the jurists of the provinces. It is also related from Ibn ʿAbbās, that is, any predatory animal or bird of prey that is receptive to training becomes a lawful instrument of *dhakāh* for game. A group of jurists said that there is no (lawful) hunting with predatory animals besides the dog, neither with the falcon nor the hawk nor with the others, unless *dhakāh* is performed on the game if caught alive. This is the opinion of Mujāhid. Some of them made an exception for the falcon alone from among the birds of prey, and said that only the game hunted by it is permitted.

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[409] Qurʾān 5 : 4.

The reason for disagreement in this topic is based upon two factors. The first is the analogy for all the predatory animals and birds of prey from the case of the dog, because it is believed that the text has permitted it for dogs, that is, in the words of the Exalted, "And those *jawāriḥ* (beasts and birds of prey) which ye have trained as hounds are trained, teaching them what Allāh taught you",[410] unless it is interpreted to mean that the word *mukallibīn* (in the verse) is derived from the pouncing[411] of the predatory animals, and not from the meaning of the word dog. This is indicated by the generality of the word *al-jawāriḥ* used for predatory animals and birds of prey in the verse. On the basis of this the reason for disagreement is the equivocality of the word *mukallibīn*.

The second reason is about the stipulation of catching that it (the animal) should catch for its master. If this is a condition, then, does it apply to animals other than the dog? Those who maintained that an analogy for the remaining animals is not to be drawn from the dog, and that the word *mukallibīn* is derived from the word meaning "dog" and not from any other term, or that catching can only be achieved by the dog, that is, for its master (and on his bidding), and that this is a condition, said that hunting is not to be undertaken with any predatory animal except the dog. Those who made an analogy for all predatory animals drawn from the dog, and did not stipulate in the act of catching the condition that it be on the bidding of the master, said that hunting with all other predatory animals and birds of prey is permitted as long as they are amenable to training. Those who made an exemption only for the falcon alone decided on the basis of the tradition of ʿAdiyy ibn Ḥātim, who said, "I asked the Messenger of Allāh (God's peace and blessings be upon him) about the game caught by a falcon and he said, 'Eat what it catches for you'". It is recorded by al-Tirmidhī.

These, then, are the reasons for their agreement and disagreement about the different kinds of predatory animals and birds of prey.

The conditions stipulated for the predatory animals and birds of prey over which they disagreed include those that they agreed to as a whole, and this is training, because of the words of the Exalted, "And those beasts and birds of prey which ye have trained as hounds are trained, teaching them what Allāh taught you,"[412] and also the words of the Prophet (God's peace and blessings be upon him), "If you dispatch your trained dogs". They disagreed about the description of the stipulated training and its conditions. A group of jurists said that training is of three types. The first is that you call the predatory animal or bird of prey and it comes to you (responds). The second is that you set it off to pursue game and it does. The third is that you deter it from doing something and it stops. There is no disagreement among them about these three conditions in the case of the dog. They disagreed about deterrence in the case of all other animals (used for hunting). They also disagreed over whether it is a condition that the animal should not eat (from) what it has caught. Some of them stipulated this without qualifications, while others stipulated it for the dog alone. Mālik's opinion is that these three conditions are to be stipulated for dogs as well as other animals. Ibn Ḥabīb, one of his disciples, said that deterrence is not to be stipulated for those animals that are not amenable to it, like falcons and hawks. In Mālik's view it is not a condition, either for dogs or for other animals, not to eat (what they catch), while others stipulated it for the dog, but not for the birds of prey. Some of them stipulated it, as we have said, for all. The majority of the jurists permit the eating of game caught by the falcon and the hawk even if they eat of it, because it is prompted to catch for eating.

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[410] Qurʾān 5 : 4.

[411] The meaning here could also be "rabid predatory animals"; however, training a rabid animal for hunting would be out of the question insofar as it conveys the meaning of a diseased animal.

[412] Qurʾān 5 : 4.

The disagreement, then, in this topic refers to two points. The first is whether it is a condition for training that it should be deterred, if that is in its nature. The second is whether it is a condition that it should not eat (of what it catches). The reason for disagreement over the stipulation of not eating is based upon two factors. The first is the conflict of traditions over this, and the second is whether it is still effective as trained catcher if it eats part of the catch. The traditions include that of ʿAdiyy ibn Ḥātim, which has preceded, and in it are the words, "If the dog eats (part of) what it catches do not eat it, for I am afraid that it has then caught for itself". The tradition that conflicts with this is the tradition of Abū Thaʿlaba al-Khushanī, who said, "The Messenger of Allāh (God's peace and blessings be upon him) said, 'If you let go your trained dog after mentioning the name of Allāh over it, then eat (what it catches)'. I said, 'Even if it eats from it, O Messenger of Allāh?' He said, 'Even if it eats of it'". Those who reconciled the two traditions by construing the tradition of ʿAdiyy ibn Ḥātim to imply recommendation, and this for permissibility, said that it is not a condition that jthe animal should not eat (of the prey). Those who preferred the tradition of ʿAdiyy ibn Ḥātim—as it is a tradition agreed upon by al-Bukhārī and Muslim, while the tradition of Abū Thaʿlaba is disputed, for which reason the two Shaykhs, al-Bukhārī and Muslim have not recorded it—and (in addition) maintained that it is a condition for catching that it should not eat from it on the basis of the mentioned tradition, said that if it eats of the caught game it is not to be eaten. This was upheld by al-Shāfiʿī, Abū Ḥanīfa, Aḥmad, Isḥāq, and al-Thawrī, and it is also the opinion of Ibn ʿAbbās. An exemption was made, as we have said, in the eating of what it (the trained animal) has (partly) eaten, by Mālik, Saʿīd ibn Mālik, Ibn ʿUmar, and Sulaymān.

The later Mālikites maintained that eating (by the dog) is no indication that it did not catch for its master nor is catching for its master a condition for *dhakāh*, as the intention of the dog is not known, as it may catch for its master at first and it may then suit it to have it all for itself. This statement of theirs, however, is in conflict with the text of the tradition and is contrary to the apparent meaning of the Book, that is, the words of the Exalted, "So eat of that which they catch for you".[413] There is a method for identifying what is caught for the master of the dog, and that is practice; therefore, the Prophet (God's peace and blessings be upon him) said, "If the dog eats (part of) what it catches do not eat it, for I am afraid that it has then caught for itself".

With respect to their disagreement over deterrence, there is no reason for it besides analogy drawn for the remaining animals and birds from the case of the dog, as the dog that is not deterred cannot, by agreement, be called trained. Can animals and birds be called trained if they are not deterred? Their is a vacillation in this and that is the basis for the disagreement.

15.3. Chapter 3 *Dhakāh* Specific to Game and its Conditions

They agreed that *dhakāh* specific to game is *ʿaqr* (shooting to kill). They disagreed extensively over its conditions. If its principles, which are the basis of disagreement, are taken into account, besides the conditions stipulated for the instrument and the hunter, you will find them to be eight conditions. Two are common to the two kinds of *dhakāh*, I mean, the *dhakāh* of game and the *dhakāh* of animals other than game. These are intention and the *tasmiya*. Six of them are specific to this kind of *dhakāh* of game. The first is that if a (hunting) weapon or a predatory animal has not struck the game by damaging one of its vital organs, then, it is necessary that it be subjected to the form of *dhakāh* meant for a domesticated animal, before it dies from whatever has struck it whether it was a predatory animal or a blow. If, however, one of its vital organs has been damaged this is not necessary, even though it is desirable. The second condition is that the act of hunting the game must be initiated by the hunter and not occurring by chance as in the case of a snare (net), or spontaneously by a predatory animal as is the case of a dog that springs of its own accord. The third condition is that a thing not valid for lawful hunting should not be coupled with his action. Fourth, the hunter should not be in doubt about the identification of the particular game that he has struck, and this may happen when it disappears from his sight. Fifth, the game should not be in a position of being (easily) caught at the time of dispatch (when it could have been caught and slaughtered like a domesticated animal). Sixth, its death should not be caused by its terror of the predatory animal or by a collision with it.

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[413] Qurʾān 5 : 4.

These are the fundamental conditions the stipulation of which, or the lack of it, led the jurists to disagree. Sometimes they agreed about the necessity of some of these conditions, and disagreed about their existence in each particular incident. This is like the agreement of the Mālikites that the act causing death should be initiated by the hunter, and their disagreement over the case where the predatory animal or bird of prey springs from his hand or takes off on its own and the hunter urges it on afterwards. They disagreed as to whether this catch would be permissible, because of the vacillation whether this condition has been fulfilled in this situation. Again, it is like the agreement of Abū Ḥanīfa and Mālik that when he (the hunter) comes upon a prey that does not have a wounded vital organ the condition is that he should subject it to *dhakāh* before it dies, but they disagreed when he retrieves it alive and it dies in his hand before he is able to slaughter it. Abū Ḥanīfa forbids its consumption like that of carrion. Mālik permitted it and considered it to be similar to the first case, I mean, when he is not able to retrieve it from the predatory animal until it dies. This is so, because of the vacillation of this situation between saying that he appears negligent, as he caught it without its vital organs having been damaged when it was not in the clutches of the predatory animal, and saying that he does not appear to be negligent.

As these conditions are the foundation for the conditions stipulated for game, along with all the remaining conditions that have been mentioned about the instrument and the hunter himself, as will be coming up, it is necessary that we mention what they agreed upon from among these and what they differed over, as well as the reasons for disagreement in these and the cases that arise from the well-known issues.

We say: The discussion about the disagreement over *tasmiya* and intention has preceded, along with the reasons for it, in the Book of Slaughtered Animals. With reference to intention in *dhakāh* according to those who stipulate it, it is not permitted (to eat the game) when the hunter sets his predatory animal after the game and another (predatory animal owned by him) executes the *dhakāh* for this game. This is Mālik's opinion. Al-Shāfiʿī, Abū Ḥanīfa, Aḥmad, and Abū Thawr said that this is permitted and may be eaten. Of the same nature is the disagreement among Mālik's disciples about setting a predatory animal after unseen game, like setting it after possible game in a swamp covered with trees or after newborn game or something behind a hillock, when he does not know whether there is something over there, as the intention here is based on ignorance.

The first condition specific to the *dhakāh* of game, out of the six that we have mentioned, is that the wound inflicted by the predatory animal, when it is not (inflicted) on a vital organ, amounts to *dhakāh* if the hunter is not able to catch the game alive. The majority of the jurists upheld this stipulation, because of what is related in the tradition of ʿAdiyy ibn Ḥātim, where in some of its versions the Prophet (God's peace and blessings be upon him) said, "If you catch it alive, slaughter it". Al-Nakhaʿī said: "If you catch it alive and you do not have a sharp instrument, set the dogs after it until they kill it". This was also maintained by al-Ḥasan al-Baṣrī deciding on the basis of the general implication of the words of the Exalted, "So eat of that which they catch for you".[414] On the basis of this condition, Mālik said that the hunter dispatching his predatory animal is not to be sluggish in finding the game, and if he is lazy and finds the game dead, then, if it died from damage to a vital organ with an arrow eating it is permitted otherwise it is not permitted, for had he not been lazy about it he would have been able to catch it alive without its vital organs being damaged.

The second condition is that the act should be initiated by the trapper and should be continuous until the prey is caught. With reference to their dispute over this they disagreed about what is caught in the snare or net, if a vital organ is struck by a sharp instrument inside these. Mālik, al-Shāfiʿī, and the majority of the jurists prohibited this, while al-Ḥasan al-Baṣrī made an exemption for it. Under this rule Mālik did not permit the *dhakāh* the game when the predatory animal, having been dispatched, becomes occupied with something else and later comes to it (the prey) of its own accord.

The third condition is that nothing else should participate with it in wounding the prey when the wounding by such other thing is not valid as *dhakāh*. This is a condition that is unanimously agreed upon, as far as I can recall, as it is not known what killed it (the prey).

The fourth condition is that there should be no doubt about the corpus of the prey or about the predatory animal having killed it. With reference to this they disagreed about eating the game when the target has disappeared from the hunter's sight. Mālik said, once: "There is no harm in eating game when the target dropped has disappeared from your sight, if you find the marks of your dog upon it or if you find your arrow in it, as long as it has not been there overnight, for if it has been there overnight I consider it abominable". Al-Thawrī also considered it abominable. ʿAbd al-Wahhāb said that if the prey has taken shelter overnight (after being struck) it is not to be eaten (when found). There is a disagreement about the arrow. Ibn al-Mājishūn said that it is to be eaten in both cases, if it is found to have a damaged vital organ. Mālik maintained, according to *al-Mudawwana*, that it is not to be eaten in either case, if it stays out overnight and has a ruptured vital organ. Al-Shāfiʿī said that on the basis of analogy it is not to be eaten if its track has disappeared. Abū Ḥanīfa said that if the game conceals itself and the dog continues to search for it, if the hunter finds it dead it is permissible for eating as long as the dog has not given up the hunt, but if it gives up the search eating the game is disapproved.

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[414] Qurʾān 5 : 4.

The reason for their disagreement is based upon two things. The first is the doubt occurring about the corpus of the game or about its *dhakāh*. The second is the conflict of traditions on the issue. Muslim, al-Nasāʾī, Al-Tirmidhī, and Abū Dāwūd have recorded from Abū Thaʿlaba from the Prophet (God's peace and blessings be upon him) about the person who finds his game after three days. He (the Prophet) said, "Eat it as long as there is no stench". Muslim has recorded, also from Abū Thaʿlaba from the Prophet (God's peace and blessings be upon him), that he said, "If you shoot your arrow and the target drops, but disappears from your sight, eat it as long as it does not elude you overnight". In the tradition of ʿAdiyy ibn Ḥātim the Prophet (God's peace and blessings be upon him) said, "If you find your arrow in it and you do not find marks from beasts of prey on it, and you know that it is your arrow that killed it, then, eat it".

Within this topic is their disagreement about game that is shot by an arrow or has been struck by the hunting animal but falls into water or falls from a height. Mālik said that it is not to be eaten as it is not known from which of the two causes it has died, unless the arrow has penetrated a vital organ and there is no doubt that it has died from it. This was upheld by the majority of the jurists. Abū Ḥanīfa said that a prey with a damaged vital organ is not to be eaten if it falls in the water, but it may be eaten if it falls from a height. ʿAṭāʾ said that it is not to be eaten at all if it falls into water or from a height, after it was struck in a vital organ, because of the possibility that it died because of the fall or the water before it was affected by the damage to its vital organ.

With respect to its death due to a collision with the hunting animal, Ibn al-Qāsim prohibited (eating it) on the analogy of death by a blunt weapon. Ashhab permitted it because of the generality of the words of the Exalted, "So eat of that which they catch for you".[415] The School did not disagree that what dies of terror of the hunting animal has not been subjected to valid *dhakāh*. With respect to the condition that the prey be out of reach at the time of dispatching the hunting animal, it is agreed upon as far as I know, and this condition prevails when the game is within reach without any apprehension or risk (of its fleeing). This happens in situations when it is entangled in something or something is clinging to it or has a broken wing or leg due to a shot. There are a number of cases in which the game vacillates between its being within reach or out of it, like the dogs pursuing it until it falls into a ditch. It is maintained in the School that in this case it may be eaten, and it is also said that it is not to be eaten.

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[415] Qurʾān 5 : 4.

They disagreed about the description of striking the game (*ʿaqr*) when one of its limbs is severed by the hit. It is said that the game may be eaten and not what is severed, while a group of jurists said that all of it may be eaten. Another group of jurists made a distinction between whether the severed limb was a vital part or some other part, and they said that if it was a vital limb the whole may be eaten but if it was not a vital limb the game may be eaten and not this limb. This is the meaning of Mālik's opinion. It is the background to their disagreement when the game is cut into two equal parts or when one is larger than the other.

The reason for their disagreement stems from the conflict between the saying of the Prophet (God's peace and blessings be upon him), "What is cut off from the animal when it is alive is carrion", and the general implication of the words of the Exalted, "So eat of that which they catch for you",[416] and His words, "The game which ye take with your hands and your spears".[417] Those who gave predominance to the *ḥukm* of game, which is the effectiveness of the *ʿaqr*, without qualifications, and interpreted the tradition to apply to domesticated animals, said that the game and the severed limb of the game may be eaten. Those who interpreted the tradition to be applicable to both domesticated as well as wild animals, and who excluded from the general implication, through this tradition, the severed limb said that the game may be eaten and not the severed limb. Those who took into account the term *ḥayāh* (life) in the Prophet's saying, "while it is alive", to mean the normal unthreatened life, made a distinction based on whether the severed part was vital.

15.4. Chapter 4 Conditions for the Hunter

The conditions for the hunter are the same as those for the person slaughtering, and these have preceded in the Book of the Slaughtered Animals, whether they were agreed upon or disputed. There is an additional condition specific to hunting land, which is that he should not be in the ritual state of *iḥrām*. There is no dispute about this because of the words of the Exalted, "But to hunt on land is forbidden you so long as ye are on the pilgrimage".[418] If he does hunt, is this game to be considered as permitted for those not in the state of *iḥrām* or is it to be considered carrion not permitted for anyone at all? The jurists disagreed about it. Mālik maintained that it is carrion, while al-Shāfiʿī, Abū Ḥanīfa, and Abū Thawr held that it is permitted to the person not in a state of *iḥrām* to eat it.

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[416] Qurʾān 5 : 4.
[417] Qurʾān 5 : 94.

The reason for their disagreement derives from the well-known principle whether the proscription renders the object of the act proscribed as invalid. This is similar to the *ḥukm* of slaughter (of the stolen or misappropriated animal) by a thief or by a person who misappropriates.

Within this topic they disagreed about hunting with a dog belonging to the Magians. Mālik said that it is permitted to hunt with it, as the consideration is to be given to the hunter not the instrument he employs. This was also the opinion of al-Shāfiʿī, Abū Ḥanīfa, and others. Jābir ibn ʿAbd Allāh, al-Ḥasan, ʿAṭāʾ, Mujāhid, and al-Thawrī disapproved this, because the communication in the words of the Exalted, "And those beasts and birds of prey which ye have trained as hounds are trained",[419] is directed at the believers.

This is sufficient in accordance with our aim in this book. Allāh is the Grantor of the truth.

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[418] Qurʾān 5 : 96.

[419] Qurʾān 5 : 4.

XVI

THE BOOK OF *ʿAQĪQA* (SACRIFICE FOR NEWBORN INFANTS)

The comprehensive discussion of the fundamentals of this book is covered under six topics. The first is about the identification of its *ḥukm*. The second is about the identification of its subject-matter. The third is about the person for whom *ʿaqīqa* is to be made and the number (of animals sacrificed). the fourth is about the identification of the time of this rite. The fifth is about the age of the sacrificial animal for this rite and description. The sixth is about the *ḥukm* of its flesh and its other parts.

With respect to its *ḥukm*, a group of jurists, including the Ẓāhirites, maintained that it is obligatory. The majority of the jurists held that it is a *sunna*. Abū Ḥanīfa held that it is neither an obligation nor a *sunna*, and it is said that in the final analysis it is, in his view, voluntary.

The reason for their disagreement stems from the conflict of traditions on the subject. This is so as the apparent meaning of the tradition of Samura implies obligation, and this is the saying of the Prophet (God's peace and blessings be upon him), "Each boy is held in pledge for his *ʿaqīqa*, which is slaughtered on his behalf on the seventh day, and the harm is removed (by shaving his hair)". The apparent meaning of the saying of the Prophet (God's peace and blessings be upon him), when he was questioned and said, "I do not like the breaking of ties (*ʿuqūq*), and he to whom a child is born, if he wishes to perform the rite for it, he may do so", implies recommendation or permissibility. Those who understood it to imply a recommendation said that *ʿaqīqa* is a *sunna*, while those who understood it to mean permissibility said that it is neither a *sunna* nor an obligation. Both traditions have been recorded by Abū Dāwūd. Those who relied upon the tradition of Samura deemed it obligatory.

The majority of the jurists agreed about its subject-matter that nothing is valid in it except what is valid in making sacrifice from the eight pairs. Mālik, however, preferred sheep in accordance with his views in the case of sacrifice. His opinion differed over whether a camel or cow is valid. The remaining jurists abide by their principle that a camel has greater merit than a cow and a cow has greater merit than sheep.

The reason for their disagreement arises from the conflict between traditions on the subject and analogy. The tradition is that of Ibn ʿAbbās, "that the Messenger of Allāh (God's peace and blessings be upon him) performed the *ʿaqīqa* for al-Ḥasan and al-Ḥusayn with a ram each", as well as his saying, "For a girl is one sheep and for a boy two". These are recorded by Abū Dāwūd. The analogy is that it is a religious rite, therefore, it is necessary that first priority should be for the one having greater merit on the basis of analogy drawn from offerings.

About the person for whom *ʿaqīqa* is to be offered, the majority of the jurists maintain that it is only for the newborn infants, male and female. Al-Ḥasan deviated and said that *ʿaqīqa* is not to be performed for a girl, while some permitted it for grown-up persons. The evidence of the majority for its restriction to infants is the saying of the Prophet (God's peace and blessings be upon him), "On the seventh day", and the evidence for its relevance for the girl is the saying of the Prophet (God's peace and blessings be upon him), "For a girl is one sheep and for a boy two". The evidence of those who confined it to the male is the saying of the Prophet (God's peace and blessings be upon him), "Each boy (*ghulām*) is held in pledge for his *ʿaqīqa*".

The jurists also disagreed about the number of animals sacrificed. Mālik said that one sheep each is to be sacrificed for the male and the female. Al-Shāfiʿī, Abū Thawr, Abū Dāwūd, and Aḥmad said that one sheep is to be sacrificed for a girl and two for a boy. The reason for their disagreement springs from the conflict of traditions on the subject. These include the tradition of Umm Kurz al-Kaʿbiyya, who said, "I heard the Messenger of Allāh (God's peace and blessings be upon him) saying about *ʿaqīqa*, 'For the boy are two similar sheep, and for the girl one sheep'". Similarity here implies equivalence (for exchange). This implies a distinction between a male and a female, while the tradition related about his performing *ʿaqīqa* for al-Ḥasan and al-Ḥusayn with one ram each implies an equality between them (male and female).

With respect to the time of this rite, the majority of the jurists maintain that it is the seventh day after birth, but Mālik does not count the day on which the child is born, if it is born during the day, while ʿAbd al-Malik ibn al-Mājishūn counts it. Ibn al-Qāsim has stated in *al-ʿUtbiya* that if the sacrifice is made during the night it is not valid. Mālik's disciples disagreed about the commencement of the time of validity. It is said that it is the time for sacrifices, that is, after sunrise, while it is said that it is after dawn on the analogy of Mālik's opinion about offerings. There is no doubt that those who permitted sacrifices during the night permitted this too, during the night. It is said that it is permitted on the second and the third seventh (the fourteenth and the twenty-first).

The ages and the description (of the sacrificial animals) for this rite are the ages of sacrifices and their valid attributes, that is, the defects avoided for the sacrifices must be avoided in the case of *ʿawīq* too. I do not know of a disagreement over this within the School, nor outside it.

The *ḥukm* of its meat, skin, and the remaining parts of the animal is the *ḥukm* of the meat of the sacrifices with respect to eating, giving as alms, and (prohibition of) sale.

All of the jurists maintain that the pre-Islamic custom of smearing the head of the child with blood of the sacrifice stands abrogated in Islam. This is because of the tradition of Burayda al-Aslamī, who said, "In the days of *jāhiliyya*, when a son was born to one of us, a sheep was slaughtered for him and his head was smeared with its blood. When Islam came, we (stopped that practice and instead) slaughtered (a sheep) and shaved his head and smeared it with saffron". Al-Ḥasan and Qatāda deviated and said that the head of the child is to be touched with cotton that has been dipped in blood. It is considered desirable to break the animal's bones in order to be at variance with the custom of *jāhiliyya*, when the people used to sever them from the joints.

They disagreed about the shaving of the head of the child on the seventh day, and over giving alms worth the value of the weight of his hair in silver. It is said that this is desirable, while it is said that it is not desirable. Both views are narrated from Mālik. Desirability is preferable, and this is the opinion of Ibn Ḥabīb, because of what has been related by Mālik in *al-Muwaṭṭaʾ* "that Fāṭima, the daughter of the Messenger of Allāh (God's peace and blessings be upon him), shaved the hair of al-Ḥasan, al-Ḥusayn, Zaynab, and Umm Kulthūm, and gave alms in silver equal to the weight of the hair".

XVII

THE BOOK OF FOODS AND BEVERAGES

The discussion of the fundamentals of this book is covered in two chapters. In the first chapter we shall mention the things prohibited in a state of choice. In the second chapter we shall mention the situations arising under duress.

17.1. Chapter 1 The Prohibited Foods and Beverages

Human foods are vegetation and animals. The animals that are consumed for nutrition include those that are permissible by law and those that are prohibited. Of these some exist on land and some on water. The things prohibited include those that are prohibited in themselves and those that are prohibited for a cause that is imposed externally. In all of these there are some that are agreed upon by the jurists and some that are disputed. The things prohibited because of an external reason are nine (in number) as a whole: carrion, strangulated animals, those dead from a blow, those dead after a fall, those dead after being gored, those (partly) devoured by a predatory animal, those for the consumption of which *dhakāh* is stipulated but they lack one of its conditions, animals that consume filth, and food smeared with filth.

With respect to *mayta* (carrion), the jurists agreed about the carrion on land. They disagreed about carrion found in the sea into three opinions. One group of jurists said that it is permitted absolutely, while another group said that it is prohibited absolutely. One group said that what floats on the sea is prohibited and what is left (on the coast) by the tide is permitted.

The reason for their disagreement arises from the conflict of traditions on the subject, and the conflict of the general implication with some of them, at the level of the principle, while conforming with them some and conflicting with some at the level of cases. The general implication is found in the words of the Exalted, "Forbidden unto you (for food) are carrion . . ."[420] The traditions conflicting with this generality on the level of the principle are two.

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[420] Qur'ān 5 : 3.

The first is agreed upon by al-Bukhārī and Muslim, while the other is disputed. The tradition agreed upon is that of Jābir, in which it is said, "The companions of the Messenger of Allāh (God's peace and blessings be upon him) found a whale known as *ʿanbar*, or some animal, that had been brought in by the tide. They ate from it for about twenty days or a month, and then came up to the Messenger of Allāh (God's peace and blessings be upon him) and informed him about it and he said, 'Do you have some of its meat with you?' They sent him some meat and he ate of it". This conflicts with the Book on principle through its implication not its words. The second tradition is disputed, and it is what has been related by Mālik from Abū Hurayra "that he (the Prophet) was asked about the water of the sea and he said, 'Its water is pure and its carrion is permissible'".[421] The tradition that partially conforms with the general implication (of the verse) is what is related by Ismāʿīl ibn Umayya from ʿAbū al-Zubayr from Jābir from the Prophet (God's peace and blessings be upon him), who said, "Eat what is thrown out by the sea or is left by the tide, but do not eat what floats on it". It is, in their view, weaker than the tradition related by Mālik (above). The reason for the weakness of Mālik's tradition is that there is a narrator in the chain who is unknown, and that it has been transmitted through a single *isnād*. Abū ʿUmar, however, maintains that its narrators are known and it has been transmitted through various channels. The reason for the weakness of Jābir's tradition is that though the narrators in its *isnād* are reliable, the name of Jābir's disciple who is supposed to have narrated from him is dropped, and the tradition is attributed to Jābir directly be the disciple's disciple (*mawqūf* at Jābir).[422]

Those who preferred this tradition of Jābir over Abū Hurayra's tradition, because of the support of the general implication of the Book for it, did not exempt anything from it (the general rule), except what is brought in by the tide, as no conflict arises from it. Those who preferred Abū Hurayra's tradition upheld absolute permissibility (of the carrion from the sea). Those who upheld its absolute prohibition decided on the basis of preference for the general implication of the Book. Absolute permissibility is upheld by Mālik and al-Shāfiʿī, while absolute prohibition is maintained by Abū Ḥanīfa. A group, other than these jurists, upheld the distinction (between what floats and what comes in with the tide).

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[421] This tradition is in conflict with the Qurʾānic verse, but apparently it restricts its meaning to the carrion of the land.

[422] When the name of the Companion, who is supposed to be the immediate narrator of a tradition, is missing from the *isnād* and the text of the tradition is attributed to the Prophet directly by a disciple from the second Muslim generation, the tradition is known as *mursal*. If the name of the second narrator, the Companion's disciple, is dropped, the tradition is known as *mawqūf*.

There is no disagreement among the jurists that the five other categories laid down by Allāh along with carrion also carry the *ḥukm* of carrion. They disagreed with respect to the eating of *jallāla*, which is an animal that consumes filth. The reason for their disagreement stems from the conflict of analogy with a tradition. The tradition is in the report "that the Messenger of Allāh (God's peace and blessings be upon him) proscribed the meat of the *jallāla* as well as its milk". It is recorded by Abū Dāwūd from Ibn ʿUmar. The analogy conflicting with this is that what enters the mouth of the animal is converted into its flesh and other elements. Thus, if we say that the flesh of an animal is permitted, though it is converted and developed from food consumed by the animal which became filthy in the animal's stomach, then, the *ḥukm* of all converted material must be the same, and this includes flesh, and also when that is converted to dust, or when blood is converted into flesh.[423] Al-Shāfiʿī prohibits *jallāla*, while Mālik considers it disapproved.

With respect to filth being mixed up with permissible food, the source is the well-known tradition from Abū Hurayra and Maymūna "that the Prophet (God's peace and blessings be upon him) was asked about a mouse falling into butter, and he said, 'If it was in a solid state, throw it (the mouse) out and what was around it, but eat the rest, but if it was melted, spill it or do not touch it'". The jurists have two opinions on filth mixing up with eatables. The first is the opinion of those who took into account mixing alone for purposes of prohibition, even if the food has not changed in colour or smell or in taste because of the filth that is mixed up with it. This is the well-known opinion and is maintained by the majority of the jurists. The second opinion is held by those who take change into account. This is the opinion of the Ẓāhirites and is a narration from Mālik.

The reason for their disagreement arises from the dispute over the meaning of the tradition. This is so as some of them considered it to be a specific application intended to apply to a specific case, and these are the Ẓāhirites. They maintained that this tradition is to be considered in its apparent meaning and all other things are to be considered with respect to the change caused in them by the filth. Some of them considered it to be a specific case intended to apply generally, and these are the majority. They maintained that the meaning of the tradition is that it is the mixing up of the filth itself that makes a permissible thing filthy, otherwise he (the Prophet) would not have elaborated upon the distinction for them as to whether the filth mixed up with it was in a solid or melted state, as things mix more readily when they are in a liquid state. It follows from this that it is necessary to distinguish between small and large amounts of filth. As they did not distinguish between them, it appears that they confined some of the implications to its apparent meaning and constructed analogies from some. It was for this reason that the Ẓāhirites construed the entire tradition in its apparent meaning.

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[423] The author appears to be saying here that according to analogy the *ḥukm* of permissibility cannot be based upon chemical conversions. For example, if blood changes into flesh and other constituents of the body, then the consumption of blood is prohibited and meat is not.

The jurists also agreed about some of the things that are prohibited in themselves and they differed about others. The Muslim jurists agreed about two of these things: swine-flesh and blood. With respect to the swine, they agreed about its fat, meat, and skin. They disagreed about the utilizing of its bristles and the purification of its skin, whether tanned or untanned. This has preceded in the Book of Purification. With respect to blood, they agreed about the prohibition of blood that flows out from an animal subjected to *dhakāh*, but they disagreed about blood that does not flow out. Likewise, they disagreed about the blood of a whale. Some of them held it to be filthy, while others did not. The disagreement about all this is found within Mālik's school and outside it. The reason for disagreement about blood that does not flow out derives from the conflict of the unqualified implication with the qualified. This is so as the words of the Exalted, "Forbidden unto you (for food) are carrion and blood . . .",[424] imply a prohibition of flowing as well as non-flowing blood, while the words of the Exalted, "Say: I find not in that which is revealed to me aught prohibited to an eater that he eat thereof, except it be carrion, or blood poured fourth . . .",[425] implies through the indirect indication of the text the prohibition of the flowing blood alone. Those who preferred the unqualified implication to the qualified stipulated the prohibition of flowing blood. Those who maintained that the unqualified meaning implies an additional *ḥukm* over the qualified, and that the conflict between the unqualified and qualified meanings is a category of the indirect implication of the text whereas the unqualified meaning has a general implication, the general implication being stronger than the indirect indication of the text, decided to give predominance to the unqualified meaning over the determined and said that small as well as large quantities of blood are prohibited.

The condition of "flowing" stipulated in the proscription of blood relates to blood flowing from the animal subjected to *dhakāh*, that is, the blood flowing out at the time of *dhakāh* from an animal that is permissible for eating. The blood flowing out from an animal, while that animal is alive, is prohibited in small or large quantities, similarly, the blood that flows from an animal which is prohibited for eating, even when this animal is subjected to *dhakāh*. Small as well as large quantities of it are prohibited, and there is no dispute about this.

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[424] Qur'ān 5 : 3.
[425] Qur'ān 6 : 146.

With respect to their disagreement about the blood of a whale, the reason for disagreement is the conflict of a general implication with analogy. The general implication is in the words of the Exalted, "and blood . . ."[426] The analogy is based on the assumption that the *ḥukm* of blood follows the *ḥukm* of the dead animal, that is the blood of that whose carrion is prohibited is also prohibited, and if the animal is permissible its blood should also be permissible. It was for this reason that Mālik held that animal with no blood is not carrion.

The Qāḍī (Ibn Rushd) said: We have discussed this issue in the Book of Purification. The jurists quote a tradition in this context that restricts the general implication of the prohibition of blood. This is the saying of the Prophet (God's peace and blessings be upon him), "Two kinds of carrion are permitted for us as are two kinds of blood".[427] The authenticity of this tradition is probable (*ẓannī*), as it is does not exist in the well-known compilations of *ḥadīth*.

The things prohibited (perpetually and) in themselves, and which are disputed, are four in number. The first is the flesh of birds of prey and four-footed predatory animals. The second are domesticated animals with hoofs. The third is the flesh of animals the killing of which is prescribed in the Ḥaram. The fourth is the flesh of animals for which there is a natural aversion and which appear repulsive by nature. Abū Ḥāmid has related from al-Shāfiʿī that he prohibited the flesh of animals whose killing[428] is prohibited, like the *khuttāf* (a type of swallow) and the bee. This makes it the fifth of the disputed species.

17.1.1. Issue 1

This deals with predatory quadrupeds. Ibn al-Qāsim has related from Mālik that they are disapproved (*makrūh*). This is the opinion on which his disciples have relied and it is the prominent opinion in their view. Mālik has mentioned something in *al-Muwaṭṭa*, which indicates that they are prohibited. This is so as he said immediately after the tradition of Abū Hurayra from the Prophet (God's peace and blessings be upon him), "Eating of all predators with fangs is prohibited. That is the position taken by us". Al-Shāfiʿī, Ashhab, the disciples of Mālik, and Abū Ḥanīfa upheld their prohibition, except that they disagreed about the species of the predators with Abū Ḥanīfa saying that anything that eats meat is a predator, so that even the elephant, the hyena, and the gerbil are also included under predators, as are cats. Al-Shāfiʿī said that the hyena and the fox may be eaten, and the predators are those that attack humans, like the lion, leopard, and the wolf. Both views are to be found in the

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[426] Qurʾān 5 : 3.

[427] The remaining text of the tradition is: "the fish and locust, and the liver and the spleen."

[428] The text in the original mentions the word "eating", that is, animals whose eating is prohibited; however, a comparison with the text two pages later reveals that this should be "killing".

School. The majority of the jurists maintain that the monkey is not to be eaten and not to be benefited from, and in al-Shāfiʿī's view even the dog is prohibited and is not to be benefited from, as he concluded its filthiness in itself from the filthiness of its saliva.

The reason for their disagreement about the prohibition of the flesh of quadruped predators stems from the conflict of the Book with traditions. This is so as the apparent meaning of the words of the Exalted, "Say: I find not in that which is revealed to me aught prohibited to an eater that he eat thereof, except it be carrion, or blood poured fourth . . .",[429] implies that whatever is besides what is mentioned in the verse is permitted. The apparent meaning of the tradition of Abū Thaʿlaba al-Khushanī, who said, "The Messenger of Allāh (God's peace and blessings be upon him) proscribed the eating of all predators with fangs", implies that the predators are prohibited. This is how it has been recorded by al-Bukhārī and Muslim. The version related by Mālik in the same context on the authority of Abū Hurayra conflicts more obviously, and it states that the Messenger of Allāh (God's peace and blessings be upon him) said, "The eating of any predator with fangs is prohibited". This is so as a reconciliation is possible between the first tradition and the verse by construing the proscription laid down in it to imply abomination. A reconciliation between the tradition of Abū Hurayra and the verse is not possible, unless it is assumed that it abrogates the verse, in accordance with the view of those who maintain that an addition amounts to abrogation and that the Qurʾān may be abrogated by the *sunna* that is *mutawātir*. Those who reconciled the tradition of Abū Thaʿlaba and the verse construed the tradition about the flesh of predators to imply abomination. Those who maintained that the tradition of Abū Hurayra includes an addition over what is in the verse prohibited the flesh of predators. Those who maintained that the hyena and the fox are prohibited did so through the general implication of the term "predators". Those who exempted from this the hostile decided on the basis of what is related by ʿAbd al-Raḥmān ibn ʿAmmār, who said, "I asked Jābir ibn ʿAbd Allāh about the hyena whether it is to be eaten. He said, 'Yes'. I said, 'Is it to be hunted?' He said, 'Yes'. I said, 'And you have heard this from the Messenger of Allāh (God's peace and blessings be upon him)?' He said, 'Yes'". Though this tradition is related by ʿAbd al-Raḥmān alone he is a trustworthy narrator according to the leading traditionists. Further, they relied upon the tacit approval of the Prophet (God's peace and blessings be upon him) when the hyena was eaten before him.

With respect to the birds of prey, the majority of the jurists maintain that they are permitted because of the verse mentioned, but a group of jurists prohibited them, because of what is related in the tradition of Ibn ʿAbbās, who said, "The Messenger of Allāh (God's peace and blessings be upon him) proscribed the eating of all predatory animals with fangs and all birds of prey with claws". This tradition, however, has not been recorded by the two Shaykhs (al-Bukhārī and Muslim), but it has been recorded by Abū Dāwūd.

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[429] Qurʾān 6 : 146.

17.1.2. Issue 2

This issue is about the domesticated animals with hoofs, I mean, horses, mules, and donkeys. The majority of the jurists agreed about the prohibition of eating the meat of the domesticated donkey, except what is related from Ibn ʿAbbās and ʿĀʾisha, who used to consider it permissible. It is related from Mālik that he used to consider it abominable, while a second narration from him is the same as that of the majority. Mālik, Abū Ḥanīfa, and a group of jurists maintained that eating horses is prohibited, while al-Shāfiʿī, Abū Yūsuf, Muḥammad, and a group of jurists upheld its permissibility. The reason for their disagreement over the domesticated ass is the conflict of the mentioned verse with authentic traditions on the topic from Jābir and others. He said, "The Messenger of Allāh (God's peace and blessings be upon him) proscribed on the Day of Khaybar the meat of the domesticated ass and permitted the meat of horses". Those who reconciled the verse and this tradition construed it to imply abomination. Those who maintained that it is a case of abrogation upheld the prohibition of the donkey, or they maintained that it is an additional *ḥukm* without invoking abrogation. Those who did not uphold the prohibition argued on the basis of what is related from Abū Isḥāq al-Shaybānī from Ibn Abī Awfā, who said, "We came across an ass when we were with the Messenger of Allāh (God's peace and blessings be upon him) on the day of Khaybar and cooked it. The crier sent by the Messenger of Allāh (God's peace and blessings be upon him) announced that the pots should be turned over with what is in them". Ibn Isḥāq has said, "I mentioned this to Saʿīd ibn Jubayr and he said that this proscription was laid down as it eats filth".

Their disagreement about mules is based upon the conflict of the indirect implication in the words of the Exalted, "And horses and mules and asses (hath He created) that ye may ride them, and for ornament",[430] (read) along with the words of the Exalted in the case of cattle, "Allāh it is Who hath appointed for you cattle, that ye may ride on some, and eat of some",[431] with the verse comprehensively detailing the prohibited things, because the indirect meaning of the communication indicates that the permissibility in the case of mules is for riding, as well as the analogy for mules drawn from donkeys. The reason for their disagreement about horses arises from the conflict of the indirect implication of this verse with the tradition of Jābir, and the conflict of the analogy for the horse drawn from the mule as well as the donkey with it; however, the permissibility of horseflesh is explicit in Jābir's tradition, and it is not imperative to oppose it with analogy or the indirect implication of the communication.

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[430] Qurʾān 16 : 8.

17.1.3. Issue 3

This issue is about their disagreement over animals whose killing is prescribed within the Ḥaram, and these are five that have been expressly mentioned (in the texts): the raven, the kite, the scorpion, the mouse, and the ferocious dog. A group of jurists understood from the command to kill them, along with the proscription of killing animals that are permitted for eating, that the underlying cause (*ʿilla*) for this is that these five creatures are prohibited for eating. This is al-Shāfiʿī's opinion. Another group of jurists understood from this the reason to be the of hostility (found in these creatures) and not prohibition. This is the opinion of Mālik and Abū Ḥanīfa and of the majority of their disciples.

With respect to the fourth species that is repulsive for humans, like insects, frogs, lobsters, turtles, and other similar creatures, al-Shāfiʿī considered them prohibited while others permitted them. Some of them merely considered them abominable. The reason for their disagreement is their dispute over the term *khabāʾith* (foul, gross) in the words of the Exalted, "He will make lawful for them all good things and prohibit for them only the foul".[432] Those who maintained that these are the things prohibited by the text of the law did not prohibit those that are repulsive for humans, as long as there was no explicit text forbidding them. Those who maintained the foul things are those that are found repulsive by humans said that these are prohibited.

What Abū Ḥāmid has related from al-Shāfiʿī about his prohibiting the flesh of animals whose killing is proscribed is conjecture, for I do not know where the traditions about this occur. Perhaps, they are in books other than those that are well-known to us.

The jurists agreed unanimously about the permissibility of eating animals of the sea, as long as their names do not coincide with the names of land animals that are prohibited. Mālik said that there is no harm in eating all the animals of the sea, except that he considered the porpoise (*khinzīr al-māʾ*)[433] abominable, and said: you call it *khinzīr*. This was also the opinion of Ibn Abī

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[432] Qurʾān 7 : 157.

[433] This is the name given to the porpoise which, according to the dictionary, is a name for a number of gregarious toothed whales. *Porcus* in Latin is pig, while *piscis* is fish. Together they form porpoise, which is *khinzīr al-māʾ*.

Laylā, al-Awzāʿī, Mujāhid, and the majority of the jurists, except that they stipulated *dhakāh* in things other than fish, and this has already been mentioned. Al-Layth ibn Saʿd said that the *insān al-māʾ* (manatee)[434] and the porpoise are not to be eaten under any circumstances.

The reason for their disagreement is whether the terms "human beings" and "swine" include these things in the literal meaning or whether this is the technical application in the law. On the basis of this, the discussion must turn to every animal of the sea that has a counterpart in name in the language or in the technical application among the animals prohibited upon land, like the dog, according to those who consider it prohibited. The examination of this issue refers to two factors. The first is whether these names are literal. The second is whether an equivocal term has a general application. For example, *insān al-māʾ* and the swine of the water (porpoise) are referred to in the terms "swine on land" and "*insān*". Those who accepted that these terms are literal, and who held that the equivocal terms have a general application, were bound to uphold their prohibition. Mālik, therefore, reserved his view and said: you call it *khinzīr*.

This is the position about animals prohibited for eating and those permitted.

All vegetation that provides nutrition is permitted, except for *khamr* (wine) and all other intoxicating beverages derived from juices that ferment and from honey itself.

With respect to *khamr*, they agreed about its prohibition in small or large quantities, I mean, that which is derived from grape juice. In the case of the other intoxicating beverages, they disagreed about a small quantity that does not intoxicate. They agreed that the amount which intoxicates is prohibited. The majority of the jurists of Ḥijāz, as well the majority of the traditionists, maintained that small and large quantities of intoxicating liquor are prohibited. The Irāqīs, Ibrāhīm al-Nakhaʿī from the Tābiʿūn, Sufyān al-Thawrī, Ibn Abī Laylā, Shurayk, Ibn Shubrama, Abū Ḥanīfa, and all the remaining jurists of Kūfa, as well as the majority of the jurists of Baṣra maintained that what is prohibited in all the remaining beverages (that is, besides wine derived from grape juice) is intoxication itself and not the substance (of the beverages).

The reason for their disagreement springs from the conflict of traditions and analogies on the issue. The jurists of Ḥijāz have two methods for establishing their opinion. The first is through the traditions laid down on the issue. The second is by designating all the intoxicating beverages, in their totality, by the name *khamr*. One of the best known traditions that the jurists of Ḥijāz used as evidence is what is related by Mālik from Ibn Shihāb from Abū Salama ibn

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[434] Manatee is probably what is intended here. The dictionary defines *insān al-māʾ* as a sea-animal with a tail. The description fits manatee, which is also known as a sea-cow.

ʿAbd al-Raḥmān from ʿĀʾisha that she said, "The Messenger of Allāh (God's peace and blessings be upon him) was asked about *bitaʿ* (wine from honey and dates) and *nabīdh* from honey (mead) and he said, 'Any drink that intoxicates is prohibited'". It is recorded by al-Bukhārī. Yaḥyā ibn Maʿīn said that this is the most authentic tradition related from the Prophet (God's peace and blessings be upon him) about an intoxicant. There is also the tradition recorded by Muslim from Ibn ʿUmar that the Prophet (God's peace and blessings be upon him) said, "Each intoxicant is *khamr*, and each *khamr* is prohibited". These two are authentic (*ṣaḥīḥ*). The first one is agreed upon by all, while the second is declared authentic by Muslim alone. Al-Tirmidhī, Abū Dāwūd, and al-Nasāʾī have recorded from Jābir ibn ʿAbd Allāh from the Messenger of Allāh (God's peace and blessings be upon him) that he said, "(If) something intoxicates in a large quantity its small quantity is prohibited". This is explicit on the point at issue.

The second argument is that all (intoxicating) beverages are called *khamr*. For this they have two methods. The first is from the aspect of establishing names by way of derivation. The second is by way of transmission. They said, from the aspect of derivation, that it is known to the experts of language that *khamr* has been called *khamr* because it clouds (veils) the intellect, therefore, it follows that the term *khamr* be applied to everything that befuddles the intellect. There is a disagreement among the experts on *uṣūl al-fiqh* over this method of establishing names, and it is not acceptable to the Khurāsānians. The second method is by way of transmission. They maintained that even if it is not conceded to us that intoxicating beverages are designated in the language by the term *khamr*, yet they are called *khamr* in the legal sense. They argued for this on the basis of the tradition of Ibn ʿUmar that has preceded and by what is related by Abū Hurayra that the Messenger of Allāh (God's peace and blessings be upon him) said, "*Khamr* is from these two trees: the date-palm and the grapevine". Further, on what is related from Ibn ʿUmar that the Messenger of Allāh (God's peace and blessings be upon him) said, "*Khamr* is from grapes. *khamr* is from honey, *khamr* is from raisins, *khamr* is from wheat, and I forbid you from using all intoxicants". These are the arguments of the jurists of Ḥijāz for the prohibition of all intoxicating beverages.

The Kūfians relied for their opinion upon the apparent meaning of the words of the Exalted, "And of the fruits of the date-palm, and grapes, whence ye derive strong drink, *sakar*, and good nourishment",[435] and on traditions that they related on the issue, as well as upon *qiyās maʿnawī* (primary form of analogy).

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[435] Qurʾān 16 : 67.

With respect to their arguments on the basis of the verse, they said that *sakar* is an intoxicant and if it had been prohibited in its substance Allāh would not have designated it as "good nourishment." Among traditions that they relied upon in this topic, the best known, in their view, is the tradition of Abū ʿAwn al-Thaqafī from ʿAbd Allāh ibn Shaddād from Ibn ʿAbbās from the Prophet (God's peace and blessings be upon him), who said, "*Khamr* is prohibited for its substance", and intoxication in things besides it. They said that this is explicit and is not susceptible to interpretation. The jurists of Ḥijāz considered it weak as some of its narrators related the words: "intoxicant from other things". Further, there is the tradition of Shurayk from Sammāk ibn Ḥarb with its *isnād* from Abū Burdā ibn Niyār, who said, "I used to forbid you from drinking beverages in certain containers, so drink what you like but do not get intoxicated". It is recorded by Al-Ṭaḥāwī. It is related from Ibn Masʿūd that he said: "I witnessed the prohibition of *nabīdh* (mead) as you witnessed it, thereafter, I witnessed its permissibility. I remembered and you forgot". They related from Abū Mūsā that he said, "The Messenger of Allāh (God's peace and blessings be upon him) sent me as well as Muʿādh to Yemen. We said, 'O Messenger of Allāh, there are two beverages there that they make from wheat and barley. One of them is called *mizr* and the other is called *bitaʿ*.[436] Which one should we drink'. He said, 'Drink (both) but do not get intoxicated'". This is also recorded by al-Ṭaḥāwī. There are other traditions also that they narrated on the subject.

In their argument by way of reasoning they said that the Qurʾān has explicitly laid down that the *ʿilla* (underlying cause) of prohibition of *khamr* is that it prevents the remembrance of Allāh and breeds enmity and hatred, as the Exalted has said, "Satan seeketh only to cast among you enmity and hatred by means of strong drink (*khamr*) and games of chance, and to turn you from remembrance of Allāh and from (His) worship". This *ʿilla* (they said) is found in a certain quantity of the intoxicating liquor not in what is less than that; it follows therefore that this quantity be prohibited, except on what a consensus has taken place regarding small as well as large quantities of *khamr*. They said that this kind of analogy is linked with the text, and it is one in which the underlying cause is indicated by the law.

The later analysts said that the argument of the jurists of Ḥijāz is stronger with respect to transmission, while the arguments of the Iraqīs by way of analogy are better. If this is as they say, then, their disagreement refers back to their dispute about giving predominance to traditions over analogy, or to analogy over tradition, when they conflict. It is an issue that is disputed, but the truth is that if the tradition is explicit and authentic, then, it must be granted predominance over analogy; however, if the apparent meaning is subject to interpretation, the analysis vacillates between reconciling the two through the interpretation of the text and between granting predominance to the apparent meaning over the implications of analogy. This varies with the strength of the words used in the apparent text as well as on the strength of the analogy that confronts it, and the distinction between them cannot be grasped except through mental skill (taste), just as (the distinction between) balanced and unbalanced speech (or poetry) is grasped. Perhaps, both kinds of skills are equal and because of that there is extensive disagreement over this category, so much so that some have said: each *mujtahid* is correct.

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[436] *Mizr* is Abyssinian beer made of millet, barley, or grain. *Bitaʿ* is an intoxicating drink made from honey and dates.

The Qāḍī (Ibn Rushd) said: As it appears to me, Allāh knows best, although the saying of the Prophet (God's peace and blessings be upon him), "Each intoxicant is prohibited", can probably be interpreted as meaning the *ḥukm* of a certain quantity of the intoxicant and not its category, it is more likely to mean the prohibition of the category rather than the quantity, because of the conflict of analogy with this as has been construed by the Kūfians. It is not unlikely that the Lawgiver prohibit a small amount of the intoxicant for the purpose of plugging of the channels (to an agreed unlawful end) and by way of emphasis, even though the harm appears to occur when excessive amounts (of the intoxicant) are taken. Moreover, it is established from the state of the law, by consensus, that the Lawgiver has considered the category in the prohibition of *khamr* and not the requisite quantity. It follows that whenever the underlying cause of *khamr* is found it (the intoxicant) should be linked with *khamr*. And those who believe in the existence of a distinction should come up with an evidence for this. This is the case when they do not concede to us the authenticity of the saying of the Prophet (God's peace and blessings be upon him), "(If) something intoxicates in a large quantity its small quantity is prohibited." If they concede it, they will not find any way of avoiding our conclusion, as it is explicit on the point of dispute, and (besides this) it is not proper to oppose explicit texts with analogies. Further, the law has communicated that in *khamr* there is harm as well as benefit. The Exalted has said, "They question thee regarding strong drink (*khamr*) and games of chance. Say: In both there is great sin, and (some) utility for men".[437] If the aim of analogy is to reconcile the negation of the harm and the existence of the benefit, it would prohibit larger quantities and permit smaller quantities, but when the law has given predominance to the *ḥukm* of the harmful in the case of *khamr* and has prohibited small as well as large quantities of it, it is necessary that it be the same for everything in which the underlying cause of prohibition is found, unless there is established in it a legal distinction.

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[427] Qur'ān 2 : 219.

They agreed that the making of beverages is permitted, as long as the intensity of fermentation related to *khamr* does not exist in them, because of the saying of the Prophet (God's peace and blessings be upon him), "Make (fermented) beverages, but each intoxicant is prohibited", and also because of what is established from the Prophet (God's peace and blessings be upon him) "that he used to make *nabīdh* (fermented beverage), but he used to spill it on the second or third day". They disagreed about this on two issues. The first is about utensils in which fermentation is undertaken. The second is about fermentation of two things together like fresh and ripe dates, and dried dates and raisins.

17.1.4. Issue 1: Fermented beverages

They agreed unanimously about the fermentation of drinks in water-skins, but they differed about fermentation in other containers besides this. Ibn al-Qāsim has related from Mālik that he used to disapprove fermentation in gourds and vessels smeared with pitch, but he did not disapprove of it in things besides these. Al-Thawrī disapproved fermentation in gourds, green jars, hollow stumps, and vessels smeared with pitch. Abū Ḥanīfa and his disciples said that there is no harm in fermenting drinks in all (kinds of) vessels and utensils.

The reason for their disagreement derives from the conflict of traditions in the topic. This is so as a proscription is related on the authority of Ibn ʿAbbās in four things that were disapproved by al-Thawrī. It is an authentic tradition. It is related by Mālik from Ibn ʿUmar in *al-Muwaṭṭaʾ* "that the Prophet (God's peace and blessings be upon him) proscribed the fermentation of drinks in a gourd or a vessel smeared with pitch". It is laid down in the tradition of Jābir from the Prophet (God's peace and blessings be upon him) on the authority of Shurayk from Sammāk that he said, "I used to forbid you from fermenting drinks in a gourd, green jars, hollow stumps, and a jug smeared with pitch. Ferment the drinks, but an intoxicant is not permitted". The tradition of Abū Saʿīd al-Khudrī, which is related by Mālik in *al-Muwaṭṭaʾ*, is that the Prophet (God's peace and blessings be upon him) said, "I used to forbid you from fermenting drinks. Ferment them and each intoxicant is prohibited".

Those who maintained that the earlier proscription, which was abrogated, was a proscription about fermentation in these utensils, as another proscription besides this is not known, said that fermentation is permitted in all utensils. Those who maintained that the earlier proscription, which was abrogated, was an absolute proscription of fermentation said that the proscription of fermenting in these utensils persists. Those who relied on the tradition of Ibn ʿUmar upheld the proscription for the two utensils mentioned in it. Those who relied upon the tradition of Ibn ʿAbbās upheld the proscription for four utensils, as it includes an additional *ḥukm*, and because the conflict between this tradition and the tradition of Ibn ʿUmar belongs to the category of the indirect indication of the text. In the book of Muslim the proscription is about fermentation in a green jar, and it says that he made an exemption for them in *using it if it was not smeared with pitch.*

17.1.5. Issue 2: Fermented beverages

This issue is about the fermentation of two mixed constituents. The majority of the jurists maintained the prohibition of mixed constituents of things that are amenable to fermentation. A group of jurists said that (such) fermentation is abominable. Another group of jurists said that it is permitted. One group said, as far as I know at the moment, that a mixture of two constituents is prohibited even if they are not those that are amenable to fermentation.

The reason for their disagreement stems from their ambivalence as to whether the proscription laid down in this indicates disapproval or prohibition. If we maintain that it indicates prohibition, then, does it indicate the invalidity of the object of the act proscribed? This is so as it is established from the Prophet (God's peace and blessings be upon him) "that he proscribed the mixing of dried dates and raisins, of blossoms and ripe dates, and of unripe dates and raisins." In some versions the Prophet (God's peace and blessings be upon him) said, "Do not ferment blossoms and raisins together, or dates and raisins together, and ferment each separately". On the basis of this, three opinions are derived: an opinion prohibiting it, an opinion upholding permissibility along with the accompanying sin (inherent) in fermenting, and an opinion upholding abomination.

Those who maintained that it is permissible probably relied upon the general implication of the tradition about fermentation in the tradition of Abū Saʿīd al-Khudrī. Those who prohibited all mixing of constituents either adopted the prohibiting underlying cause, which is mixing itself and not what results from the intensity of the fermented drink, or they adopted the general implication of the tradition in which he proscribed the mixing of constituents.

The jurists agreed that if the *khamr* turns into vinegar (of itself) its consumption is permitted. But they had three opinions about what would be the case when its conversion into vinegar is initiated by human intervention: prohibition, abomination, permissibility. The reason for their disagreement stems from the conflict of analogy with a tradition, as well as their dispute over the meaning of the tradition. This is so as Abū Dāwūd has recorded a tradition from Anas ibn Mālik "that Abū Ṭalḥa asked the Prophet (God's peace and blessings be upon him) about orphans who had inherited wine. He said, 'Spill it'. He asked, 'Should I not turn it into vinegar?' He replied, 'No'". Those who understood the prohibition to be a plugging of the channels (to an unlawful end) construed it to mean abomination. Those who interpreted the proscription as having no underlying cause upheld prohibition. From this it can be derived that there is no prohibition even according to the opinion of those who believe that a proscription renders unlawful the object of the proscribed act. With respect to the conflicting analogy in the case of the prohibition of turning it into vinegar, it is known from the law by necessity that the different *aḥkām* are for different substances, and the substance of *khamr* is different from the substance of vinegar, and vinegar, by consensus, is permitted. Thus, when the substance of *khamr* is converted into the substance vinegar it is necessary that it be permitted, whatever the manner in which it was converted.

17.2. Chapter 2 The Use of Prohibited Things under Duress

The source for this topic are the words of the Exalted, "He hath explained unto you that which is forbidden unto you, unless you are compelled thereto".[438] The study of the topic relates to the legalizing cause, about the category of a thing made lawful, and its quantity.

The cause is the necessity of eating, that is, when nothing permissible is found that may be eaten, and there is no dispute about this. The second is the seeking of a cure, and this is disputed. Those who permitted it argued on the basis of the permission granted by the Prophet (God's peace and blessings be upon him) to ʿAbd al-Raḥmān ibn ʿAwf to wear silk because of a (skin) rash that he had. Those who prohibited it did so on the basis of the saying of the Prophet (God's peace and blessings be upon him), "Allāh has not placed the cure for my *umma* in things that he has prohibited for it".

The category of things made lawful (due to necessity) includes every thing prohibited, like carrion and others. The disagreement is about *khamr* when it is used for medicinal purposes but not about its use as food (under duress); therefore, they permitted a thirsty person (dying of thirst) to drink it if that can quench his thirst, and the person who is burned by the sun to do away with the burns.

With respect to the quantity that may be eaten under duress from carrion and other things, Mālik said that the limit for this is to stay hunger and to make provisions until other food is found. Al-Shāfiʿī and Abū Ḥanīfa said that he is not eat more than what is enough to sustain life, and this was also upheld by some of Mālik's disciples. The reason for disagreement is whether the thing permitted to a person in a state of duress is the whole quantity

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[438] Qurʾān 6 : 120.

(available) or what will sustain life. It is apparently the whole of it because of the words of the Exalted, "But he who is driven by necessity, neither craving nor transgressing".[439]

Mālik and al-Shāfiʿī agreed that it is not permitted for a person under duress to eat carrion if he has undertaken his journey in disobedience, because of the words of the Exalted, "Neither rebellious nor transgressing".[440] Other jurists upheld its permissibility.

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[439] Qurʾān 2 : 173.

[440] Qurʾān 2 : 173. Pickthall's translation changed slightly to convey the literal meaning intended in the discussion.

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THE
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VOLUME II

Bidāyat al-Mujtahid
wa Nihāyat al-Muqtaṣid

Ibn Rushd

Translated by Professor Imran Ahsan Khan Nyazee

Reviewed by Professor Mohammad Abdul Rauf

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XVIII
THE BOOK OF *NIKĀḤ* (MARRIAGE)

The principles of this book are covered in five chapters:
Chapter 1: Preliminaries of marriage;
Chapter 2: Requirements for the validity of marriage;
Chapter 3: Requirements for an option (*khiyār*) in marriage;
Chapter 4: Marital rights; and
Chapter 5: Marriages prohibited by law.

18.1. Chapter 1: Preliminaries of Marriage

In this chapter there are four issues: the *ḥukm* of marriage; the *ḥukm* of the proposal (*khiṭba*) for marriage; proposal to a woman proposed to already; and glancing at the woman to be proposed to (*makhṭūba*).

18.1.1. Issue 1: The *ḥukm* of marriage

A group of jurists maintained that the *ḥukm* of marriage conveys recommendation. These are the majority (*jumhūr*). The Ẓāhirites said that it is obligatory. The later Mālikites held that for some it is obligatory, for others recommended, and for the rest it is permitted. This depends on the extent to which an individual fears falling into evil.

The reason for their disagreement lies in whether the form (*sīgha*) of the command—in the verse: "[M]arry of the women who seem good to you",[1] and in the tradition, "Marry, for through you I wish to outnumber the nations", and in other traditions like it—implies obligation, recommendation, or permissibility. Those who say it is obligatory for some, recommended for others, and permitted for the rest, have recourse to *maṣlaḥa* (secured interest), which is a kind of analogy called *mursal*.[2] It is a principle for which there is no determined source of reliance; it has been rejected by a number of jurists. The preferred opinion in Mālik's school is based on it.

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[1] Qurʾān 4 : 3

[2] The word *mursal*, from *irsāl*, means "to let go". This term is used with reference to *qiyās*, which is analogy within a narrow framework tied down to a particular text. *Maṣlaḥa* is undertaken with reference to the meaning of the texts considered collectively, free from the hold of a particular text.

The form of the proposal for marriage transmitted from the Prophet (God's peace and blessings be upon him) is not obligatory according to the majority. Dāwūd said it is obligatory. The reason for their disagreement lies in whether he act of the Prophet (God's peace and blessings be upon him) related to this mplies an obligation or recommendation.

18.1.2. & 18.1.3. Issues 2 & 3: Proposal of marriage (*Khiṭba*) and the *ḥukm* of proposal to a woman proposed to already

The proscription from the Prophet (God's peace and blessings be upon him) about a proposal made while another's proposal is pending is well established. The jurists differed as to whether it indicates rescission of the second proposal? If it does indicate rescission, then under what circumstances? Dāwūd said it is rescinded while al-Shāfiʿī and Abū Ḥanīfa said it is not. Both opinions are narrated from Mālik, and a third is that it is rescinded, before consummation and not after it. Ibn al-Qāsim said that the proscription has meaning when a righteous person proposes during the proposal of another righteous person; however, if the first person is not righteous while the second is, it is permissible.

About the time of the second proposal, the majority are of the opinion that it arises when the matter of the first has been referred to a third party, but not in the early stages of the proposal. This is based on the tradition of Fāṭima bint Qays "when she came to the Prophet (God's peace and blessings be upon him) and mentioned to him that Abū Jahm ibn Hudhayfa and Muʿāwiya had both proposed to her. He said, 'As for Abū Jahm, he is a person who does not lift his stick off women, and Muʿāwiya is destitute having no wealth, but marry Usāma' ".

18.1.4. Issue 4: Glancing (for approval) at the woman to be proposed to

Glancing at a woman prior to proposal was permitted by Mālik up to the face and hands alone, while others permitted it for the whole body except the private parts. Some have prohibited this without qualification. Abū Ḥanīfa permitted glancing at the feet along with the face and the hands. The reason for their disagreement is that the command permits glancing at women in general terms and the proscription also prohibits it in general terms. It is also laid down in qualified terms, that is, glancing at the face and the hands, which was the interpretation of most of the jurists of the words of the Exalted, "[Women] are not to display their adornment save that which is apparent",[3] that they mean the face and the hands. Further, there is the analogy of the permissibility, according to the majority, of uncovering them during *ḥajj*. Those who forbade the use of this principle did so because of the absolute prohibition of looking at women.

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[3] Qurʾān 24 : 31

18.2. Chapter 2: Requirements for the Validity of Marriage

This chapter is divided into three elements (*arkān*; sing. *rukn*). The first element is about the identification of the formation of this contract. The second element is about the identification of the subject-matter (*maḥall*) of this contract. The third element is about the identification of the conditions of the contract.

18.2.1. Element 1: Formation of the Contract

The study of this element is undertaken from different aspects: the nature of the permission with which the contract is concluded; the person whose permission is acknowledged for the validity of this contract; whether the contract of marriage is permitted with an option; and whether the contract is obligatory with delay from one of the parties, or whether immediate acceptance is a condition?

18.2.1.1. Aspect 1: Consent in marriage

Permission in marriage is of two types. It takes place for men and deflowered women by means of words and for consulted virgin women through their silence, that is, their consent; rejection, however, is by words. There is no dispute about this, as a whole, except what is narrated from the followers of al-Shāfiʿī that the permission of the virgin is by words, when the person giving her away in marriage (her guardian) is other than the father or the grandfather. The majority inclined towards permission through silence because of what is established from the Prophet (God's peace and blessings be upon him) that "the deflowered woman has a greater right over herself than her guardian (*walī*), but the virgin is to be asked about herself and her silence is her permission".

They agreed that in order to be valid, the marriage contract of a person whose permission is by words has to be concluded by the use of the word "*nikāḥ*" or "*tazwīj*". They differed about its conclusion through the word "gift" or the word "sale" or "sacrifice". Some jurists, like Mālik and Abū Ḥanīfa, permitted this. Al-Shāfiʿī said that it cannot be concluded except by the word "*nikāḥ*" or by the word "*tazwīj*". The reason for their disagreement lies in whether it is a contract in which, along with intention (*niyya*), a particular word is required, or whether the employment of such a word is not necessary for its validity. Those who attach it to the category of contracts that require the consideration of both factors said that the contract is not concluded except by the word "*nikāḥ*" or "*tazwīj*". Those who said that particular words are not a condition in it, keeping in view those contracts in which words are not a condition, permitted marriage by means of any word that renders the legal meaning, that is, if between it and the legal meaning there is a common basis.

18.2.1.2. Aspect 2: The person whose consent is taken into account for the validity of the contract

The person whose acceptance is taken into account for the validity of this contract is identified in the law (*sharʿ*) in two ways. In the first, the consent of the parties (themselves) to the marriage, the groom and the bride, is taken into account, either with the consent of the guardian, or without his consent, according to the opinion of those who do not stipulate a guardian in the case of consent by a woman who possesses the right herself. In the second, the consent of the guardians alone is taken into account. In both methods there arise issues that are agreed upon and those that are disputed. We shall mention out of these the (issues that furnish) principles and rules.

We say: The jurists agreed about the stipulation of the consent and acceptance of men who had attained puberty, were free, and were in charge of their own affairs. They disagreed whether the master could force his slave to marry, and the executor (*waṣī*) his *bāligh*[4] interdicted protégé. Mālik said that the master could force his slave to marry. The same is the opinion of Abū Ḥanīfa. Al-Shāfiʿī said that he is not to be forced. The reason for their disagreement is based on whether this (the contract of marriage) is one of the rights of the master. Similarly, they disagreed about the executor forcing his interdicted ward, and this dispute exists within the school (of Mālik). The reason for their disagreement, thus, lies in whether marriage is one of the interests (*maṣlaḥa*) secured for him, or is not an interest but a means for pleasure. On the basis of the opinion that marriage is obligatory there should be no hesitation in this.

On the question of women, whose consent is taken into account in marriage, they agreed that the consent of the deflowered *bāligh* (major) woman is to be taken into account, because of the saying of the Prophet (God's peace and blessings be upon him), "The deflowered woman expresses her own consent", except what is narrated from al-Ḥasan al-Baṣrī. They disagreed about the *bāligh* virgin and the non-*bāligh* deflowered girl (when she does not exhibit bad behaviour). About the *bāligh* virgin, Mālik, al-Shāfiʿī and Ibn Abī Laylā said that it is only for the father to force her to marry. Abū Ḥanīfa, al-Thawrī, al-Awzaʿī, Abū Thawr and a group of jurists said that it is necessary to take her consent into consideration. Mālik agreed with them about the virgin spinster in one of his opinions.

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[4] The term *bāligh* is used for someone who has attained the age of puberty (*bulūgh*). This is the age of majority in Islamic law, however, the terms "major" and "adult" are being avoided, as they indicate a person who is usually older than the *bāligh*. The age of *bulūgh* depends on the actual physical puberty of the individual concerned, and may start at twelve for a boy and even lower for a girl. In the absence of any physical signs of puberty, the presumption of puberty is linked to different ages determined by the *fuqahāʾ*.

The reason for their disagreement is based on the conflict of the indirect indication of the communication (*dalīl al-khiṭāb*) with the relevant general meaning in this, which is found in the saying reported from the Prophet (God's peace and blessings be upon him) that "the orphan girl is not to be married without her permission", and his saying, "The orphan girl is to be asked about herself". It is narrated by Abū Dāwūd. The meaning derived from it through the indication of the communication is that one having a father is different from the orphan girl. The saying of the Prophet in the well-known tradition of Ibn ᶜAbbās, "The virgin is to be asked (for permission)", makes the seeking of permission from each virgin obligatory through its generality. The general meaning is stronger than the indirect indication of the text, but Muslim has narrated, in the tradition of Ibn ᶜAbbās, an addition that "the virgin's permission is to be sought by the father". This is decisive on the point of dispute.

Mālik and Abū Ḥanīfa said about the non-*bāligh* deflowered woman that the father can force her to marry, while al-Shāfiᶜī said that he is not to force her. The later Mālikites said that there are three views about her in the school. First, that the father can force her as long as she has not attained puberty after divorce. This is the opinion of Ashhab. Second, that he can force her even though she has attained puberty. This is the opinion of Saḥnūn. Third, that he is not to force her even if she has not attained puberty. This is the opinion of Abū Tammām. What we have narrated from Mālik is what is narrated by the writers of *khilāf*, like Ibn al-Qaṣṣār and others.

The reason for their disagreement is based on the conflict of the indirect indication of the text with the general implication. This is witnessed in the saying of the Prophet (God's peace and blessings be upon him) that "the orphan girl is not to be married without her consent",—from which it is understood that permission of one having a father is not to be sought except as agreed upon by the majority (*jumhūr*) in the case of the divorced *bāligh* woman—and in the general implication of his (God's peace and blessings be upon him) saying that "the deflowered woman has a greater right over herself than the guardian", which includes the *bāligh* and the non-*bāligh*. So also his saying that "the widow (*ayyim*) is not to be married till her permission is sought, and is not to be married till she gives her consent", which indicates through its general implication what has been said by al-Shāfiᶜī.

There is another reason for their disagreement upon these two issues. It is the construction of an analogy upon a point of consensus (*ijmāᶜ*). They arrived at the consensus that the father can force a non-*bāligh* virgin and that he cannot force a divorced *bāligh* woman, except for isolated instances of disagreement in all this, as we have indicated.

They disagreed about the underlying cause of forced consent whether it is virginity or minority (*ṣighar*). Those who said it is minority maintained that the *bāligh* virgin is not to be forced, while those who considered it to be virginity said that the *bāligh* virgin is forced, but not the deflowered minor girl. Those who considered both as causes made forced consent obligatory when either was found and said that the *bāligh* virgin is to be forced and so is the non-*bāligh* deflowered woman. The determination of the underlying cause (*ta*ʿ*līl*) in the first case is by Abū Ḥanīfa, in the second by al-Shāfiʿī, and in the third by Mālik. The sources, however, lend greater support to the cause determined by Abū Ḥanīfa.

They disagreed about the loss of virginity that does away with compulsion and obligates the expression of consent or rejection. Mālik and Abū Ḥanīfa said that it is loss of virginity that results from a valid marriage, or from a semblance of marriage, or from ownership (*milk*), and that does not result from illegal intercourse (*zinā*) or from rape following abduction (*ghaṣb*). Al-Shāfiʿī said that each kind of loss of virginity does away with compulsion. The reason for their disagreement lies in whether the *ḥukm* is linked to the legal meaning or the literal meaning of the loss of virginity in the saying of the Prophet (God's peace and blessings be upon him) that "the deflowered woman has a greater right over herself than her guardian".

They agreed that the father can compel his minor son to marry and also his minor virgin daughter, and he may not seek her permission, as it has been established that "the Messenger of Allāh (God's peace and blessings be upon him) married ʿĀʾisha (God be pleased with her) when she was a girl of six or seven and consummated the marriage with her when she was nine, through a marriage contracted with Abū Bakr (God be pleased with him)", except for the disagreement narrated from Ibn Shubrama. In this, they disagreed about two issues. First, whether the minor girl can be given away in marriage by someone other than the father. Second, whether the minor boy can be married away by someone other than the father.

About the marriage of the minor girl undertaken by someone other than the father, al-Shāfiʿī said that only the paternal grandfather can give her away in marriage. Mālik said that no one can give her away in marriage except the father, or one to whom the father has delegated this task, unless she is likely to fall into corruption and loss. Abū Ḥanīfa said that the minor can be married away by anyone who enjoys guardianship over her, including the father, relatives, and others, but when she attains puberty she has the option (*khiyār*) (of revocation).

The reason for their disagreement is the conflict of analogy with the general meaning. This is because of the saying of the Prophet (God's peace and blessings be upon him), "Seek permission from the virgin, her silence being her consent", implies a generality in the case of all virgins except one having a father, as her case was qualified by consensus (*ijmā*ʿ), besides the disagreement we have mentioned. As it is known about all guardians that they will be cautious and will watch the interest of their wards, it is necessary that they be deemed equivalent to the father. Some included all guardians in this meaning, while some included only the grandfather as he is a father who is an ascendant. This was done by al-Shāfiʿī. Those who restricted the right to the father said that what the father possesses is not proper for anyone else, either because the law has singled him out for this or because the sympathy and kindness exhibited by the father are not found to the same degree in anyone else. This is what Mālik (God be pleased with him) has upheld and what he has upheld is the most outstanding, Allāh knows best, except in the case of necessity.

The Ḥanafites argued for the permissibility of contracting the marriage of minors by persons other than the father on the basis of the words of the Exalted: "And if ye fear that ye will not deal fairly by the orphans, marry of the women, who seem good to you".[5] They said the word "orphan" (*yatīm*) is not applied to anyone except the non-*bāligh* girl. Others have said the name orphan is applied to the *bāligh* girl because of the evidence in his (God's peace and blessings be upon him) saying, "Seek permission from the orphan girl", and the girl whose permission is sought is one who is capable of consent, and she is the *bāligh* girl. Thus, their disagreement has another reason and that is the equivocality (*ishtirāk*) of the word orphan (*yatīm*). Those who have not permitted marriage through someone other than the father, have argued on the basis of his (God's peace and blessings be upon him) saying that "the orphan girl is to be asked about herself". They said that the minor, by agreement, is not one of those who grant permission, therefore, denial of the right of persons other than the father is obligatory. And they may also add that this is the *ḥukm* of the orphan girl who is capable of giving consent. The case of the minor is not (expressly) covered by the *sharīʿa*.

In response to the question whether the guardian, who is not a father, can contract the marriage of a minor boy, Mālik granted permission to the executor (*waṣī*) and Abū Ḥanīfa permitted this to the guardians (*awliyāʾ*), except that he granted the minor the option (*khiyār*) upon attaining puberty, while Mālik did not make this obligatory. Al-Shāfiʿī said that none other than the father can contract his marriage. The reason for their disagreement in this is the construction of the analogy for those other than the father from the case of the father. Thus, those who did not find in the person other than the father the reasons uncovered by *ijtihād* that permitted the father to contract the marriage of one of his minor children, did not permit this, while those who said that such reasons were to be found for others did permit it. Those who made a distinction in this between the minor boy and the minor girl were of the view that a male possesses the right to divorce upon attaining puberty, while the female does not. For this reason Abū Ḥanīfa has granted both an option upon attaining puberty.

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[5] Qurʾān 4 : 3

18.2.1.3. Aspect 3: Is the contract permissible with an option (*khiyār*)?

The third aspect is whether the contract of marriage is permitted with an option (*khiyār*). The majority are of the view that it is not permitted. Abū Thawr said it is. The reason for their disagreement is the vacillation of the contract of marriage between sales (*buyūᶜ*) in which an option is not permitted and those sales in which it is. We can say that the principle in sales is that there is no option except when there is a text supporting it, and the burden of proof is upon one who wishes to establish it. We can also say that the principle is the prohibition of option in sales and that its basis is hazard (*gharar*). In marriages there is no hazard because their object is quality and not measure, and because the need for option and examination in marriage is more than that in sales. With respect to delay in acceptance on the part of one of the parties to the contract, Mālik permitted a slight delay, while some prohibited it. Others permitted it in a manner that the guardian contracts a woman's marriage without her consent, but when the information reaches her she permits it. From among those who prohibited it absolutely is al-Shāfiᶜī and from those who permitted it absolutely are Abū Ḥanīfa and his disciples, while Mālik distinguished between an extended and a short delay. The reason for disagreement is whether (the existence of) acceptance by both parties simultaneously is a condition for the validity of the contract. A similar disagreement is presented in sales.

18.2.2. Element 2: The Conditions of the Contract

In this topic there are three sections:
Section 1: Guardians (*Awliyāʾ*);
Section 2: Witnesses;
Section 3: Dower (*ṣadāq*).

18.2.2.1. *Section 1: The Guardians* (Awliyāʾ)

The study of guardians is undertaken from four aspects. First, the stipulation of guardianship (*wilāya*) for the validity of marriage. Second, the qualifications of a guardian. Third, the kinds of guardians, their priority for guardianship, and related issues. Fourth, the prevention of ward marriages by the guardians and differences arising between a guardian and his ward.

18.2.2.1.1. Aspect 1: Is guardianship a condition for the validity of the contract of marriage?

The jurists disagreed whether guardianship is one of the conditions for the validity of marriage. Mālik, in Ashhab's narration from him, said that there is no marriage without a guardian and that it (guardianship) is a condition of validity. Al-Shāfiʿī held the same opinion. Abū Ḥanīfa, Zufar, al-Shaʿbī and al-Zuhrī said that if a woman contracts her marriage without a guardian, and with someone of equivalent status (*kufʾ*), it is permitted. Dāwūd distinguished between a virgin and a deflowered woman and stipulated the existence of a guardian as a condition in the case of a virgin, but did not stipulate it in the case of a deflowered woman. The fourth opinion is Mālik's, as derived from Ibn al-Qāsim's narration, that its stipulation as a demand is recommended (*sunna*), but not obligatory. This is because it is narrated from him that he used to view inheritance among parties married without a guardian (as valid), and permitted an unchaste woman to appoint a man as her guardian for her marriage, and he held as recommended that a deflowered woman present a guardian who could contract on her behalf. Thus, guardianship for him is one of the complementary demands and not a condition for validity, as against the statement of Mālik's disciples from Baghdad, who consider it a condition of validity and not that of perfection. The reason for their disagreement is the absence of a verse or tradition that is apparent (*ẓāhir*), not to say explicit, about the stipulation of guardianship as a condition of marriage. In fact the verses and traditions that are quoted in practice, by those who stipulate it as a condition, are all subject to interpretation. Similarly, the verses and traditions that are quoted in support of its absence as a condition are also not so clear on the issue. The traditions, besides being unclear in meaning, are disputed as to their authenticity, except the tradition of Ibn ʿAbbās, which negates it, but it lacks persuasive force as the original rule requires freedom from all liability.

We will state the most prominent sources from among those cited for support by both parties and explain the aspects of probability in them. The most prominent sources used from the Qurʾān, by those who lay down guardianship as a condition, are the words of the Exalted: "[When] they reach their term, place not difficulties in the way of their marrying their husbands".[6] They said that this is addressed to the guardians. If they had no right of guardianship how is it that they were prohibited from prevention (of marriage)? About the words of the Exalted: "And do not marry idolaters till they believe",[7] they said that this too is addressed to the guardians. The most prominent tradition used by them is narrated by al-Zuhrī from ʿUrwa from ʿĀʾisha that she said, "The Messenger of Allāh (God's peace and blessings be upon him) said: 'Any woman who marries without the consent of her guardian, her marriage is void, void, void, and if the wedding takes place she is entitled to dower according to her status (*mahr al-mithl*). And if they should disagree, then, the sultan is the guardian of whoever is without a guardian'." It is narrated by al-Tirmidhī who said it is a *ḥasan* tradition.

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[6] Qurʾān 2 : 232

[7] Qurʾān 2 : 221

Among the verses from the Qurʾān and the traditions, used by those who do not lay down guardianship as a condition, are the words of the Exalted: "[T]hen there is no sin for you in aught that they (widowed women) may do with themselves in decency".[8] They maintain that this is proof of the permissibility of her entering into a contract for her marriage on her own. They said that in addition to this, the act (of marrying independently) is attributed to them in several other verses. Thus, the words, "[I]n marrying their husbands"[9] and "until she hath wedded another husband".[10]

In their reliance on traditions, they argued on the basis of a report by Ibn ʿAbbās, the authenticity of which is agreed upon. It is the saying of the Prophet (God's peace and blessings be upon him) that "the deflowered woman has a greater right over herself than her guardian, and the virgin is to be asked about herself, and her silence is her consent". It is on the basis of this tradition that Dāwūd argued about the distinction he made between the deflowered woman and the virgin. These, then, are the best-known evidences put forward by both parties from the transmitted texts.

In the words of the Exalted: "[A]nd [when] they reach their term do not place difficulties in their way of marrying their husbands",[11] there is nothing more than a proscription for the relatives and residuaries that they may not prevent her (the woman) from marrying, and from this proscription for non-prevention it is not understood, either in its metaphorical or actual meaning, that their (the guardian's) consent is stipulated for the validity of the contract. I mean, from any aspect of the apparent or explicit indication of the communication (*khiṭāb*). In fact, the opposite may be understood from it, which is that there is no way the guardians can prevent their wards (from marrying). Similarly, the words of the Exalted: "And do not marry idolaters till they believe",[12] are better understood as a communication for the rulers (*ūlūl amr*) of the Muslims or for all the Muslims collectively rather than a communication for the guardians. On the whole, it vacillates between being a communication for the guardians or for the rulers. Thus, those who have argued on the basis of this verse are under the obligation to explain how the communication is addressed, through its apparent meaning, to the guardians and not to the rulers.

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[8] Qurʾān 2 : 234
[9] Qurʾān 2 : 232
[10] Qurʾān 2 : 230
[11] Qurʾān 2 : 232
[12] Qurʾān 2 : 221

If it is maintained that it has a general implication, and being general it includes both rulers and guardians, it will be said that this communication implies the denial of a right in which the guardians and others are equal, and their being addressed does not grant them exclusive authority for giving consent. If we say that it is a communication addressed to the guardians, making it obligatory that they stipulate their consent for the validity of marriage, it would nevertheless be an unelaborated (*mujmal*) communication and acting according to it would be difficult as there is no indication in it about the kinds of guardians, their qualifications and their grades. The explanation (*bayān*) must not be delayed from the time of its need. Had there been a known law practised on this issue it would have come down through a collective communal transmission or through a transmission close to it as this was a point of general need and it is known that there were those in Medina who had no guardians. In addition, it has not been related from the Prophet (God's peace and blessings be upon him) that he used to administer their marriage contracts or that he appointed someone who performed this function. Further, the purpose of the verse is not to expound the *ḥukm* of *wilāya*, but the (purpose is) to prohibit marriage with the polytheists, men and women. This is evident—Allāh knows best.

ʿĀʾisha's tradition is disputed with respect to the obligation of acting upon it. The preferred course is that a tradition disputed with respect to its soundness does not give rise to the obligation of acting upon it, and even if we concede the soundness of the tradition, there is nothing in it beyond the stipulation of seeking the permission of the guardian by one who has a guardian, I mean, the female ward. If we concede that it is general for all women, it does not contain the prohibition for a woman to contract her own marriage, that is, she cannot herself conclude the contract. In fact, it is evident from it that if the guardian grants her his permission, it is permitted to her to form her own contract without there being the stipulation of including the guardian among the witnesses for the validity of the contract.

The meaning of what is adduced as proof by the other party of the words of the Exalted, "[T]here is no sin for you in that which they do of themselves within the recognized limits",[13] indicates a prohibition of attributing blame to them for acting independently to the exclusion of the guardians, and there is no act through which a woman can go against the wishes of her guardian except the contract of marriage. The apparent meaning of the verse, then,

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[13] Qurʾān 2 : 240. Pickthall's translation has been altered slightly. He uses the word "rights" for recognized limits.

Allāh knows best, is that a woman has the right to contract her own marriage and the guardians have a right to revoke it if it is not in conformity with her status. This is the manifest requirement of the law, but none of the jurists has expressed it. Arguing on the basis of a part of a verse and not arguing on the basis of the remaining part exhibits weakness (of method). There is no evidence of exclusivity in the verse in attributing the contract of marriage to them (the women), but the principle is that it is exclusive, unless an evidence to the contrary is adduced to contradict this.

The tradition of Ibn ʿAbbās is, upon my life, explicit in indicating the distinction between a deflowered woman and a virgin, for if permission from each one of them is to be sought and it is their guardian who supervises the contract, then, in what, I wish I knew, does the widow have a greater right over herself than her guardian? The tradition of al-Zuhrī would be better (understood) if it is considered to be in conformity with this tradition rather than being in conflict with it. It is probable that the difference between the two is only to the extent of one being explicit and the other not being so, and silence is sufficient for the contract.

The proof in the words of the Exalted, "[T]here is no sin for you in that which they do of themselves within their recognized limits",[14] indicating that a woman has a right to form her own contract, is stronger than the implication of the words of the Exalted, "And do not marry idolaters till they believe",[15] which are claimed to convey that the guardian has the right to conclude the contract.

The Ḥanafites deemed the tradition of ʿĀʾisha as weak for the reason that it is a tradition narrated by a group from Ibn Jurayj from al-Zuhrī, and Ibn 'Ulayya related from Ibn Jurayj that he (Ibn Jurayj) asked al-Zuhrī about it, but he did not know of it. They added: "The evidence confirming this is that al-Zuhrī did not make the stipulation of *wilāya*, nor is *wilāya* upheld in ʿĀʾisha's opinion."

They also argued on the basis of the tradition of Ibn ʿAbbās, who said, "There is no marriage without a guardian and two *ʿadl* witnesses". The completeness of its chain, however, is disputed. In the same manner, they differed about the tradition concerning the marriage of the Prophet (God's peace and blessings be upon him) to Umm Salama and his ordering her (young) son to give her away himself in marriage.

The argument of the parties based on reason is equivocal, as it is possible to say that when discretion (*rushd*) is found in a woman, it is sufficient for purposes of the marriage contract, for it is deemed to be so in the case of financial transactions. It may be said, however, that a woman is inclined toward men more than she is inclined toward wealth, and it is for this reason that the *sharʿ* has been cautious in interdicting her permanently in this respect; the shame that may result from her casting herself in a place out of her status will most likely affect the guardians. It is, however, sufficient to say here that the guardians do have a right of revocation and inquiry. The issue is ambivalent, as you can see, but the point which forces itself upon the mind is that if the lawgiver had intended the stipulation of guardianship, he would have elaborated the categories of the guardians, their types, and grades. Delay of the elaboration, beyond the time of its need, would be harmful. If delay in the needed explanation is not permitted to him (God's peace and blessings be upon him), especially when the general public need requires that the stipulation of guardianship be transmitted through a general communal transmission or in a manner close to it—and yet it is not transmitted—it makes it necessary to believe in one of two possibilities: that guardianship is not a condition for the validity of marriage, and that the guardians have only the right of inquiry in it, or that if guardianship is a condition, then, the explanation of qualifications, types, and grades of the guardians is not a condition for its validity, and it is for this reason that the opinion of those who nullify the contract by a remote guardian in the presence of an immediate guardian, is to be deemed as weak.

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[14] Qurʾān 2 : 240

[15] Qurʾān 2 : 221

18.2.2.1.2. Aspect 2: Qualifications and disqualifications for guardianship

With respect to qualifications establishing entitlement, and disqualifications leading to denial of guardianship, they agreed that the conditions for guardianship are Islam, *bulūgh*, and being a male; the disqualifications are the opposite of these, that is, disbelief, minority, and being a female.

They disagreed about three cases: that of the slave, the *fāsiq*, and the prodigal (*safīh*). Most of the jurists inclined toward the prevention of the slave's guardianship, but it was permitted by Abū Ḥanīfa. The well-known opinion in the school about discretion (*rushd*)—that is, according to the majority of the disciples of Mālik—is that it is not one of its conditions, I mean, of guardianship, which was also Abū Ḥanīfa's opinion. Al-Shāfiʿī said that it is a condition, and an opinion similar to al-Shāfiʿī's was related from Mālik. Al-Shāfiʿī's opinion was also adopted by Ashhab and Abū Muṣʿab.

The reason for disagreement is the similarity of this kind of guardianship with guardianship over wealth. Those who said that discretion is necessitated in this kind of guardianship, despite its absence from that over wealth, held that it is not a condition that he possess discretion in the case of wealth, but those who maintained that this was impossible ruled that discretion is a must for guardianship over wealth. Discretion, in fact, is of two kinds, as you can see, I mean, the discretion related to wealth is different from discretion required by the woman in making a choice about proportionality of status.

They differed about *ʿadāla* (probity) due to the fact that it is based on rational inquiry, I mean, in this kind of guardianship, and, therefore, (the guardian) cannot be trusted, in the absence of *ʿadāla*, to select someone who is an equal match for her. It is possible to say that the situation (here) in which guardians make a choice for their wards, of someone with equal status, is different from the general meaning of *ʿadāla*. Here it is the fear of shame in case they make the wrong choice. This *ʿadāla* exists naturally, while the other kind of *ʿadāla* is acquired. The deficient capacity of the slave causes disagreement about his guardianship, as it does in the case of his *ʿadāla*.

18.2.2.1.3. Aspect 3: Kinds of guardianship

The bases for the kinds of guardianship, according to those who uphold it, are three: descent, authority, and superior and subordinate clientage. According to Mālik, the qualification of Islam by itself is sufficient for guardianship over one of a low social status. They differed about the *waṣī* (executor). Mālik said that the *waṣī* can be a guardian, while al-Shāfiʿī prohibited this. The reason for disagreement is their dispute whether the nature of guardianship is such that it makes deputization possible. It is for the very same reason that they disagreed about agency (*wakāla*) in marriage, but the majority upheld it, the exception being Abū Thawr. There is no difference between agency and executorship, except that an executor is an agent after death, while agency is terminated at death.

They disagreed about the priorities in guardianship on the basis of lineage. According to Mālik, guardianship is allocated among residuaries, excluding the son (in the case of the mother), thus, whoever is the closest from among the residuaries has the right to be a guardian. The sons, according to him, even if in the lowest rank of descendants, have a higher priority. They are followed by the fathers, uncles german, consanguine uncles, sons of the brother german, sons of consanguine brothers, and the grandfathers on the father's side, in that order. Al-Mughīra said that the grandfather and his father have a higher priority than the brother and his son, for he (the brother or his son) is not an outsider, then come the uncles graded like the brothers, however low in rank, followed by the client (*mawlā*) and then by the sultan.

The higher-order client, according to him (Mālik), has a right prior to that of the lower-order client. The executor, according to him, has priority over the guardian through lineage, that is, the executor appointed by the father. His disciples differed about the priority of the father's executor over a guardian through lineage. Ibn al-Qāsim, in conformity with Mālik's opinion, said that the executor has a superior right, while Ibn al-Mājishūn and Ibn ʿAbd al-Ḥakam said that the guardian has a higher priority.

Al-Shāfiʿī went against Mālik in the guardianship of sons (over their mothers), and also in the preference of brothers over the grandfather, not permitting it as a rule, saying that there is no guardianship for the son. It is related from Mālik that the father has priority over the son, which is preferable. He said that the grandfather has priority over the brother, which was also the opinion of al-Mughīra. Al-Shāfiᶜī, on the other hand, considered the residuaries—the son not being among her residuaries—due to the tradition of ᶜUmar: "A woman is not to be married without the consent of her guardian, or one of her relatives having authority, or of the sultan". Mālik did not take this into account, in the case of the son, because of the tradition of Umm Salama "that the Prophet (God's peace and blessings be upon him) ordered her son to give her away in marriage himself", and also because they, that is, Mālik and al-Shāfiᶜī, agreed that the son inherits the obligatory guardianship of his mother (in other matters), and guardianship according to them is for the residuaries.

The reason for disagreement about the grandfather is based on their dispute about who is closer in relationship, the grandfather or the brother.

There are three important issues related to the grades of the guardians. First, if a remote guardian gives her away in marriage in the presence of the immediate guardian. Second, if the immediate guardian is absent, is guardianship then transferred to the remote guardian or to the sultan? Third, if the father deserts his virgin daughter, is guardianship passed on?

18.2.2.1.3.1. Issue 1: Contract of the remote guardian in the presence of the immediate guardian

Mālik's opinion differed on this issue. He said once that if the remote guardian gives her away in marriage, in the presence of an immediate guardian, the marriage is annulled. On another occasion he said that it is valid. A third time he said that it is up to the immediate guardian to ratify it or repudiate it. These different opinions, related from him, apply to cases other than that of the father and his virgin daughter and that of the executor and his interdicted ward, as in these cases his opinion is firm that the contract would be repudiated, that is, in case of marriage through someone other than the virgin daughter's father, or by someone other than the executor in the presence of the executor. Al-Shāfiᶜī said that no one has the right to conclude the contract in the presence of the father irrespective of the bride being a virgin girl or a deflowered woman.

The reason for disagreement is the dispute whether gradation (of the guardians) is a *ḥukm sharᶜī*, that is, established through the law (*sharᶜ*) in the case of *wilāya*. If it is such a *ḥukm*, is it the right of the immediate guardian or is it the right of Allāh? Those who did not consider gradation as a *ḥukm* of law said that marriage contracted by the remote guardian in the presence of the immediate guardian is valid. Those who considered it a *ḥukm* of law based upon the right of the immediate guardian said that the contract is effective to the extent that if it is ratified by the immediate guardian it is permissible, otherwise it is revoked. Those who maintained that it is the right of Allāh said that the marriage is not deemed to have taken place. Some of the jurists within the school (Mālik's) rejected this interpretation, that is, the contract being void and not effective.

18.2.2.1.3.2. Issue 2: Transfer of guardianship in the absence of the immediate guardian

Mālik said that if the immediate guardian is absent, guardianship is transferred to the next guardian. Al-Shāfiʿī said that it is transferred to the sultan. The reason for their disagreement is the dispute whether absence is equivalent to death, as they have no disagreement about its transfer in the case of death.

18.2.2.1.3.3. Issue 3: Father absent leaving behind a virgin daughter

There are detailed discussions and disagreements about it within the school (Mālik's). They refer to the remoteness of his (the father's) location, prolonged or short absence, and knowledge or ignorance about his location, as well as the daughter's need for marriage, which may be due to the lack of maintenance, fear of inadequate protection, or due to both factors combined.

The school agreed that if the father is absent, having gone to a remote place, or his location is unknown, or he is a prisoner of war, but the daughter is protected and provided for, not requiring marriage, she is not to be married (by the next guardian). If she desires to be married, then, she is to be married in the case of imprisonment of her father or when his location is not known. They disagreed whether she is to be married when his location is known but he is in a remote place. It is said that she is to be married, which is Mālik's opinion, and it is said that she is not to be married, which is the opinion of ʿAbd al-Malik and Ibn Wahb.

In case of lack of maintenance or adequate protection, she is to be married in the three stated situations, that is, in the absence of her father, having gone to a remote place, his imprisonment, and in the case of his location being unknown. Similarly, when both factors are combined (i.e. lack of adequate protection and the need for maintenance). If she has inadequate protection, she is to be married even if she does not demand it. They did not disagree, as far as I think, that she is not to be married when her father has departed to a nearby place and his location is known, because he can be approached. When examined on the basis of the interests to be secured (*maṣāliḥ*), it can be said that when time is short, and the sultan fears unbecoming conduct from her, he is to give her away in marriage even if the location (of her father) is close.

If we were to say that the right of the remote guardian subsists even in the presence of the immediate guardian, and the woman delegates her affair to both, with both making separate contracts of marriage for her, the possibility is that one of them preceded the other in concluding the contract or both finalized the contracts at the same time. It is also possible that the first contract comes to be known or it may not be known. If the first contract comes to be known, they agreed that she is (to be declared) the wife of the husband through the first contract. This is the case when none of them has consummated the marriage with her.

They disagreed when the second husband consummates the marriage with her. One group of jurists said that she is the wife of the first, while another group said that she is the wife of the second, which is the opinion of Mālik and Ibn al-Qāsim. The first opinion was upheld by al-Shāfiʿī and Ibn ʿAbd al-Ḥakam. If both guardians concluded the marriages at the same time, there is no disagreement about the rescission of the contracts, as far as I know. The reason for disagreement in the consideration of consummation is based upon the conflict of the general meaning with analogy, as it is related that the Prophet (God's peace and blessings be upon him) said, "If a woman is given away in marriage separately by two guardians, she belongs to the first (husband) among them". The general meaning of this tradition requires that she is the wife of the first husband, irrespective of the second having consummated marriage with her. Those who took consummation into account compared it to the consumption of goods in a contract of a coerced sale, which is weak. If, however, the first contract was not known, the majority rule for rescission, while Mālik said that it is to be rescinded when none of them has consummated the marriage. Shurayḥ said that she is to be given a choice, and whosoever she chooses is to be her husband. This is a deviant opinion, although it has also been related from ʿUmar ibn ʿAbd al-ʿAzīz.

18.2.2.1.4. Aspect 4: Removal of guardians

They agreed that the guardian does not have the right to decline his ward's marriage, if she desires marriage to a man of equal status and with a dower in keeping with such status. If he does this, her case will be referred to the sultan who will give her away in marriage, except when the father is her guardian, about which there is disagreement in the school. After agreeing on this, they differed about the meaning of *kafāʾa* that is to be taken into account, and whether *ṣadāq al-mithl* (dower conforming with status) constitutes a part of it. They agreed that a woman has a right to refuse marriage when a *mujbir* (coercing) guardian is forcing her into it and there is no proportionality of status, as in the case of a father forcing his virgin daughter. This is so, with complete agreement of the jurists, when the girl has not attained puberty, and with some disagreement in the cases of a major and a deflowered minor, as has preceded. Similarly, when the executor is forcing his ward, according to those who hold this opinion.

They agreed that a factor to be considered in *kafāʾa* is religion, except what has been related from Muḥammad ibn al-Ḥasan about the elimination of the attribute of religion (in this issue). The school was in agreement that if a father were to get his virgin daughter married to a drunkard or a *fāsiq*, she has the right to refuse compliance. The judge is to take cognizance of this and to annul the marriage. Similarly, when he gets her married to a person possessing wealth that is *ḥarām*, or one who is known to pronounce divorce very often.

They disagreed about lineage whether it constitutes a part of *kafāʾa*, as they did about liberty, financial ease, and freedom from bodily defects. It is well known of Mālik that he permitted marriage between the Arabs and the clients, for which he argued on the basis of the words of the Exalted, "Lo! the noblest of you, in the sight of Allāh, is the best in conduct".[16] Sufyān al-Thāwrī and Aḥmad said that an Arab woman is not to marry a client. Abū Ḥanīfa and his disciples said that a Quraysh woman can marry only a Quraysh, and an Arab woman an Arab.

The reason for their disagreement is their dispute over the meaning of the saying of the Prophet (God's peace and blessings be upon him), "A woman is married for her piety (religion), her beauty, her wealth, and her noble descent, but take hold of piety and you will be satisfied with what you have". Some of the jurists held that only piety is to be taken into account, because of the words of the Prophet, "But you should marry the pious and you will be satisfied with what you have". Others said that noble descent, here, stands for piety, as does wealth. Nothing, however, can be eliminated from these, except when excluded by consensus (*ijmāʿ*), as has been done by declaring that beauty does not constitute an element of *kafāʾa*. All those who revoke marriage on the basis of defects maintain that freedom from bodily defects is a part of *kafāʾa*, because of which beauty is taken into consideration, to some extent.

The jurists within the school did not disagree that marriage contracted by a father for his virgin daughter may be revoked on the basis of poverty, that is, when the groom is poor and unable to maintain her. Wealth, thus, constitutes a part of *kafāʾa*. Abū Ḥanīfa does not maintain this opinion. There was no disagreement in the school about liberty that it is a part of *kafāʾa*, because of the established *sunna* granting the female slave a right to choose, if she is liberated (to maintain a pre-liberty marriage or otherwise). About *mahr al-mithl*, Mālik and al-Shāfiʿī maintain that it is not a part of *kafāʾa*, and the father has the right to give his daughter away in marriage for an amount less than the *mahr al-mithl*,

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[16] Qurʾān 49 : 13

I mean, his virgin daughter. If a deflowered woman possessing discretion agrees to the amount (of dower), the guardians do not have a right of interference. Abū Ḥanīfa said that *mahr al-mithl* is an essential ingredient of *kafā'a*.

The reason for disagreement, with respect to the father, is their dispute whether he has the right to reduce a part of the dower of his virgin daughter. In the case of the deflowered woman, it is because of their disagreement whether guardianship is revoked for her with respect to the amount of her dower, when she possesses discretion, just as it is revoked for all her financial transactions, or whether guardianship is not revoked (for the amount of dower) since it is still required in marriage, and dower is one of its elements. This opinion would have suited those who stipulate guardianship rather than those who do not, but the matter has been turned around.

A well-known issue is related to the *aḥkām* of guardianship, which is whether it is permitted to the guardian to marry his ward himself? Al-Shāfiʿī prohibited this on the analogy of a judge and a witness, that is, he does not render judgment for himself nor does he testify for himself. Mālik permitted it, and I am not aware of his argument in this, except what is related that the Prophet (God's peace and blessings be upon him) "married Umm Salama when she did not have a guardian", as her son was a minor, and also the established report "that the Prophet (God's peace and blessings be upon him) emancipated Ṣafiyya and deemed her emancipation to be her dower".[17] The principle for al-Shāfiʿī about the marriages of the Prophet (God's peace and blessings be upon him) is that these were specific to him in the absence of generalized evidence, and the Prophet enjoys a number of exemptions, but his opinion differed in the case of the head of the state.

18.2.2.2. *Section 2: Attestation by Witnesses* (Shahāda)

Abū Ḥanīfa, al-Shāfiʿī and Mālik agreed that attestation by witnesses is a condition of marriage. They disagreed whether it was a condition of completion required over an extended period as to the time of consummation or a condition of validity required at the time of contract. They agreed that a secret marriage was not valid. They disagreed about the witnesses who attest the marriage contract, but are instructed to keep it secret, whether it amounts to a secret marriage. Mālik said that it is a secret marriage and is to be rescinded, while Abū Ḥanīfa and al-Shāfiʿī said that it is not secret. The reason for disagreement is whether attestation is a *ḥukm sharʿī* or it serves the purpose of eliminating disputes or denial. Those who held it to be a proscribed *ḥukm* said that it is a condition of validity, but those who considered it as attestation of the contract said that it is a condition of completion.

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[17] In these the Prophet may be said to have exercised his authority as the sulṭān; however, the same rule will apply to such an assertion, that is, whether the sulṭān can render judgment for himself.

The source for this is what has been related from Ibn ᶜAbbās: "There is no marriage without two *ᶜadl* witnesses and a supervising guardian". None of the Companions opposed this, and many jurists considered this to have constituted *ijmāᶜ*, which is a weak claim. This tradition has been related as *marfūᶜ* and is recorded by al-Dār Quṭnī, who mentioned that among its transmitters are unknown persons.

The contract can be concluded, according to Abū Ḥanīfa, even through the attestation of *fāsiq*s, as the purpose in his view is only its publicity. Al-Shāfiᶜī is of the view that attestation includes both meanings, that is, proclamation and acceptance, therefore, he stipulates *ᶜadāla* as a condition. For Mālik, however, it does not comprise proclamation when the witnesses have been instructed to maintain silence. The reason for their disagreement is whether the act attested by the witnesses can be designated as secret.

The source for the legality of proclamation is the saying of the Prophet (God's peace and blessings be upon him), "Proclaim this marriage and beat the drums". It is recorded by Abū Dāwūd. ᶜUmar is reported to have said, "This is a secret marriage, and had they gone ahead with it I would have awarded *rajm*".

Abū Thawr and a group of jurists said that attestation by witnesses is not a condition for the validity of a marriage, neither a condition of validity nor that of completion. Ḥasan ibn ᶜAlī is reported to have done this. It is related about him that he married without witnesses and then proclaimed his marriage.

18.2.2.3. *Section 3: Dower* (Ṣadāq)

The study of dower comprises six points. First, its *ḥukm* and elements. Second, fixing it entirely for the wife. Third, about its division into parts. Fourth, *Tafwīḍ* and its *ḥukm*. Fifth, void dowers and their *ḥukm*. Sixth, disputes among the spouses over dower.

18.2.2.3.1. Case 1: The *ḥukm* and elements

In this section there are four issues. First is about its *ḥukm*. Second, about its amount. Third, about its species and description. Fourth, about its deferment.

18.2.2.3.1.1. Issue 1: The *ḥukm*

In the discussion of its *ḥukm*, they agreed that it is one of the conditions of validity (of marriage), and an agreement to forgo it is not permitted, because of the words of the Exalted, "And give unto the women, (whom ye marry) free gift of their marriage portions",[18] and His words, "[S]o wed them by permission of their folk, and give unto them their portions in kindness".[19]

18.2.2.3.1.2. Issue 2: The amount

They agreed about its amount that it has no maximum limit, but disagreed about its minimum limit. Al-Shāfiʿī, Aḥmad, Isḥāq, Abū Thawr, and the jurists of Medina, among the *Tābiʿūn*, said that there is no minimum limit for it, and anything that can be a price or value for a thing may be the dower. This was the opinion of Ibn Wahb, from among the disciples of Mālik. A group of jurists upheld the obligation of fixing the minimum amount of dower, but they differed about its extent. Two opinions are well known in this. First is Mālik's opinion and that of his disciples, while the second is that of Abū Ḥanīfa and his disciples. Mālik said that the minimum dower is one-fourth *dīnār* of gold, or three measured *dirhams* of silver, or what is equivalent to three *dirhams*, that is, *dirhams* of measure only, according to the well-known opinion; while it is said that whatever is equivalent to any of them (the amounts in gold or silver). Abū Ḥanīfa said that ten *dirhams* is the minimum; it is said five *dirhams*, and it is said forty *dirhams*.

There are two reasons for disagreement over the amount. First is its vacillation between being a compensation—like other counter-values, in which mutual consent is taken into account for small or large amounts, as is the case in sales—and an act of worship, in which it has to have a fixed time. This is so, as from the point of view that he (the husband) comes to own her benefits perpetually, it (dower) resembles compensation, but from the other aspect of the prohibition of consenting to forgo it by mutual agreement it resembles (an act of) worship.

The second reason is the conflict of this analogy, requiring fixation, with the meaning of the tradition, which does not imply fixation. The analogy requiring fixation is, as we have said, an act of worship, and worship is of a determined duration. The tradition implying non-fixation is one tradition related by Sahl ibn Saʿd al-Sāʿidī, which is agreed upon (by al-Bukhārī and Muslim) for its soundness, and in which it is said "that a woman came up to the Messenger of Allāh (God's peace and blessings be upon him) and said to him, 'O Messenger of Allāh, I have bestowed myself to you as a gift.' She, then, waited there (for an answer) for a long time. A man got up (in the meantime) and said, 'O Messenger of Allāh, marry her to me, if you do not have a need for her.' The Messenger of Allāh (God's peace and blessings be upon him) said (to him), 'Do you have something that you can grant her as dower?' He replied, 'I have nothing but this garment (which covers me).' The Messenger of Allāh (God's peace and blessings be upon him) said, 'If you give her that you will be sitting with nothing to cover you. Search for something.' He said, 'I cannot find anything.' He (God's peace and blessings be upon him) said, 'Find it, even if it be a ring made of iron.' The man searched, but could not find a thing. The Messenger of Allāh (God's peace and blessings be upon him) said, 'Do you possess (memorize) anything from the Qurʾān.' The man said, 'Yes, such and such *sūra* (which he named).' The Messenger of Allāh said, 'I hereby marry you to her with what you have of the Qurʾān'. "

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[18] Qurʾān 4 : 4

[19] Qurʾān 4 : 25

They said that the words of the Prophet, 'Find it, even if it be a ring made of iron', are an evidence that there is no minimum limit for it, and had there been such a limit, he would have mentioned it, as a delay in explanation is not permissible from the time of its need. This evidence is manifest, as you can see, along with the fact that the analogy upheld by those who maintain fixation does not have sound premisses. This is so, as it is constructed upon two premisses. First, that dower is an act of worship. Second, that worship must have a fixed time. In each the contender has an objection, which is that there have been laid down in the *sharᶜ* kinds of worship that have no fixed duration, but what is required is the least that can come under the term *ᶜibāda*. Moreover, it (dower) does not have any pure (real) resemblance with (acts of) worship.

Those who preferred this analogy maintained that the tradition may have been specific to the man in the case, because of the words of the Prophet, 'I hereby marry her to you with what you have of the Qurʾān'. This is against the principles (of interpretation). Though in some versions of this tradition he told him to 'get up and teach her', what he possessed of the Qurʾān, after which the man got up and taught her. It, thus, turned into a marriage on the basis of wages. Yet, when they (these jurists) sought to find a basis for the measure of the dower, they did not find a resemblance better than the minimum scale for amputation due to theft, on the basis of which they could construct their flimsy analogy for fixation of the amount of dower.

The analogy they employed is that it (the female organ here) is a limb that becomes permissible in return for wealth, therefore, it is necessary that it be determined on the basis of amputation (like theft). The weakness of their analogy is evident from the wrong assumption of the existence of a *mushtarak* term, but amputation is different from intercourse; further, amputation has been allowed, even required, as a punishment, involving infliction of pain, and loss of a limb, while that permission is for pleasure with affection. Furthermore, *qiyās al-shabah*, despite its weakness, is that the factors of resemblance on the basis of which the *aṣl* (original case) and the *farᶜ* (case in issue) are being compared are the same not through denotation but in meaning, and the *ḥukm* is based in the original case on resembling features, but all this is missing from this analogy. Further, it is a resemblance that is not even indicated through a common term (denotation): It is a type of analogy that is rejected by recognized jurists. These jurists, however, did not employ this analogy for the fixation of dower, in the face of the implication of the tradition that they used to determine what the amount of the fixation would be. The analogy that they employed in opposition to the tradition is stronger than this analogy.

Non-fixation is evidenced by the tradition recorded by al-Tirmidhī "that a woman was married for a pair of sandals. The Messenger of Allāh (God's peace and blessings be upon him) said to her, 'Are you content, in return for yourself and your wealth, on a pair of sandals?' She said, 'Yes.' He, therefore, declared her marriage permissible." Al-Tirmidhī says that it is a sound and *ḥasan* tradition.

After agreeing about the fixation of dower, on the basis of analogy on the minimum scale for theft, those who upheld it, disagreed in accordance with their disputes over the amounts of the minimum scale in the case of theft. Mālik said that it is one-fourth of a *dīnār* or three *dirhams*, as that is the scale for theft, according to him. Abū Ḥanīfa said that it is ten *dirhams*, as that is the scale according to him. Ibn Shubrama said that it is five *dirhams*, for that is the minimum scale (for theft) in his view.

The Ḥanafites argued, for the fixation of dower at this amount, on the basis of the tradition related by them from Jābir from the Prophet (God's peace and blessings be upon him) that he said, "There is no dower less than ten *dirhams*". Had this been established, it would have eliminated the point of contention, for it would become necessary to construe the tradition of Sahl ibn Saʿd as limited to its specific content (to its case), but this tradition of Jābir is weak, according to the traditionists. They relate it from Mubashshir ibn ʿUbayd from al-Ḥajjāj ibn Arṭāʿa from ʿAṭāʾ from Jābir, but Mubashshir and al-Ḥajjāj are considered weak narrators, while ʿAṭāʾ had not met Jābir. It is, therefore, not proper to oppose the tradition of Sahl ibn Saʿd with this tradition.

18.2.2.3.1.3. Issue 3: The species

With respect to its species, it is anything that may be lawfully owned and can be a compensation. About this they disagreed on two occasions: marriage through hire and consideration of manumission of a slave-woman as her dower. About marriage through hire, there are three views in the school: an opinion permitting it, an opinion prohibiting it, and an opinion considering it abhorrent. The best-known opinion from Mālik is (about) its abhorrence. It is for this reason that he considers it revoked prior to consummation (seclusion).

It was permitted, among his disciples, by Aṣbagh and Saḥnūn, which was also al-Shāfiᶜī's opinion. It was prohibited by Ibn al-Qāsim and Abū Ḥanīfa, except in the case of a slave, which was permitted by Abū Ḥanīfa.

The reasons for their disagreement are two. First is their dispute over the question whether the *sharᶜ* of those before us is binding upon us, till evidence indicates their remission, or whether the matter is the other way round. Those who said that the earlier laws are binding permitted it (marriage through hire) due to the words of the Exalted, "He said: Lo! I fain would marry thee to one of these two daughters of mine on the condition that thou hirest thyself to me for (the term of) eight pilgrimages".[20] Those who said that they are not binding upon us maintained that marriage through hire is not permitted. The second reason is whether an analogy for marriage can be constructed upon hire. This is so, as *ijāra* has been exempted from the rule prohibiting uncertain sales involving *gharar* (and analogy cannot be based upon an exemption). It is for this reason that al-Aṣamm and Ibn ᶜUlayya have opposed it, for the principle of mutual exchange requires a determined tangible thing in lieu of another tangible thing, while *ijāra* involves a tangible thing facing which are movements or actions that are not definable or stable or measured. The *fuqahā*ʾ have, therefore, differed about (the time) when the wages of *ijāra* are due from the hirer.

The *fuqahā*ʾ of the provinces, except for Dāwūd and Aḥmad, have prohibited that manumission be considered as dower. The reason for disagreement is the clash of a tradition, laid down on this issue, with the general principles, that is, the tradition established from the Prophet (God's peace and blessings be upon him) "that he manumitted Ṣafiyya and deemed her emancipation to be her dower", which bears the likelihood of being specific to his case, because of there being many specific rulings for him in this part of the law. The reason for its divergence from the principles is that manumission is the alienation of ownership, and alienation does not include the permissibility of the thing from another case: when she is emancipated she comes to own herself. How, then, can marriage be binding upon her? It is for this reason that al-Shāfiᶜī said that if she is repelled by her marriage to him, she owes him her price; as he was of the view that she has caused him to lose her value, since he has destroyed her (value) by stipulating the condition of utilizing her. All this, however, cannot be attributed to the act of the Prophet (God's peace and blessings be upon him), for had it not been permitted to others besides him he would have explained it. The principle is that his acts are binding upon us, except when there arises evidence indicating their being specific to him.

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[20] Qurʾān 28 : 27

For the specification of dower, they agreed about the conclusion of marriage for a determined and specified counter-value, that is, determined as to species and amount by description. They disagreed about dower that is unspecified and undetermined, like one saying, "I have married you for a slave or a servant," without a specification that determines his price or value. Mālik and Abū Ḥanīfa said that this is permitted, while al-Shāfiʿī said that it is not. When a marriage takes place in this way, then, according to Mālik, she is entitled to an average value of what has been named, while Abū Ḥanīfa said that he is forced to pay the value (whatever it is). The reason for their disagreement is whether marriage, in this case, resembles sale with the intent of being based on bargaining, or that it does not acquire this state, and the intent is for something else, that is, affection. Those who considered it to be based upon frugality with similarity to a sale said that just as a sale is not permitted for an unspecified thing, similarly, marriage is not permitted. Those who held that it does not resemble it, as the intention is to be noble, said that it is permitted.

A group of jurists did not permit deferment (of the dower) at all, while some did recommending that he advance part of it, at or before consummation, which is Mālik's opinion. Some of the jurists who permitted deferment did so for a limited period and for an amount in proportion to it, which is also Mālik's opinion. Among them were those who permitted deferring it till separation by death or divorce when it becomes due, which is *al-Awzāʿī*'s opinion. The reason for the disagreement is whether marriage resembles sale in deferment. Those who said that it does, did not permit deferment till death or divorce, but those who said that it does not resemble it permitted such deferment. Those who disallowed deferment considered marriage as an act of worship.

18.2.2.3.2. **Case 2: Entitlement to dower**

The jurists agreed that the entire *ṣadāq* becomes due by consummation or death. The basis for its becoming due in the entire amount, following consummation, are the words of the Exalted, "And if ye wish to exchange one wife for another and ye have given unto one of them a sum of money (however great), take nothing from it".[21] I cannot recall transmitted evidence, at the moment, about its obligation upon death (before consummation), except the occurrence of *ijmāʿ* over it.

They disagreed whether consummation for this purpose implies copulation or it merely means being in seclusion[22] with her, which they call drawing of the curtains. Mālik, al-Shāfiʿī and Dāwūd said that only one-half dower becomes due with mere seclusion, unless there is intercourse. Abū Ḥanīfa said that (full) dower becomes due with seclusion itself, unless he was in a state of *iḥrām*, ill, fasting in Ramaḍān, or she was menstruating. Ibn Abī Laylā said that full dower becomes due with seclusion, and added no other stipulation.

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[21] Qurʾān 4 : 20

[22] The term "seclusion" is being used here to describe a situation after marriage (*nikāḥ*) in which the

The reason for their disagreement is the clash of the verdicts of the Companions in this case with the apparent meaning of the Book. This is so as Allāh, the Exalted and Glorious, has laid down a proscription in the case of a woman whose marriage stands consummated that it is not permitted to take back anything from her dower, as in the words of the Exalted, "How can ye take it (back) after one of you hath gone into the other, and they have taken a strong pledge from you".[23] And He stated in the case of a woman divorced before consummation that she has one-half of the dower, thus, the Exalted says, "If ye divorce them before ye have touched them and ye have appointed unto them a portion, then (pay the) half of that which ye appointed".[24] These are explicit, as you can see, in each of the two situations, that is, before touching and after it, and there is no state in between the two. Thus the apparent obligation created by this is that (full) dower does not become due without touching, and touching here, as is obvious from it, is intercourse. It may be construed, however, that "touching" is used here in its normal denotation, not as a polite hint for intercourse, and, perhaps, this is how the Companions interpreted it. It is for this reason that Mālik has said that an impotent person is obliged to pay her the delayed dower, if he divorces her after spending a long period with her; he, thus, fixed it for him without intercourse having any effect upon the obligation of dower. The ruling recorded from the Companions about this is that whoever closes the door behind him or lets down the curtain is obliged to pay dower and no one opposed them in what they decided.

In this topic, those who stipulated touching differed about a case in which the occurrence of touching is disputed. This occurs, for example, when she claims "touching" and he denies it. The well-known opinion of Mālik is that the acceptable statement is hers. It is, however, said that if it was seclusion with

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married couple has the opportunity for sexual intercourse, but it may not actually take place. The term "consummation" is being used to denote actual sexual intercourse. The distinction is important for understanding the opinions of the jurists, some of whom maintain that mere seclusion, without sexual intercourse, gives rise to the entitlement to dower, while others say that sexual intercourse must have taken place for such entitlement. "Seclusion" occurs after the wedding ceremony; however, wedding may not necessarily lead to sexual intercourse or even to "seclusion." The use of the term "wedding" is likely to lead to confusion. It is, therefore, being avoided.

[23] Qurʾān 4 : 21

[24] Qurʾān 2 : 237

residence (after marriage), she is to be considered truthful, but if it was merely a visit she is not. It is also said that if she was a virgin, she is to be examined by women. In this case, therefore, three opinions are arrived at in the school. Al-Shāfiʿī and the Ẓāhirites said that it is his statement that is acceptable, for he is the defendant. Mālik, on the other hand, does not give weight to the obligation of oath being upon the defendant in so far as he is the defendant, but to the stronger *prima facie* case. It is for this reason that he prefers the statement of the plaintiff on many occasions when he has a stronger *prima facie* case. This refers to whether the obligation of oath being on the defendant has an underlying reason; similarly, the discussion about the obligation of testimony upon the plaintiff, which will be coming up under its own heading.

18.2.2.3.3. Case 3: Division of dower

They agreed generally, when a man divorced (his wife) prior to consummation, and he had fixed a dower, that she has recourse to him for one-half dower, because of the words of the Exalted "If ye divorce them before ye have touched them and ye have appointed unto them a portion, then (pay the) half of that which ye appointed".[25] The study of division of dower relates to three principles: its basis in marriages; the underlying cause of division in different kinds of divorce, that is, those occurring prior to seclusion; and the changes occurring in it before divorce.

Its basis in marriages, according to Mālik, is the validity of a marriage, that is, divorce should have taken place prior to seclusion in a valid marriage. There are two opinions about an irregular marriage, if separation in it does not amount to rescission, and when the husband divorces before rescission. The cause of division is divorce that is pronounced voluntarily by the husband, not on her volition, like the divorce that takes place before she discovers a defect found in him. In this topic they disagreed about the division having as a cause her pressing demand for dower or for maintenance, when he is in difficult straits; there being no difference between residence when he has a defect and between this and the case of her displeasure because of his defect.

There is no disagreement about rescission, that does not amount to divorce, that it does not give rise to sharing of the dower, when the rescission is based upon (a defective) contract or upon (the species of) dower, and generally upon the absence of the requisites of validity, in which she does not have a choice at all. In rescissions that are the result of external contingencies affecting a valid contract, like apostasy or fosterage, if none of them has a choice in it, or she has it but not he, division is not binding; if, however, he has a choice in it, as in apostasy, division becomes obligatory. The ruling to which the opinions of the Ẓāhirites lead is that division is obligatory in each divorce occurring before residence is taken up, whether its cause is attributed to him or to her, but in a rescission, not amounting to a divorce, there is no division.

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[25] Qurʾān 2 : 237

The reason for disagreement is whether it is a practice (*sunna*) that has an underlying rational cause. Those who said that it has a comprehensible meaning, which is that one-half dower becomes due to her, in compensation for her lost right through the return of her commodity and being forced to return the price—as is done by a purchaser; however, marriage differs from sale in this respect and compensation is awarded to her for this (offended) right—(they) upheld that if the cause of divorce arises from her, nothing should be given to her, for she has eliminated any coercion that would have been caused to her by him for returning the price and taking back the commodity. Those who maintained that it is a *sunna* not based on a rational reason, and followed the apparent meaning, said that division (into one-half) is binding in each divorce, whether caused by him or by her.

The changes made in the dower, before divorce, may be either from her or from Allāh. Those that are from Allāh may take one or more of four forms: loss of the whole, reduction, increase, or reduction and increase combined. Those emanating from her may be in the form of disposal by her through consumption as sale, manumission, or donation, or in the form of a disposal for her own benefit or for the preparation of a dowry with it for her groom. According to Mālik, both of them share in the case of loss, or increase or reduction. According to al-Shāfiʿī he has recourse to her for half in the case of reduction and loss but he does not claim half from her in the case of increase. The reason for their disagreement is whether the woman comes to own the dower firmly prior to seclusion or death (of her husband). Those who said that she does not own it through an indisputable ownership maintain that she is a co-owner in it, as long as she does not transgress, and shares in the benefits with him. Those who said that she owns it through an indisputable ownership, and that division is an obligatory right, force her to return all that has been lost in her possession. Further, after the establishment of ownership they have recourse to her for all that passed on to her.

They did not disagree that if she disposes of the revenue, she is liable for one-half, but they disagreed if she purchases with it things necessary for the dowry, as is customary, whether recourse to her is for one-half of what she purchased or for one-half dower, which is the price. Mālik said that he has recourse to her for one-half of what she purchased, while Abū Ḥanīfa and al-Shāfiʿī said that he has recourse to her for one-half of the price, which is the dower.

Under this topic they differed about a well-known case that relates to transmitted (texts), whether the father has the right to forgo one-half dower of his virgin daughter, or the master of his female slave, that is, if she is divorced prior to seclusion? Mālik said that he has the right, while Abū Ḥanīfa and al-Shāfiʿī said that he does not. The reason for their disagreement is the equivocality in the words of the Exalted, "Unless they (the women) agree to forgo it, or he agreeth to forgo it in whose hand is the marriage tie".[26] The word "forgo" (*yaʿfū*), it is said, may mean, in the usage of the Arabs, "to forgo" or "to gift." Also, the pronoun in the words of the Exalted, "in whose hands is the marriage tie", may refer to the guardian or the bridegroom. Those who maintained that it is the bridegroom, deemed the meaning to be "gift", while those who said that it is the guardian, considered it to mean "forgo". Some of the jurists adopted a deviant view saying that each guardian has the right to forgo one-half of the dower that is obligatory for the woman. It appears that both constructions of the meaning of the verse are equal. However, those who considered the subject to be the bridegroom did not assign an additional *ḥukm* to the verse, that is, an additional law, for its permissibility is known through the logical necessity of the law. Those who rendered it as the guardian, either the father or someone else, assigned an additional law. It is necessary for them to come up with evidence indicating that the verse applies primarily to the guardian rather than the bridegroom, which is a difficult feat.

The majority maintain that a minor and an interdicted girl do not have the right to forgo one-half of the dower to which they are entitled. Some jurists maintained a deviant opinion saying that it is permitted pursuing the general meaning of the words of the Exalted, "Unless they (the women) agree to forgo it".[27] In this topic they differed when a woman gifts her dower to her husband and is then divorced prior to seclusion. Mālik said that he cannot have recourse to her for any part of it, while al-Shāfiʿī said that he can claim one-half from her. The reason for their disagreement is whether the half to which the husband is entitled through divorce is linked to the actual dower itself or it can be a liability for the woman? Those who said that it is linked to the actual dower, maintained that he cannot have recourse to her for any part of it, for he had taken possession of the entire dower. Those who said that it has become the woman's liability maintained that he has recourse to her if she had gifted it to him, as if she had made a gift to him of some other wealth of hers. Abū Ḥanīfa made a distinction in this issue on the basis of taking possession and not taking possession: if she had taken possession of it, he has recourse for one-half, but if she had not taken possession when she made the gift, he cannot have anything. It was as if he maintained that the right is associated with the thing as long as possession has not been taken, thus, when she takes possession, it becomes a liability.

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[26] Qurʾān 2 : 237

[27] Qurʾān 2 : 237

18.2.2.3.4. Case 4: *Tafwīḍ*

They agreed that marriage (contracted) through *tafwīḍ* is permitted, which is the conclusion of the contract of marriage without *ṣadāq* (dower), because of the words of the Exalted, "It is no sin for you if ye divorce women while yet ye have not touched them, nor appointed to them a portion".[28] The jurists disagreed about this on two points. First, when the wife demands the fixation of dower, with no agreement about the amount. Second, when the husband dies without fixing it. Does she get the dower in either case?

18.2.2.3.4.1. Issue 1: When the woman demands fixation of dower

A group of jurists said that an amount equivalent to her status is to be awarded to her, and the husband has no option in this. If he divorces her after the verdict, some of these jurists said that she is entitled to one-half dower, while some of them said that she is not entitled to anything, as fixation did not take place in the contract itself, which is the opinion of Abū Ḥanīfa and his disciples. Mālik and his disciples said that the husband has three choices: he may divorce her without fixation, he may fix the amount demanded by the woman, or he may fix *ṣadāq al-mithl*, which becomes binding upon her.

The reason for their disagreement—that is, among those who determine *mahr al-mithl* for her without granting an option to the husband when he divorces her after her demand for fixation and those who do not determine such dower—is over the meaning of the words of the Exalted, "It is no sin for you if ye divorce women while yet ye have not touched them, nor appointed unto them a portion",[29] whether they are to be construed generally as conveying the dropping of *ṣadāq*, irrespective of the cause of divorce arising from their dispute over *ṣadāq*. Further, whether the absolution from responsibility (from sin) is to be construed as the dropping of dower under all circumstances. This is subject to interpretation, though the obvious meaning implies dropping it under all circumstances due to the words of the Exalted, "Provide for them, the rich according to his means, and the straitened according to his means, a fair provision".[30] There is no dispute, as far as I know, that if he divorces her, right in the beginning (without the discussion of dower), there is no liability upon him. It was logical for the person, who fixed

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[28] Qurʾān 2 : 236

[29] Qurʾān 2 : 236

[30] Qurʾān 2 : 236

mutᶜa for her along with half of *mahr* in case he divorces her before seclusion after a marriage not based upon *tafwīḍ*, and fixed *mahr al-mithl* for her in *tafwīḍ*, to fix, along with *mutᶜa*, a part of *mahr al-mithl*, as (the meaning of) the verse does not indicate the dropping of dower in a *tafwīḍ* marriage, it only permits divorce prior to the fixation of dower. If the *tafwīḍ* marriage gives rise to the liability of *mahr al-mithl*, when demanded, it is necessary that it be paid in part if divorce is pronounced, just as it is rendered in part when fixed. It is for this reason that Mālik held that *mahr al-mithl* does not become binding along with the option granted to the husband.

18.2.2.3.4.2. Issue 2: When the husband dies before fixing *ṣadāq* and prior to consummation of marriage

Mālik, his disciples, and al-Awzāᶜī said that she is not entitled to *ṣadāq*, but only to *mutᶜa* and to inheritance. Abū Ḥanīfa said that she is entitled to *ṣadāq al-mithl* and to inheritance, which was also the opinion of Aḥmad and Dāwūd. Both opinions are related from al-Shāfiᶜī, except the opinion supported by his disciples is the one similar to Mālik's.

The reason for their disagreement is the conflict of *qiyās* with a tradition. The tradition is related from Ibn Masᶜūd who, upon being asked about this issue, said: " 'I base the verdict on my own opinion, if it happens to be correct it is from Allāh, but if incorrect it is from me. I hold for her *ṣadāq* equivalent to that paid to women of her status, neither less nor more, and she has to undergo the waiting period and is entitled to inheritance.' Maᶜqal ibn Yasār al-Ashjaᶜī, then, got up and said: 'I bear witness that you have decided in accordance with the judgment of the Messenger of Allāh (God's peace and blessings be upon him) in the case of Barwaᶜ bint Wāshiq.' " It is recorded by Abū Dāwūd, al-Nasāᶜī, and al-Tirmidhī, who declared it to be *ṣaḥīḥ*. The analogy opposing this is that *ṣadāq* is a compensation, and as he has not taken delivery of the counter-value he should not be liable to compensation, on the analogy of sale. Al-Muzanī has related from al-Shāfiᶜī on this issue that if the tradition of Barwaᶜ is proved authentic, there is no force in any one's opinion with the existence of a *sunna*. (Ibn Rushd:) What he has said is correct, Allāh knows best.

18.2.2.3.5. Case 5: *Fāsid* dowers

Dower is void either in itself or because of an attribute traceable to *gharar* or to an impediment. The dower that is void in itself may be in the form of wine *(khamr)*, swine *(khinzīr)*, or a thing that cannot be lawfully owned. The dower that is void because of *gharar* or an impediment derives its principles from sales. There are five well-known issues in this.

18.2.2.3.5.1. Issue 1

If dower consists of *khamr*, *khinzīr*, fruit that has not yet begun to ripen, or a stray camel, Abū Ḥanīfa is of the opinion that the contract is valid if it contains a provision for *mahr al-mithl*. From Mālik there are two narrations about it. First, the invalidity of the contract and its rescission before seclusion and after it, which is also Abū ᶜUbayd's opinion. Second, that if the marriage is consummated, the contract is effective and she has (the right to) *mahr al-mithl*.

The reason for their disagreement is whether the *ḥukm* of marriage is the same as the *ḥukm* of sale? Those who held that its *ḥukm* is the same as sale said that marriage becomes void with the *fasād* of dower, just as a sale becomes void with the *fasād* of the price. Those who maintained that the validity of dower is not a condition for the validity of marriage, upon the evidence that fixation of dower is not a condition for the validity of the contract, said that marriage is effective and becomes valid with the *mahr al-mithl*. The distinction based upon the occurrence of seclusion and its absence is weak. Mālik's principles lead to the fact that a distinction be made between dower that is prohibited in itself and that which is prohibited due to an (external) attribute, upon the analogy of sale. I do not remember, at this moment, a recorded statement about it.

18.2.2.3.5.2. Issue 2

They disagreed when a sale is associated with dower, like her giving him a slave in return for a thousand dirhams that he gives her for dower along with the price of the slave and does not distinguish the price from the dower. Mālik and Ibn al-Qāsim prohibited such mixing, and it was also the opinion of Abū Thawr. Ashhab permitted it, which was also Abū Ḥanīfa's opinion. ᶜAbd Allāh made a distinction in this saying that if one-fourth *dīnār* or more clearly remains after accounting for the sale, it is permitted. Al-Shāfiᶜī's opinion differed in this, for he said once that it is permitted, while he said on another occasion that there is *mahr al-mithl* in it.

The reason for their disagreement is whether marriage has a resemblance with sale for this purpose. Those who held it similar to sale disallowed it, while those who permitted a degree of uncertainty in marriage, of a kind that is not permitted in sale, said that it is allowed.

18.2.2.3.5.3. Issue 3

They differed, into three opinions, about the person who gives a woman away in marriage stipulating for the husband a dower in the shape of a gift that is presented to the (girl's) father. Abū Ḥanīfa and his disciples said that the condition is binding and the marriage is valid. Al-Shāfiᶜī said that the dower is void and she is entitled to *ṣadāq al-mithl*. Mālik said that if the condition is *stipulated at the time of the contract it (the gift) is for his daughter, but if it* is stipulated after the contract it is for him.

The reason for their disagreement is the similarity of marriage to sale. Those who compared him (the father) to an agent contracting a sale, while a gift is stipulated for him said that *nikāḥ* is not permitted, just like the sale is not allowed. Those who considered *nikāḥ* to be different from sale said that it is permitted. In the distinction drawn by Mālik, he held him to be subject to blame when the condition is included in the contract of marriage, for what he has stipulated for himself amounts to a reduction in the value of the dower, but he does not subject him to blame when it occurs after the conclusion of the contract with agreement over the dower. Mālik's opinion is the same as that of ᶜUmar ibn ᶜAbd al-ᶜAzīz, al-Thawrī, and Abū ᶜUbayd. Abū Dāwūd, al-Nasāʾī, and ᶜAbd al-Razzāq have recorded from ᶜAmr ibn Shuᶜayb from his father from his grandfather that he said, "The Messenger of Allāh (God's peace and blessings be upon him) said, 'When a woman is married for a gift prior to the conclusion of the contract of marriage, the gift belongs to her, but what takes place after the contract of marriage, it belongs to whom it has been given. The best favour extended to a man is that which is given out of respect for his daughter or his sister.' " ᶜAmr ibn Shuᶜayb's tradition is disputed in so far as he distorted it, but Mālik's opinion is categorically stated. Abū ᶜUmar ibn ʾAbd al-Barr said that when a tradition is reported by trustworthy persons it is to be acted upon.

18.2.2.3.5.4. Issue 4

They disagreed about dower that involves the right of a third party or is found to be defective. The majority said that the marriage is confirmed. They disagreed, however, whether she has recourse to him for its value, a substitute, or for *mahr al-mithl*. Al-Shāfiᶜī's opinion differed in this; he held it once to be the value, and at another time as *mahr al-mithl*. Similarly, the school (Mālik's) differed about it. It is said that she has recourse for the value, and it is also said that she has recourse for *mahr al-mithl*. Abū al-Ḥasan al-Lakhmī said that if it is held to be the lesser of the two, the value or *mahr al-mithl*, it would be the correct standpoint. Saḥnūn deviated from this saying that the contract is void. The basis for disagreement is whether the contract of marriage resembles the contract of sale. Those who held it to be similar said that it is rescinded, while those who did not hold it to be similar said that it is not.

18.2.2.3.5.5. Issue 5

They disagreed about the person who marries a woman agreeing that if he (the bridegroom) has no wife the dower is one thousand (units), but if he has a wife already the dower is two thousand. The majority upheld its validity. They disagreed about the obligation arising in this. One group of jurists said that the condition is valid and she is entitled to dower in accordance with the condition. Another group of jurists said that she is entitled to *mahr al-mithl*, which is the opinion of al-Shāfiʿī and was also upheld by Abū Thawr, but he said that if he divorces her before seclusion she is only entitled to mutʿa. Abū Ḥanīfa said that if he has a wife already she (the new wife) is entitled to one thousand (units), but if he does not have a wife she is entitled to *mahr al-mithl* as long as it is not more than two thousand (units) nor less than one thousand. From these an opinion can be derived that the contract is revoked because of *gharar*, but I do not remember at the moment a recorded statement about this verdict in the (writings of the) school.

These are their well-known opinions upon the subject, though the cases under it are many. They disagreed about the attributes on the basis of which *mahr al-mithl* is determined, when it is awarded in such cases. Mālik said that her beauty, status, and wealth are to be taken into account, while al-Shāfiʿī said that it is to be determined in the light of the dower of women, from among her residuaries. Abū Ḥanīfa said that all the women related to her are to be taken into account, whether her residuaries, or others. The basis for the disagreement is whether similarity pertains to status only or to status, wealth, and beauty, because of the words of the Prophet (God's peace and blessings be upon him) "A woman is married for her faith, beauty, and descent".

18.2.2.3.6. Case 6: Disagreement among spouses over dower

Their disagreement may either be about possession, amount, category, or time, that is, the time of obligation. If they differ about the amount, with the woman saying, for example, that it was two hundred and the husband saying that it was one hundred, the jurists disagree extensively about this case. Mālik said that if the disagreement arises prior to seclusion and both the bride and the bridegroom make credible claims, then, both are to be asked to take oaths and to revoke the contract. If one of them takes the oath, while the other refuses, the statement of the one taking the oath will be accepted. If both of them refuse, it will be considered as if both had taken the oath. The statement appearing more likely will be accepted. If the dispute arises after seclusion, the acceptable statement will be the husband's, but a group of jurists said that the acceptable statement will be the husband's along with his oath. This was the opinion of Abū Thawr, Ibn Abī Laylā, Ibn Shubrama and a group of jurists. Another group of jurists said that the acceptable statement will be that of the wife to the extent of the *mahr al-mithl*, and that of the husband to the extent of the excess over the *mahr al-mithl*. A third group of jurists makes them take oaths in case of dispute and makes them revert to *mahr al-mithl* without rescinding the contract, unlike Mālik's opinion. This is the opinion of al-Shāfiʿī, al-Thawrī and a group. It is also said that she is made to have recourse to *mahr al-mithl* without taking an oath, as long as the *ṣadāq al-mithl* is not more than what she is claiming or less than what he is asserting.

Their disagreement is based upon their differing understanding of the words of the Prophet (God's peace and blessings be upon him), "(The burden of) testimony is upon the plaintiff, while the one who denies is to take the oath," whether it has an underlying rational reason. Those who maintained that it has an underlying reason said that the one who has a stronger *prima facie* claim is to take the oath, always, but if their claims are equal (in strength) they are both to take the oath and the contract is rescinded. Those who maintained that it does not have an underlying cause said that the husband is to take the oath as the right is claimed by her, and she is claiming an amount in excess of his statement; he is, therefore, the defendant. It is, however, said that they are both to take the oath, always, as each one of them is a defendant, but this is held by those who do not take into account the probabilities. There is disagreement about this in the school. Those who maintained that the acceptable statement is hers to the extent of *mahr al-mithl*, or his when in excess of the *mahr al-mithl*, were of the view that they can never be considered equal contestants in a claim, and one of them has to have a *prima facie* stronger case. This is so as her claim may either be for a sum equivalent to the *ṣadāq al-mithl* or less than it, in which case it is her statement that is accepted, or it may be more than that, in which case the acceptable statement is his.

The reason for the disagreement between Mālik and al-Shāfiʿī, about rescission after oath-taking and reverting to *mahr al-mithl*, is whether *nikāḥ* is similar to sale. The jurists who said that it resembles it ruled for rescission, while those who said that it does not resemble it, as dower is not a condition for the validity of the contract, ruled for *ṣadāq al-mithl* after oath-taking. The claim of jurists, from among the disciples of Mālik, who thought that it is not permitted to them after oath-taking to arrive at an agreement over an amount, or not permitted to one of them to revert to the claim of the other person with consent, is totally weak. Those who held this opinion compared it to (the procedure) of *liʿān*, which is a weak comparison, along with the fact that the similar *ḥukm* in *liʿān* is disputed.

In their disagreement about taking possession, with the bride saying that she did not take possession and the bridegroom saying that she did, the majority of the jurists maintain that the acceptable statement is that of the woman. These jurists are al-Shāfiʿī, al-Thawrī, Aḥmad and Abū Thawr. Mālik said that the acceptable statement is hers before seclusion and his after seclusion. Some of his disciples said that Mālik made this statement as the custom in Medina was that the husband would not go into seclusion with her till he had paid the *dower, but if there is a land that does not have this custom it is her statement* that will be accepted always. The opinion that it is her statement that should always be accepted is better, for she is the defendant, but Mālik took into account the strength of his claim after he had consummated the marriage with her. Mālik's disciples differed, when a long time had passed after the wedding, as to which is better: to accept his statement with his oath or without it.

When they differed about the species of the dower, for example, he says, "I married you with this slave as dower", while she says, "I married you with this dress as dower", then, the well-known opinion in the school is that they are both to take oaths and mutually to rescind the contract, when the dispute arises before they take up common residence, but if it is after that then the contract is confirmed and she is entitled to *ṣadāq al-mithl*, as long as it is not more than what she claims or less than what is conceded by the husband. Ibn al-Qaṣṣār said that they take oaths prior to seclusion, and the acceptable statement is that of the husband after seclusion. Aṣbagh said that the acceptable statement is the husband's, if it is credible, irrespective of the similarity of their statements. If the husband's statement does not appear credible, but her statement does, then it is her statement that is accepted. If her statement is also not likely to be true they are both to take the oath and she is entitled to *ṣadāq al-mithl*. Al-Shāfiʿī's opinion on this issue is like his opinion when they dispute over its amounts, that is, they take oaths and revert to *mahr al-mithl*. The reason for the opinions of the *fuqahāʾ* about rescission in sales you will come to know in the Book of Sales, God willing.

Their disagreement about the time is to be conceived through the example of the debt that conforms with Mālik's basic principle in a well-known opinion that the acceptable statement about the period of payment is that of the debtor on the analogy of sale, over which there is dispute. It may also be conceived through the question: when is it due, prior to seclusion or after it? Those who compared *nikāḥ* to sales said that it does not become due, except after seclusion on the analogy of sale, as the price does not become due from the buyer except after the possession of the commodity. Those who held that (payment) dower is an act of worship in which making the act lawful is stipulated said that it is due prior to seclusion. It is for this reason that Mālik recommended that the bridegroom should present part of the *ṣadāq* before seclusion.

18.2.3. Element 3: The Identification of the Subject-Matter of the Contract

A woman becomes permissible (to a man) in two ways: by marriage, or by *milk yamīn* (concubinage). The legal impediments to this are first divided, generally, into two kinds: perpetual impediments and temporary impediments. The perpetual impediments are divided into those agreed upon and those disputed. Impediments agreed upon are three: descent, relationship by marriage, and fosterage. Those disputed are *zinā* and *liʿān*. Temporary impediments are divided into nine types: (1) impediment of number; (2) impediment of combination; (3) impediment of bondage; (4) impediment of disbelief; (5) impediment of *iḥrām*; (6) impediment of illness; (7) impediment of the waiting period (*ʿidda*), with the accompanying disagreement about its perpetuity; (8) impediment of pronouncing divorce thrice for the person divorcing; and (9) impediment of an existing marriage. Legal impediments, on the whole, are thus fourteen, therefore, in this part there are fourteen[31] sections.

18.2.3.1. *Section 1: The Impediment of Lineage*

They agreed that women prohibited because of descent are the seven categories in the Qurʾān: mothers, daughters, sisters, paternal aunts, maternal aunts, brother's daughters, and sister's daughters. They agreed that "mother" here is the term for each female related to you as a cause of your birth from the mother's side or the father's side. "Daughter" is the term for each female in whose birth you are the cause through a son or a daughter or directly. "Sister" is the name of each female who shares one parent with you or both, that is, a father or a mother or both of them. "Paternal aunt" is the name of each female who is a sister to your father or to any male who is a cause in your birth. "Maternal aunt" is the term for each female who is a sister to your mother or to the female who is a cause in your birth. "Brother's daughter" is a term for each female in whose birth your brother is a cause from her mother's side or her father's side or directly. "Sister's daughter" is the term for each female in whose birth your sister is a cause directly or from her mother's side or father's side.

I do not know of any disagreement about these seven prohibited categories. The source for these prohibitions are the words of the Exalted, "Forbidden unto you are your mothers, and your daughters, and your sisters, and your father's sisters, and your mother's sisters, and your brother's daughters and your sister's daughters, and your foster-mothers, and your foster-sisters, and your mothers-in-law, and your stepdaughters who are under your protection (born) of your women unto whom ye have gone in—but if ye have not gone in unto them, then it is no sin for you (to marry their daughters)—and the wives of your sons who (spring) from your loins. And (it is forbidden unto you) that ye should have two sisters together, except what hath already happened (of that nature) in the past. Lo! Allāh is ever Forgiving, Merciful".[32] They agreed that descent, which prohibits intercourse through marriage, prohibits intercourse through *milk yamīn*.

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[31] The sections discussed by the author are actually twelve. Two are deferred to later discussions.

18.2.3.2. *Section 2: Impediment of relationship through marriage*

Women prohibited through a relationship of marriage are four. First are the wives of fathers. The source for this are the words of the Exalted, "And marry not those women whom your fathers married, except what hath already happened (of that nature) in the past. Lo! it was ever lewdness and abomination, and an evil way".[33] Second are daughters of sons. The source for this are the words of the Exalted, "[A]nd the wives of your sons who (spring) from your loins".[34] Third are mothers of wives. The source for this are the words of the Exalted, "[A]nd your mothers-in-law".[35] Fourth are the daughters of wives. The source for this are the words of the Exalted, "[A]nd your stepdaughters who are under your protection (born) of your women unto whom ye have gone in—but if ye have not gone in unto them, then it is no sin for you (to marry their daughters)".[36]

Out of these four categories, the Muslim jurists agreed upon the prohibition of two by virtue of the contract itself, namely, the prohibition of the wives of fathers and sons, and upon a third category because of consummation, namely, the wife's daughter. They disagreed in the latter case on two points. First, whether it is a condition that she be in the protection of the husband. Second, whether she becomes prohibited by mere fondling of the mother or through intercourse. They disputed about the wife's mother, whether she becomes prohibited through intercourse with the daughter or through the contract (with her) alone. They also disagreed in this subject on a fourth issue, whether *zinā* gives rise to the same prohibition as is imposed through a valid or irregular *nikāḥ*. There are, then, four issues.

18.2.3.2.1. Issue 1

The issue is whether it is a condition that the wife's daughter be in the care of the husband. The majority maintain that this is not a condition for prohibition. Dāwūd said that it is. The reason for disagreement is whether the words of the Exalted, "[W]ho are under your protection", is a description that is effective in the prohibition, or that it is not effective and has been stated to indicate the usual relationship? Those who maintained that it indicates the common relationship and is not a condition in the case of stepdaughters, for there is no difference in this between those who are under protection and those who are not, said that the prohibition is absolute for all stepdaughters. Those who considered it to be a non-rational condition said that they are not prohibited unless they are under his protection.

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[32] Qurʾān 4 : 23
[33] Qurʾān 4 : 22
[34] Qurʾān 4 : 23
[35] Qurʾān 4 : 23
[36] Qurʾān 4 : 23

18.2.3.2.2. Issue 2

Is the (step-)daughter prohibited by mere (physical) contact with the mother or by intercourse? They agreed that she becomes prohibited by intercourse. They disagreed about what is less than intercourse, like fondling or looking at the sexual organs with or without lust, whether it prohibits (the daughter). Mālik, al-Thawrī, Abū Ḥanīfa, al-Awzāʿī and al-Layth ibn Saʿd said that touching the mother with lust prohibits the daughter, which is one of the opinions of al-Shāfiʿī. Dāwūd and al-Muzanī said that only intercourse can prohibit her, which is an opinion of al-Shāfiʿī that is preferred by him. Looking (at the mother with lust) is like touching for Mālik, whatever the limb at which the gaze is focused with lust, but differing opinions have been narrated from him about it. Abū Ḥanīfa restricted his opinion to looking at the sex organs, while al-Thāwrī construed "looking" to be the same as touching without stipulating lust with it. Ibn Abī Laylā opposed them in this, as did al-Shāfiʿī in one of his opinions, and did not assign any consequence to looking, but he did so to touching. The basis for the disagreement is whether the meaning of the stipulation of seclusion in the words of the Exalted, "[U]nto whom ye have gone in", is intercourse, or pleasure through what is less than intercourse? If it is pleasure, then, is looking included in it?

18.2.3.2.3. Issue 3

The majority of the jurists of the provinces said about the (wife's) mother that she is prohibited by virtue of the contract with the daughter, irrespective of the consummation of his marriage with her. A group of the jurists held that the mother does not become prohibited except through a consummated marriage with the daughter, as is the case with the (wife's) daughter, that is, she does not become prohibited except by consummating marriage with the mother. This is related from ʿAlī and Ibn ʿAbbās, may Allāh be pleased with them both, through channels that are weak.

The basis for disagreement is whether the condition (the pronoun) in the words of the Exalted, "[U]nto whom ye have gone in", refers to the last-mentioned category, who are the stepdaughters, or to the stepdaughters and mothers who are mentioned before the stepdaughters in the words of the Exalted, "And your mothers-in-law, and your stepdaughters who are under your protection (born) of your women unto whom ye have gone in".[37] It is possible that the words "unto whom ye have gone in" refer to both mothers and daughters, and it is also possible that they refer to the last mentioned, that is, the daughters. The proof of the majority is what is related by al-Muthanna ibn al-Sabāḥ from ʿAmr ibn Shuʿayb from his father from his grandfather that the Prophet (God's peace and blessings be upon him) said, "When a man marries a woman, and has intercourse with her or he does not, her mother cannot be permissible for him".

18.2.3.2.4. Issue 4

They disagreed about unlawful intercourse whether it gives rise to the same prohibition in such cases as that of marriage through a valid contract or one made in *shubha*, that is, one in which the *ḥadd* penalty is waived. Al-Shāfiʿī said that unlawful intercourse with a woman does not prohibit marriage with her mother or her daughter or her marriage with the offender's father or son. Abū Ḥanīfa, al-Thawrī, and al-Awzāʿī said that unlawful intercourse prohibits what is prohibited by marriage. From Mālik an opinion similar to al-Shāfiʿī's is recorded in *al-Muwaṭṭaʾ* that it does not prohibit, and Ibn al-Qāsim has related from him an opinion identical to that of Abū Ḥanīfa's that it does. Saḥnūn said that the disciples of Mālik opposed him (Ibn al-Qāsim) in this, and follow what is in *al-Muwaṭṭāʾ*. It is related from al-Layth that intercourse through *shubha* does not prohibit such marriages, but it is deviant.

The reason for the disagreement lies in the equivocality in the meaning of the term "*nikāḥ*", that is, in its conveying both legal and literal meanings. Those who assigned the literal meaning to it in the words of the Exalted, "And marry not those women whom your fathers married", said that unlawful intercourse prohibits such marriages, but those who assigned it the legal meaning said that it does not. Those who determined the underlying cause for the *ḥukm* to be the prohibition that operates between a mother and her daughter and between a father and his son said that unlawful intercourse also prohibits (such marriages), but those who derived the underlying cause from descent said that it does not, because of the consensus of the majority that descent is not linked with unlawful intercourse. They agreed about what is related by Ibn al-Mundhir that intercourse in concubinage prohibits what is prohibited by intercourse in a marriage. They disagreed about the effect of physical contact in concubinage, just as they disagreed about it in marriage.

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[37] Qurʾān 4 : 23

18.2.3.3. *Section 3: The Impediment of Fosterage (Suckling; Wet-nursing)*

They agreed that fosterage, as a whole, prohibits what is prohibited because of the impediment of descent, that is, the foster-mother acquires the status of the mother, and becomes prohibited herself for the foster-child along with all those who are prohibited to the son because of the true mother. They disagreed about this in many issues out of which the primary ones are nine. First, the quantity of milk that leads to prohibition. Second, the number of years of fosterage. Third, the state of the foster-child at that time, according to those who stipulate for the prohibitive suckling a particular time. Fourth, is the child's contact with the breasts and swallowing taken into account? Fifth, is mixing of the milk (with something else) taken into consideration? Sixth, is the reaching of the milk into the gullet considered? Seventh, does the owner of the milk, that is, the husband of the foster-mother, acquire the status of a father, the case being called *laban al-faḥl*. Eighth, is the testimony about suckling. Ninth, the qualification of the foster-mother.

18.2.3.3.1. Issue 1

About the prohibiting quantity of milk, a group of jurists upheld the negation of a limitation, which is the opinion of Mālik and his disciples, is related from Ali and Ibn Masᶜūd, and is also the opinion of Ibn ᶜUmar and Ibn ᶜAbbās. According to them any quantity is sufficient for prohibition. It was also the opinion of Abū Ḥanīfa and his disciples, as well as that al-Thawrī, and al-Awzāᶜī. Another group of jurists upheld a limitation upon the quantity of milk that prohibits. These jurists are divided into three groups. One group said one or two sucklings do not prohibit, but three or more do. This was upheld by Abū ᶜUbayd and Abū Thawr. The second group said that five sucklings lead to prohibition, which was al-Shāfiᶜī's opinion. The third group said that ten sucklings are prohibitive.

The reason for their disagreement over this issue is the conflict of the general meaning of the Book with the traditions which imply limitation, and also the conflict of some traditions with the others. The general meaning in the Book is found in the words of the Exalted, "[A]nd your (mothers who have suckled you) foster-mothers, and your foster-sisters, and your mothers-in-law..."[38] This indicates whatever the term fosterage is applied to. The conflicting traditions are essentially two. First is the tradition of ᶜĀʾisha, including the other traditions which convey the same meaning, that the Prophet (God's peace and blessings be upon him) said, "One or two sucks or one or two feedings do not lead to prohibition". It is recorded by Muslim once through ᶜĀʾisha, another time through Umm al-Faḍl, and through a third channel, and in it is said, "The Messenger of Allāh (God's peace and blessings be upon him) said, 'One or two sucks do not lead to prohibition.' ". The second tradition is of Sahla about Sālim that the Prophet (God's peace and blessings be upon him) said to her, "Give him five feedings (sucklings)". There is a report from ᶜĀʾisha conveying the same meaning, in which she said: "There were ten sucklings relating to what was revealed in the Qurʾān, but were later abrogated by five. The Messenger of Allāh (God's peace and blessings be upon him) died and these are what is read in the Qurʾān (as a commentary)". Those who refer the apparent interpretation of the Qurʾān to these traditions say that one or two sucks lead to prohibition, but those who considered the traditions as an elaboration of the Qurʾān, and reconciled them with the Qurʾān, and interpreted the indirect indication of the text through the words of the Prophet, in the tradition of Sālim, "A suck or two do not lead to prohibition", said that three or more feedings lead to prohibition. This is so as the indirect indication of the text in the words of the Prophet (God's peace and blessings be upon him), "One or two sucks do not lead to prohibition", requires that what is beyond three leads to prohibition, while the indication of the text in his words, "Give him five feedings", means that what is less than this does not lead to prohibition. There is a possibility of preferring either of these indications.

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[38] Qurʾān 4 : 23

18.2.3.3.2. Issue 2

They agreed that suckling in the first two years (of the age of the child) leads to prohibition, and they differed about the nursing of an older child. Mālik, Abū Ḥanīfa, al-Shāfiᶜī, and most of the other jurists said that nursing an older child does not lead to prohibition. Dāwūd and the Ẓāhirites held that it does, which is ᶜĀʾisha's opinion. The opinion of the majority is also the opinion of Ibn Masᶜūd, Ibn ᶜUmar, Abū Hurayra, Ibn ᶜAbbās, and all the other wives (besides ᶜĀʾisha) of the Prophet (God's peace and blessings be upon him).

The reason for their disagreement is the conflict of the relevant traditions. Two traditions have been related in this. First is the tradition of Sālim that has preceded, while the second is ᶜĀʾisha's tradition recorded by al-Bukhārī, where she said, "The Messenger of Allāh (God's peace and blessings be upon him) came into the house and there was a man with me. He felt perturbed and I could see anger upon his face. I said, 'O Messenger of Allāh he is my foster-brother'. He said, 'See who your foster-brothers are, for fosterage relates to hunger'. " Those who prefer this tradition said that the milk, which does not constitute sustenance for the infant, does not lead to prohibition. Further, Sālim's tradition is laid down in a specific issue, and all the other wives of the Prophet (God's peace and blessings be upon him) maintained that it was a case of exemption for Sālim. Those who preferred Sālim's tradition and reasoned about ʿĀʾisha's tradition that she (herself) did not act upon it maintained that nursing an older child does lead to prohibition.

18.2.3.3.3. Issue 3

They disagreed when the infant becomes independent of food (suckling) before a period of two years, has weaned, and then a woman suckles him. Mālik said that this suckling does not prohibit (marriage), while Abū Ḥanīfa and al-Shāfiʿī said that it leads to prohibition. The reason for disagreement is their difference in construing the words of the Prophet (God's peace and blessings be upon him), "Fosterage is related to hunger", which could imply that he intended the years of hunger whatever the state of the infant, and these would be the years of fosterage, but it is also possible that he meant when the child has not weaned, and once he has weaned within two years it no longer remains suckling due to hunger. The disagreement, therefore, refers to the fact whether in fosterage, the cause of which is hunger and the need for milk, the natural physical need of infants for milk is considered, which is a need based on the age of suckling, or the actual need of the infant himself, which is removed with weaning but is present by nature, is to be taken into account.

Those who upheld the effectiveness of suckling in the period of fosterage, irrespective of their stipulation of weaning, differed about this duration. Some held it to be a period of two years only, which is Zufar's opinion, while Mālik resorted to *istiḥsān* for purposes of prohibition and included a short duration beyond two years; in one opinion from him it is a month, and in another it is three months. Abū Ḥanīfa held it to be two years and six months. The reason for their disagreement is based on the presumed conflict between the verse of suckling and ʿĀʾisha's tradition that has preceded. This is so as in the words of the Exalted, "Mothers shall suckle their children for two whole years; (that is) for those who wish to complete the suckling", imply that whatever is beyond these two years is not suckling based upon hunger for milk, while the words of the Prophet (God's peace and blessings be upon him), "Fosterage is related to hunger" imply by their generality that as long as the food of the infant is milk, suckling will lead to prohibition.

18.2.3.3.4. Issue 4

Does the feeding (of extracted milk) by pouring it or administering it lead to prohibition, that is, the passing of milk through the gullet by means other than suckling? Mālik said that feeding of extracted milk without direct suckling, by pouring it or administering it, leads to prohibition. ʿAṭāʾ and Dāwūd said that it does not. The reason for their disagreement is whether the consideration is for the consumption of the milk, howsoever it reaches the mouth, or is it for (consumption in) the usual way? Those who were of the view that it should be fed in the usual way, which is designated by the term 'suckling,' said that other methods of feeding do not lead to prohibition, while those who took into account the reaching of milk into the child's stomach, whatever the channel, said that it does.

18.2.3.3.5. Issue 5

They also disagreed about the question whether it is a condition for prohibiting milk that it should not be mixed with something else. Ibn al-Qāsim said that if the milk is mixed with water or with something else and is then fed to the infant there is no prohibition. This was also the opinion of Abū Ḥanīfa and his disciples. Al-Shāfiʿī, Ibn Ḥabīb, Muṭarrif, and Ibn al-Mājishūn from among the disciples of Mālik said that prohibition is caused by it in case the milk is not mixed and its essence is not lost. The reason for their disagreement is whether the *ḥukm* of prohibition for milk subsists when it is mixed with something else or it does not, as is the case with filth when it is mixed with a permissible pure thing. The principle to be considered is that prohibition is found as long as application of the term "milk" to the mixture remains valid, as is the case of water when something clean is mixed with it.

18.2.3.3.6. Issue 6

Is the passage of milk through the gullet essential (for prohibition)? It appears *that this is the cause for disagreement in the cases of snuffing and enema* with milk, and the disagreement is apparently based on their doubt as to whether milk passed on through these organs reaches the stomach.

18.2.3.3.7. Issue 7

Does the man who has authority over the milk, that is, the woman's husband, become the foster-father of the child, so that prohibition is applied to them: to this foster-father, and to their ascendants and offspring? This is what they term as *laban al-faḥl.* The jurists disagreed about this. Mālik, Abū Ḥanīfa, al-Shāfiʿī, Aḥmad, al-Awzāʿī and al-Thawrī said that *laban al-faḥl* leads to prohibition. Another group of jurists said that it does not. The former opinion was held by ʿAlī and Ibn ʿAbbās, while the latter was maintained by ʿĀʾisha, Ibn al-Zubayr and Ibn ʿUmar.

The reason for their disagreement is the conflict of the apparent meaning of the Book, that is, the verse of suckling, with the well-known tradition related by ʿĀʾisha. The tradition of ʿĀʾisha is the one in which "she said, ʿAflaḥ, the *brother of* Abū *al-*Quʿ*ays, sought permission to enter after the coming down of* the *ḥijāb* obligation, so I refused to let him in. I asked the Messenger of Allāh (God's peace and blessings be upon him), who said, 'He is your uncle, so grant him permission'. I said, 'O Messenger of Allāh, it is the woman who suckled me, not the man'. He said, 'He is your uncle and can enter in your presence'."

It is recorded by al-Bukhārī, Muslim and Mālik. Those who maintained that the content of the tradition is an addition over the provision of the Book, that is, the words of the Exalted, "And your foster-mothers, and your foster-sisters", and also upon the words of the Prophet (God's peace and blessings be upon him), "Fosterage prohibits what is prohibited by birth", said that *laban al-faḥl* leads to prohibition. Those who held that the verse of suckling and the words, "Fosterage prohibits what is prohibited by birth", were laid down to strengthen the *ḥukm* of suckling, as delaying the explanation beyond the time of its need is not permitted, said that if the requirements of this tradition are acted upon it becomes necessary to consider it as abrogating the principles, as an addition that alters the *ḥukm* abrogates it. Further, prohibition caused by *laban al-faḥl* was not ᶜĀᵓisha's opinion, and she is the narrator of the tradition. It becomes difficult to reject the declared principles that seek to strengthen and explain (the *ḥukm*) at the time of need, on the basis of rare traditions, especially those that are for a specific case. It was for this reason that ᶜUmar (God be pleased with him) said about the tradition of Faṭima bint Qays: "We cannot relinquish the Book of Allāh for a woman's fables".

18.2.3.3.8. Issue 8

A group of jurists said about the testimony regarding suckling that nothing but the testimony of two women is acceptable in this. Another group said that the testimony of at least four is required, which was the opinion of al-Shāfiᶜī and ᶜAṭāᵓ. A third group of jurists said that the testimony of a single woman is acceptable. Some among those who said that the testimony of at least two women is acceptable stipulated the spread of the news about suckling prior to the acceptance of their testimony. This is the opinion of Mālik and Ibn al-Qāsim. There were others who did not stipulate this, which is the opinion of Muṭarrif and Ibn al-Mājishūn. Among those who allowed the testimony of a single woman are some who did not stipulate spread of her claim prior to testimony, which is Abū Ḥanīfa's opinion, and there are some who did stipulate this, which is one report from Mālik, from whom it is also related that the testimony of less than two women is not acceptable.

The reason for their disagreement, over four and two women, is their dispute about the testimony of women whether two women are equivalent to one man, in cases where the testimony of a man is not acceptable, or that two women are sufficient. This issue will be coming up in the Book of *Shahādāt*, God willing. Their disagreement about the acceptance of the testimony of a single woman arises because of its conflict with the traditions relevant to the issue and with principles that are agreed upon, that is, the testimony of less than two males is not acceptable, and that the position of women in this is either weaker than that of men or is equivalent to it. Further, there is consensus on the point that judgment cannot be rendered upon the testimony of a single woman. The command that is laid down on this issue is found in the tradition of ʿUqba ibn al-Ḥārith, who said, " 'O Messenger of Allāh, I married a girl and a woman turned up saying: I suckled both of you.' The Messenger of Allāh (God's peace and blessings be upon him) said, 'How can this be apparent after what had been said? Turn her away'. " Some of the jurists interpreted this tradition as conveying a recommendation, after reconciling it with the principles, and that is more likely; it is one of the narrations from Mālik.

18.2.3.3.9. Issue 9

They agreed about the condition of the wet-nurse that the milk of any woman, *bāligh* or non-*bāligh*, even beyond the age of menopause, married or single, pregnant or not, leads to prohibition. Some of them gave an absurd opinion imposing prohibition because of male-milk. This is non-existent let alone that there be a legal *ḥukm* for it. If it is found, it is not milk except by the equivocality of the name. Under this subject, they differed about the milk of a corpse. The reason for the disagreement is whether it is included in the general meaning. There is no milk from a corpse, and if found it is only designated as such through the equivocality of the term. It is possible that an issue be hypothetical, thus, it has no existence, except as a conjecture.

18.2.3.4. *Section 4: The Impediment of Unlawful Intercourse (*Zinā*)*

They disagreed about the marriage of a *zāniya*.[39] The majority permitted this, while a group of jurists disallowed it. The reason for their disagreement is their dispute about the meaning of the words of the Exalted, "[A]nd the adulteress none shall marry save an adulterer or an idolater. All this is forbidden unto believers", whether it implies blame or prohibition, and whether the reference in the words, "All this is forbidden unto believers"[40], is to *zinā* or to marriage? The majority decided to construe the verse to mean blame and not prohibition because of what is laid down in the tradition "that a man said to the Prophet (God's peace and blessings be upon him) about his (the man's) wife that she does not turn away the hand of anyone who touches her. The Prophet (God's peace and blessings be upon him) said, 'Divorce her'.

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[39] A woman who has indulged in unlawful sexual intercourse, by way of fornication or adultery.

[40] Qurʾān 24 : 3. The use of the term "adulteress" in Pickthall's translation is not correct, in so far as it *does not indicate every woman* who has committed unlawful sexul intercourse. The term "adulteress" is applicable to a married woman alone, while the word *zāniya* has a wider meaning, and includes married as well as unmarried women. The phrase "unlawful sexual intercourse" has, therefore, been used to convey the meaning of the term *zinā*.

The man replied, 'I love her'. The Prophet said, 'Then hold on to her'. " A group of jurists also said that unlawful intercourse annuls marriage on the basis of this principle, which was the opinion of al-Ḥasan. We shall discuss in the Book of *liᶜān* (Imprecation) the marriage of a woman, accused in *liᶜān*, to her husband who accused her.

18.2.3.5. *Section 5: The Impediment of Number (of Marriages)*

The Muslim jurists agreed about the permissibility of (a man) marrying four women at the same time. This is for freemen. They disagreed on two points: in the case of slaves and about a number beyond four.

Mālik said about the slave, in his well-known opinion, that it is permitted to him to marry four (wives); this was also the opinion of the Ẓāhirites. Abū Ḥanīfa and al-Shāfiᶜī said that it is permitted to him to have two wives only (at one time). The reason for their disagreement is whether bondage is effective in discarding this number, just as it is effective in remitting one-half of the *ḥadd* that is obligatory for the freeman for fornication; similarly, in divorce, according to those who uphold it. This is so as the Muslim jurists agreed about reducing his *ḥadd* to one-half in *zinā*, that is, his *ḥadd* is one-half that of the *ḥadd* of the freeman, but they disagreed about other things.

About marrying more than four, the majority maintain that a fifth wife is not permitted, because of the words of the Exalted, "[M]arry of the women who seem good to you, two or three or four"[41] and also because of a tradition related from the Prophet (God's peace and blessings be upon him) that he said to Ghaylān when he converted to Islam and had ten wives, "Hold on to four and let go the rest". A sect says that nine are permitted. It appears that those who permitted nine held that opinion on the basis of addition of numbers occurring in the preceding verse, that is, addition of the numbers in the words of the Exalted, "two and three and four".

18.2.3.6. *Section 6: The Impediment of Combination*

They agreed that two sisters are not be combined (married together) through marriage contracts, because of the words of the Exalted, "And (it is forbidden unto you) that ye should have two sisters together, except what hath already happened (of that nature) in the past". They disagreed about combining them through the ownership of the right hand. The *fuqahāʾ* (in general) prohibit it, but one group held that it is permissible.

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[41] Qurʾān 4 : 3

The reason for their disagreement is the conflict of the general meaning in the words of the Exalted, "[T]hat ye should have two sisters together", with the generality of the exemption at the end of the verse, "[S]ave those (captives) whom your right hands possess".[42] It is likely that this exemption extends backwards to the last-mentioned category, and it is also possible that it extends to all that is included in the verse as to prohibition, except cases over which there is consensus that it does not affect them; in this way *milk al-yamīn* is excluded from the words of the Exalted, "[T]hat ye should have two sisters together". It is likely that the exemption relates to the last-mentioned category whereby the words of the Exalted, "[T]hat ye should have two sisters together", retain their generality, especially when we assign it the underlying cause of sisterhood or another cause found within it. Those who upheld its prohibition in *milk al-yamīn* differed in the case where one of them was (associated) through marriage while the other through *milk al-yamīn*. Mālik and Abū Ḥanīfa prohibited it, but it was permitted by al-Shāfiʿī.

Similarly, they agreed, as far as I know, about the prohibition of combining a woman with her paternal aunt, and a woman with her maternal aunt, as this has been established from the Prophet (God's peace and blessings be upon him) in the *mutawātir* tradition of Abū Hurayra in which the Prophet is reported to have said, "A woman is not to be married together with her paternal aunt nor with her maternal aunt". They agreed that a paternal aunt is every female who is a sister of a male who is the cause of one's birth, either directly or through another male, and that a maternal aunt is each female who is a sister of every female who is the cause of one's birth, either directly or through another female; these are free-women from the mother's side. They disagreed whether it is a case of a particular meaning whose implication is also particular or it is from the category of a particular word whose implication is general. Those who said that it is from the category of a particular word with a general implication, disagreed what kind of generality is intended by it. A group of jurists, and they are the majority of the jurists of the regions, said that it is a particular word with a particular implication, and the prohibition does not extend beyond the case delineated. Another group of jurists said that it is a particular word with a general implication, which includes any two women between whom there is a prohibiting or non-prohibiting relationship. Thus, according to them, it is not permitted to marry together two daughters of paternal uncles or an aunt, nor two daughters of maternal uncles or an aunt, nor a woman and a daughter of her paternal uncle or aunt, nor a woman and the daughter of her maternal aunt.

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[42] Qurʾān 4 : 24

One group of jurists said that it is prohibited to marry together any two women between whom there is a prohibiting relationship, that is, when one of them is a man and the other a woman, they could not have been legally permitted to marry. That is, if one of these two women had been a man. There are among them those who stipulate this from both sides, that is, if each one of them is considered a man and the other a woman, in turn, and it turns out that they are not legally permitted to marry.[43] These would be the cases where marrying them together is not permitted. If, however, one side is considered a male and marriage is prohibited, but it is not prohibited when assumed from the other side, then, marrying together is permitted, as in the case of marriage with a man's (former) wife and his daughter from another woman. Here, if we consider the daughter a male, it would not be permitted to her to marry the woman, for she is the wife of her father, but if we consider the woman as a male, she would be permitted to marry the daughter of her husband, for she is the daughter of a stranger. These rules were preferred by the disciples of Mālik. The other jurists disallow simultaneous marriage with a man's wife and his daughter from another woman.

18.2.3.7 *Section 7: The Impediment of Slavery*

They agreed that it is permissible for the slave to marry a female slave, and for a free-woman to marry a male slave, if she agrees to this and so do her guardians. They disagreed about the marriage of a freeman to a female slave. Some jurists said that it is permitted without qualification, which is the well-known opinion of Ibn al-Qāsim. Others said that it is not permitted, except on two conditions: lack of resources (dower of a free-woman), and the fear of falling into evil. This is the well-known opinion of Mālik, and also of Abū Ḥanīfa and al-Shāfiʿī.

The reason for their disagreement is the conflict between the indirect indication of the text in the words of the Exalted, "And whoso is not able to afford to marry chaste (or free), believing women, let them marry from the believing maids whom your right hands possess",[44] and the generality of His words, "And marry such of you as are solitary and the pious of your slaves and maidservants".[45] This is so as the meaning of the indirect indication of the text in the words of the Exalted, "And whoso is not able to afford to marry free, believing women, let them marry from the believing maids whom your right hands possess", requires that marriage with a female slave is not permitted except with two conditions. First, is the absence of means to marry a free-woman, while the second is the fear of falling into sin. The words of the Exalted, "And marry such of you as are solitary and the pious of your slaves and maidservants",[46] require, through their generality, the permissibility of their marriage with a freeman or slave, whether the freeman is a bachelor, and whether he is in fear of falling into sin. Yet, the indirect indication of the command in the text here has greater strength than the generality, Allāh knows best, as in this general implication the qualifications of the prospective husbands for the slave-girls are not stipulated. The aim in this verse is to issue the command for marrying them and to forbid their coercion, which is also construed by the majority to be a recommendation, though the man will cause his offspring from this marriage to go into bondage.

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[43] That is, if one of these two women had been a man.

[44] Qurʾān 24 : 32

[45] Qurʾān 24 : 32

In this topic, they differed about two widely known cases, that is, those who did not permit marriage (with a female slave) except on two prescribed conditions. The first is that if the man is already married to a free-woman, does it amount to a possession of means? Abū Ḥanīfa said that it amounts to a possession of means, while others said that it does not. From Mālik both opinions are related. The second issue is whether the person, in whom both these conditions are found, can marry more than one slave-woman, three, four, or two.

Those who maintained that a man married to a free-woman cannot fear falling into sin, as he is not a bachelor, said that such a man is not permitted to marry a slave-woman (because children from a slave go into bondage). Those who said that the fear of falling into sin can always exist, whether the man is single or married, for the first wife may not be sufficient to protect him from sin, and he is not able to marry another free-woman so as to avoid sin, said that he may marry a slave-woman. His position with respect to this free-woman is the same as his condition prior to marriage with her, especially when he fears falling into sin with the slave-woman whom he wishes to marry. This is exactly the cause in their disagreement over the issue whether he could marry a second female slave on top of the first. Those who limit the fear of falling into sin to a bachelor, for such a fear is greater for bachelors, said that he cannot marry more than one slave-woman. Those who do not impose such a limitation said that he may marry more than one slave-woman; similarly, they say that he may marry her with an existing marriage with a free-woman.

The generalization of the fear of falling into sin without qualification is subject to examination. If we say that a man married to a free-woman follows the opinion that he has the right to marry a slave-woman without the permission of the free-woman, does she have an option to stay with him or to annul the marriage? Mālik's opinion differed on this. They also disagreed when he acquires the means to marry a free-woman after marrying the slave-woman, is he to be separated from the slave-woman? They did not disagree, that is, the disciples of Mālik, that when the fear of falling into sin has left him he is not to be separated from the slave-woman. They agreed under this topic that it is not permitted to a woman to marry her own slave; if she comes to own her husband, the marriage is rescinded.

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[46] Qur'ān 24 : 32

18.2.3.8. *Section 8: The Impediment of Disbelief (*Kufr*)*

They agreed that it is not permitted to a Muslim to marry an idolatress due to the words of the Exalted, "And hold not to the ties of disbelieving women". They disagreed about marrying slave idolatresses. They agreed that he may marry a free *kitābiyya*, except what is related about it from Ibn ʿUmar. They disagreed about marrying a slave *kitābiyya*, but they were in agreement about her permissibility through *milk al-yamīn*.

The reason for their disagreement about marrying enslaved idolatresses is the conflict of the general meaning of the words of the Exalted, "And hold not to the ties of disbelieving women", and of the words of the Exalted, "Wed not idolatresses till they believe",[47] with the words of the Exalted, "And all married women (are forbidden unto you) save those (captives) whom your right hands possess",[48] that is, the female prisoners of war, with the apparent meaning implying generality, without distinction of a *kitābiyya* or idolatress. The majority of the jurists prohibit this, while Ṭāwūs and Mujāhid upheld its permissibility. Their argument is supported by what is related about the marriages of the prisoners in the battle of Awṭās when they sought the Prophet's permission for *ʿazl* (ejaculating outside) and he permitted them to do so.

The majority upheld the permissibility of marriage with the *kitābiyāt* who are free through a contract, as the principle is to construe (by exemption) the particular from the general. The words of the Exalted, "[A]nd the virtuous women (out) of those who received the Scripture", is particular, while His words, "Wed not idolatresses till they believe",[49] is general; the majority, thus, exempted the particular from the general. Those who inclined toward its prohibition, which is the opinion of some of the *fuqahāʾ*, considered the general meaning to have abrogated the particular.

They disagreed about the permissibility of a slave *kitābiyya* through marriage, because of the conflict of the generality in this case with analogy.

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[47] Qurʾān 2 : 221
[48] Qurʾān 4 : 24
[49] Qurʾān 2 : 221

This is so as analogy in her case upon a free-woman requires the permissibility of her marriage, while the remaining general meaning, after the free-woman has been exempted from the prohibition, opposes it, as it necessitates her prohibition, according to the opinion of those who maintained that an exemption made from a general meaning leaves the remaining categories within the generality. Those who restricted the remaining generality with analogy, and those who did not view the restricted general meaning as applicable generally, said that the marriage of a slave *kitābiyya* is permissible. Those who preferred the remaining generality, not restricting it with analogy, said that the marriage of a slave *kitābiyya* is not allowed.

There exists another reason for their disagreement, which is the conflict of the (indirect) indication of the text with analogy. This is so as the words of the Exalted, "let them marry from the believing maids whom your right hands possess",[50] implies through the (indirect) indication of the text that the marriage of a non-believing slave is not permitted, while analogy upon the free-woman implies that it is.[51] They agreed on the permissibility of the *kitābiyya* on the basis of the Qurʾānic words, "except those whom your right hands possess", and also on the basis of their consensus over the fact that enslavement makes the unmarried enslaved woman permissible.

They disagreed about a married woman whether imprisonment (in war) demolishes her marriage, and if it is demolished then at what time? A group said that the marriage of couple imprisoned together is not annulled, but the imprisonment of one prior to the other annuls their marriage. This was Abū Ḥanīfa's opinion. Another group of jurists said that imprisonment annuls the marriage whether they are imprisoned together or one before the other, which was al-Shāfiʿī's opinion. There are two opinions from Mālik. First, that imprisonment does not annul marriage at all. Second, that it annuls it absolutely, as in al-Shāfiʿī's opinion.

The reason for their disagreement about annulment is the vacillation of the captives who have escaped slaying in being considered as the women of the *dhimmīs* having a pact (in which case they could not be treated as concubines) and in considering them as disbelieving women who have no husbands or who have been hired by the disbelievers. In the distinction drawn by Abū Ḥanīfa between couples taken captive together and those taken separately, one before the other, the effective factor according to him in their permissibility is the difference of *dār* (legal jurisdiction) not slavery. The factor effective in permissibility according to others besides him is slavery. What is to be investigated here is whether slavery governs cases of single female captives, or it applies generally to single as well as married captives. It appears that being married in this case should not receive protection, as the effective factor in enslavement is disbelief, which is the cause of permissibility. Her comparison with a *dhimmiyya* is far-fetched, as the *dhimmī* has agreed to pay *jizya* so that he may retain even his religion, let alone his marriage.

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[50] Qurʾān 4 : 25

[51] There are two lines after this, which according to the note given by the editor of the original are found in some manuscripts. The text in these lines appears to be a gloss, which was somehow incorporated into the text at some stage. As these lines have no relevance to the discussion they have been omitted.

18.2.3.9. *Section 9: The Impediment of (the Ritual State of)* Iḥrām

They disagreed about the marriage of the *muḥrim* (person in the ritual state of *iḥrām*). Mālik, al-Shāfiᶜī, al-Layth, al-Awzāᶜī and Aḥmad said that a muḥrim does not marry and cannot be married. If he should go through a marriage contract, the marriage is void. This was the opinion of ᶜUmar ibn al-Khaṭṭāb, ᶜAli, Ibn ᶜUmar and Zayd ibn Thābit. Abū Ḥanīfa said that there is no harm in this.

The reason for their disagreement is the conflict of transmitted traditions on this subject. Among these is the tradition of Ibn ᶜAbbās "that the Messenger of Allāh (God's peace and blessings be upon him) married Maymūna when he was a muḥrim". It is a tradition with an established transmission and is recorded by the compilers of the *Ṣaḥīḥs*. This, however, is opposed by many traditions. First, from Maymūna "that the Messenger of Allāh (God's peace and blessings be upon him) married her when he had relinquished the state of *iḥrām*". Abū ᶜUmar said that it is related from several channels, from Abū Rāfiᶜ, from Sulaymān ibn Yasār who was her client, and from Yazīd ibn al-Asamm. Mālik also related it through the tradition of ᶜUthmān ibn ᶜAffān, who said along with this, that "The Messenger of Allāh (God's peace and blessings be upon him) said, 'A *muḥrim* is neither to marry nor to be married, nor to be proposed to.' " Those who preferred this tradition over the tradition of Ibn ᶜAbbās said that a *muḥrim* is not to marry nor is to be married. Those who preferred the tradition of Ibn ᶜAbbās or reconciled it with the tradition of ᶜUthmān ibn ᶜAffān, by construing the prohibition to indicate disapproval, said that he may marry and may be given away in marriage. This refers to a conflict between practice and word, and the right method is either reconciliation or giving predominance to the word.

18.2.3.10. *Section 10: The Impediment of Illness*

They disagreed about the marriage of the *mariḍ* (sick person). Abū Ḥanīfa and al-Shāfiᶜī said that it is permitted. Mālik in a well-known opinion of his said that it is not permitted. It may be derived from his opinion that he rules for separation between them even if the *mariḍ* recovers, and it may also be derived from his opinion that he does not uphold separation between them, but separation is recommended not obligatory. The reason for their disagreement is the vacillation of marriage between sale and a gift, because the gift of a *mariḍ* is not permitted except to the extent of a third (of his estate), but his sale is permitted. There is another reason for their disagreement, which is the fear that he (the *mariḍ*) may be accused of intending to harm the heirs by introducing an additional heir?

The analogy of marriage upon a gift is incorrect, for they agreed that a gift is valid if it can be accommodated within a third, but they did not associate marriage, here, with a third. The rejection of the permissibility of marriage on account of the inclusion of an additional heir is an analogy based upon *maṣlaḥa,* which is not permitted according to the majority of the *fuqahāʾ*. Taking interests into account in a genus that is remote from the genus that is desired for the establishment of the *ḥukm* according to (the principle of) *maṣlaḥa* led some jurists to the conclusion that upholding such an opinion amounts to legislating additional law, and the adoption of such an analogy dilutes the principle of submission to the *sharīʿa*, neither adding to it nor detracting from it. Yet, reluctance to pay attention to *maṣlaḥa* might cause the people to be pushed, because of a lack of precedents in this genus, toward injustice. Such interests should be brought to the scholars of the *ḥikma* (philosophy) of the law, the learned who will not be accused of judging by it, especially nowadays when the qualified persons think that adoption of the letter of the law (apparent meaning) leads to injustice. The proper methodology of the learned scholar in this should be to examine the evidence in the circumstances of the case. If such evidence indicates that he (the *mariḍ*) intends betterment through the marriage, he should not prohibit the marriage, but if it indicates that he intends harm to his heirs, he should disallow it. This is the case in many things among skills and services where the professional is faced with opposing results in what he is trying to do upon the strength of his skill, for it is not possible to lay down fixed limits for the service. This (situation) is usually faced in the profession of medicine and also in various other professions.

18.2.3.11. *Section 11: The Impediment of* ʿIdda *(Waiting Period)*

They agreed that marriage is not permitted during the (woman's) waiting period, whether it is the waiting period of menstruation, of pregnancy, or of months. They disagreed about the person who marries a woman during her waiting period and consummates it. Mālik, al-Awzāʾī, and al-Layth said that they are to be separated and she is not to be permissible for him, ever. Abū Ḥanīfa, al-Shāfiʿī, and al-Thāwrī said that they are to be separated and when her *ʿidda* is over there is no harm in his marrying her a second time.

The reason for their disagreement is whether the opinion of a Companion has binding force. This is so as Mālik related from Ibn Shihāb from Saʿīd ibn al-Musayyib and Sulaymān ibn Yasār that ʿUmar ibn al-Khaṭṭāb ruled for a separation between Ṭalīḥa from the tribe of Asad and Rāshid al-Thaqafī when he married her during her *idda* from another husband, saying, "If a woman marries during her *idda*, and if the husband whom she marries has not consummated the marriage with her, they are to be separated, and she will then complete the remaining *idda* from the first, after which the second husband may be one of those who can propose. If he consummates the marriage with her, they are to be separated, after which she will complete her *idda* from the first and then the second, but then they can never come together in marriage, ever". Saʿīd said that she is entitled to dower in view of his irregular marriage to her. Perhaps, those who ruled for perpetual prohibition supported this analogy with *qiyās al-shabah* that was weak and disputed with respect to its basis, which is that this invalid marriage, during the *ʿidda*, may cause confusion in lineage and thus (his position) is similar to the accuser in *liʿān*.

It is related that ʿAli and Ibn Masʿūd opposed ʿUmar's ruling on this case. The principle is that she is not to be forbidden to him unless evidence to that effect can be adduced from the Book, *sunna*, or the consensus of the community (of jurists). Some of the narrations state that when ʿAli heard that ʿUmar had ruled for her prohibition, and for the dower being the liability of the treasury, he denied it, upon which ʿUmar retracted from it placing the liability for dower on the husband and not declaring her to be prohibited for him. This is related by al-Thāwrī from Ashʿath from al-Shaʿbī from Masrūq. (The opinion of) those who declared her to be prohibited for him merely on the basis of the contract is weak.

They agreed unanimously that intercourse is not to be had with a pregnant enslaved prisoner, unless she delivers, because of the *mutawātir* reports from the Messenger of Allāh (God's peace and blessings be upon him) to this effect. They disagreed, when the master has had intercourse with her, whether the child is to be manumitted on his account. The majority maintain that the child is not to be manumitted. The reason for the disagreement is whether his sperm has any effect in its growth. If we maintain that it has been effective, the child is his to some extent, but if we say that it does not have any effect this would not be the case. It is related from the Prophet (God's peace and blessings be upon him) that he said, "How can he enslave it, when he has fed it with respect to sight and hearing".

The examination of the impediment of pronouncing divorce thrice will be taken up in the Book of Divorce.

18.2.3.12. *Section 12: The Impediment of Marriage*

They disagreed, regarding the impediment of marriage, that marriage among Muslims amounts to a prohibition, as it does among the *dhimmīs*. They disagreed about an enslaved female prisoner of war as has preceded. They also disagreed over whether the sale of a slave-girl amounts to a divorce. The majority maintain that it does not amount to a divorce, while a group said that it does, which is related from Ibn ʿAbbās, Jābir, Ibn Masʿūd, and Abū ibn Kaʿb.

The reason for their disagreement is the conflict of the tradition of Barīra with the generality of the words of the Exalted, "And all married women (are forbidden unto you) save those (captives) whom your right hands possess[52]," which includes captives as well as others besides them. The granting of a choice to Barīra implies that her sale was not a divorce, for had it been a divorce the Messenger of Allāh (God's peace and blessings be upon him) would not have granted her a choice in the matter after manumission, and her purchase itself by ʿĀʾisha would have amounted to a divorce.

The evidence for the majority of the jurists is what is recorded by Ibn Abī Shayba from Abū Saʿīd al-Khudrī "that the Messenger of Allāh sent out, on the day of Hunayn, a troop that came upon an Arab camp on the day of Awṭās. They defeated them and slew them, and found women who had husbands. Some Companions hesitated to touch them fearing it was not permissible because of their existing marriages. Thus, Allāh sent down the verse, 'And all married women (are forbidden unto you) save those (captives) whom your right hands possess'."[53] This issue is better suited to the Book of Divorce.

These are all the things that influence the validity of the marriage contract. They refer, as we have said to three categories: the qualifications of the party to the contract and the description of the subject-matter of the contract, the description of the contract, and the description of the conditions of the contract. About marriages that were concluded prior to Islam and then became subject to Islam, they agreed that if both converted to Islam simultaneously, that is, the husband and the wife, and the parties to the marriage were mutually permissible in Islam, then, Islam confirmed such a marriage. They disagreed on two points. First, when marriage was polygamous with more than four (wives) or with those who cannot be married together in Islam. Second, when one of them converted to Islam before the other.

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[52] Qurʾān 4 : 24

[53] Qurʾān 4 : 24

18.2.3.12.1. Issue 1

When a disbeliever converted to Islam and had more than four women or he converted and had two sisters (as wives), Mālik said that he is to choose four from among them and one from the sisters, whomsoever he likes. This was also upheld by al-Shāfiʿī, Aḥmad, and Dāwūd. Abū Ḥanīfa, al-Thawrī and Ibn Abī Laylā said that he is to hold on to those who were first in the order of the contracts. If he has married them (all) through a single contract a separation is ordered between them and him. Ibn al-Mājishūn, one of the disciples of Mālik, said that if he converts to Islam and is married to two sisters, both are to be separated (from him) and he concludes a new contract with the one he likes. No one else among Mālik's disciples held this opinion.

The reason for their disagreement is the conflict of analogy with traditions, as there are two traditions that are related to this issue. First is the *mursal* by Mālik "that Ghaylān ibn Salāma al-Thaqafī converted to Islam and he had ten wives, who converted to Islam with him. The Messenger of Allāh (God's peace and blessings be upon him) ordered him to select four out of them". The second tradition is that of Qays ibn al-Ḥārith that he converted to Islam having two wives as sisters. The Messenger of Allāh (God's peace and blessings be upon him) said to him, "Choose whomsoever you like". The analogy opposing these traditions is the similarity of the contracts of later wives concluded before Islam with the forbidden contracts after Islam, that is, just as the contracts with them were void in Islam it should be the same for the contracts prior to Islam. This is weak.

18.2.3.12.2. Issue 2

When one of them converts to Islam before the other, which is the second issue, they disagreed about it. Mālik, Abū Ḥanīfa, and al-Shāfiʿī said that if he accepts Islam[54] before her and she is a *kitābiyya*, her contract is confirmed, but if the woman accepts Islam before him, he has a right to her if he accepts Islam during her *ʿidda* (waiting period), because of the tradition of Ṣafwān ibn ʿUmayya about this "that his spouse ʿĀtika daughter of al-Walīd ibn al-Mughīra converted to Islam before he did, then he also accepted Islam and the Messenger of Allāh (God's peace and blessings be upon him) ratified his original contract of marriage". They said that between the conversion of Ṣafwān and his wife there was a duration of approximately one month. Ibn Shihāb said that word has not reached us that a woman migrated to the Messenger of Allāh (God's peace and blessings be upon him) and her husband was a disbeliever residing in the *dār al-kufr*, except that her migration caused a separation between her and her husband, unless her husband came over too as a migrant prior to the termination of her *ʿidda*.

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[54] The text in the original was not clear at this point. The problem was resolved by switching this sentence with the one following it.

If the husband converted to Islam prior to the conversion of the wife, they differed about this. Mālik said that if the husband converted to Islam earlier and the wife is offered conversion, but she refuses, a separation is to be effected between them. Al-Shāfiʿī said that whether the husband converts to Islam before the wife or the wife before the husband, if the conversion to Islam of the later is within the period of the *ʿidda* the marriage is confirmed.

The reason for their disagreement is the conflict of a general meaning with traditions and analogy. The general meaning is found in the words of the Exalted, "And hold not to the ties of disbelieving women,"[55] which implies immediate separation. The tradition opposing the implication of this general meaning is that related about Abū Sufyān ibn Ḥarb, who converted prior to Hind bint ʿUtba, his wife. His conversion took place at Marr al-Ẓahrān (during the conquest of Mecca). He then returned to Mecca where Hind was still a disbeliever. She took hold of his beard and said, "Slay the misguided old man". Within a few days she accepted Islam, and they were confirmed upon their marriage. In the analogy opposing the tradition, it is obvious that there is no difference whether she converts to Islam before him or he converts before her. If the *ʿidda* is to be considered in her accepting Islam prior to him, it should be acknowledged in his prior conversion too.

18.3. Chapter 3: The Requisites of an Option in Marriage

The causes for an option are four: defects; inability to pay the dower, maintenance, and clothing; absence, that is, absence of the husband; and manumission of a married slave-woman. Thus, there are four sections in this chapter.

18.3.1. *Section 1: The Option of Defects*

The jurists disagreed about the causes of the option of defects for each one of the spouses. This they did on two points. First, is it revoked because of defects? If we say that it is to be revoked, then, by whom is it revoked, and what is its *ḥukm*.

About the first point, Mālik, al-Shāfiʿī and their disciples said that defects give rise to the option of revocation or of retaining the marriage. The Ẓāhirites said that they do not give rise to the option of revocation or of retaining the marriage, which was the opinion of ʿUmar ibn ʿAbd al-ʿAzīz. The reason for their disagreement is based on two factors. First, (upon the question) whether the opinion of a Companion is binding as a source (of law). Second, on the analogy for marriage, in this case, upon sale. The opinion of a Companion laid down in this is what has been related from ʿUmar ibn al-Khaṭṭāb that he said, "When a man marries a woman and she is suffering from insanity, leprosy, or a skin disease"—in some narrations is added the word *qarn* (see the meaning of *ratq* a few lines below)—"she is entitled to full dower, and it is a debt to be claimed by the husband from her guardian". Regarding analogy upon sale, those who upheld defects to be a cause for an option in marriage, said that marriage in this case resembles sale. Their opponents asserted that it does not resemble sale, because of the unanimity of the Muslims on the point that it is not every defect that can lead to the revocation of marriage, while sale can always be revoked because of defects.

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[55] Qurʾān 60:10

In the second point about revocation due to defects, they disagreed about the defects that can entail revocation, and those that did not, and also about the *ḥukm* of revocation. Mālik and al-Shāfiʿī agreed that revocation is on the basis of four defects: insanity, leprosy, *baraṣ* (skin disease like leprosy), and disease of the sex organ that prevents intercourse—*qarn* or *ratq* (birth defect in which the vulva is blocked, or the sides of the vulva are joined together) in a woman, and impotence or castration in a man. Mālik's disciples differed about four defects: black colour, baldness, excessive vaginal odour, and foul breath. It is said that marriage can be revoked because of them, and it is said that it cannot. Abū Ḥanīfa, his disciples, and al-Thāwrī said that a woman cannot be rejected in a marriage except for two defects: *qarn* and *ratq*.

In relation to the *aḥkām* of revocation, those who upheld revocation (due to defects) agreed that if the husband came to know about the defects prior to seclusion, he pronounces divorce and there is nothing due from him. They disagreed when he comes to know about them after seclusion and "touching". Mālik said that if her guardian who gave her away in marriage, about whom it can be said because of his closeness to her as in the case of a father or brother that he was aware of the defects, then, he is a deceiver and the husband has recourse to him for the dower, but he has no claim against the woman for anything. If the guardian is a distant relative, the husband has recourse to the woman for the entire dower, except for one-fourth *dīnār*. Al-Shāfiʿī said that if he consummates marriage with her, he is obliged for the dower and he cannot have recourse to the woman for it, or to the guardian.

The reason for their disagreement is the similarity of marriage with sale and its similarity with void marriages in which consummation has occurred. They agreed about the obligation of paying dower in void contracts on the basis of the words of the Prophet (God's peace and blessings be upon him), "When a woman enters into a marriage without the permission of her guardian, her marriage is void, and she has dower as compensation for her". The point of disagreement turns on the vacillation of this rescission between the *ḥukm* of revocation due to defects in sale, and the rescinded marriages, that is, after consummation.

Those who upheld the rescission of the marriage of an impotent person, agreed that it is not rescinded until they are left alone with each other without any hindrance for a year. The disciples of Mālik disagreed about the underlying reason due to which revocation has been confined to these four defects. It is said that it is so because it is a non-rational law. It is said that because they are hidden defects. The implication about the remaining defects is that they are not concealed. It is also said that (the underlying reason is that) they may be passed on to the children. On the basis of this reasoning they repudiate because of blackness of colour and baldness, while on the basis of the former they revoke (marriage) because of every defect if it is known that it was concealed from the husband.

18.3.2. *Section 2: Option on Inability to Pay Dower and Maintenance*

They disagreed about inability to pay dower. Al-Shāfiʿī used to say that the wife is to be given a choice if the husband has not consummated the marriage with her. This was also Mālik's opinion, but his disciples differed about the extent of delay permitted to him. It is said that there is no limit on this for him, while it is said it is a year, and it is also said that it is two years. Abū Ḥanīfa said that he is a debtor like all other debtors and there is to be no separation between them, but he is to be taken to task for maintenance; and she has the right to refuse access to herself till he pays her the dower.

The reason for their disagreement is the predominance of the similarity of marriage with sale, or the predominance of the harm to be caused to the woman, because of the absence of intercourse just as in in the cases of *al-īlāʾ* and impotence.

About the inability to pay maintenance, Mālik, al-Shāfiʿī, Aḥmad, Abū Thawr and Abū ʿUbayd said that they are to be separated, which is also related from Abū Hurayra and Saʿīd ibn al-Musayyib. Abū Ḥanīfa and al-Thawrī said that they are not to be separated, which was also the opinion of the Ẓāhirites.

The reason for their disagreement is the similarity between harm resulting from this with harm resulting from impotency, as the majority uphold the pronouncement of divorce in the case of the impotent person, and Ibn al-Mundhir has gone so far as to say that there is consensus (*ijmāʿ*) over it. Perhaps they maintained that maintenance is a counter-value for (sexual) utilization, on the evidence that there is no maintenance for the recalcitrant woman according to the majority. If maintenance is not available, utilization lapses and the option becomes obligatory. Those who do not acknowledge analogy (as a principle) said that if the bond has been established through consensus, it cannot be severed except by another consensus or by an evidence from the Book of Allāh or the *sunna* of the Prophet. The reason for their disagreement, then, is the conflict of analogy with *istiṣḥāb al-hāl*.[56]

18.3.3. *Section 3: Option upon Absence*

They disagreed over the missing person about whose life or death nothing is known in the land of Islam. Mālik said that his wife is to be given a period of four years from the day her case is brought before the judge. If search for information about his life and death terminates and (his whereabouts) become unknown, the judge will determine a period for her; upon the termination of the period she will begin to observe the waiting period of four months and ten days, after which she will be free. About his wealth, he said that it is not to be distributed among his heirs till such a time has passed after which he is not likely to survive. It is said that this is seventy years, or eighty, or ninety, and it is said a hundred years, if he disappeared before reaching this age. This opinion is related from ʿUmar ibn al-Khaṭṭāb, and is also related from ʿUthmān. It was upheld by al-Layth. Al-Shāfiʿī, Abū Ḥanīfa and al-Thāwrī said that the wife of a missing person is not to be released (from the marriage contract) till his death is verified; their opinion is related from ʿAlī and Ibn Masʿūd.

The reason for their disagreement is the conflict of *istiṣḥāb al-hāl* with analogy, as *istiṣḥāb al-hāl* requires that the bond should not be severed except through death or divorce, unless evidence indicates the contrary. The analogy here is the similarity of harm caused to her because of absence with the harm in *al-īlāʾ* and impotence; she thus has an option, as she has in these two cases.

Missing persons according to the authorities in Mālik's school are of four types: persons missing within the Islamic lands, and there was a disagreement over this category; persons missing in enemy lands; persons missing in Muslim wars, I mean, those that are among the Muslims; and persons missing in the wars with the disbelievers. There is a substantial disagreement reported from Mālik and his disciples about three of these types.

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[56] This principle requires the maintenance of the *status quo* in accordance with the previous rule applicable to the case, if any, unless valid evidence from the Qurʾān, *sunna* or consensus can be adduced to change the ruling. This principle arises from another principle, which maintains: "The original rule for all things is permissibility, unless evidence can be adduced to the contrary".

The *ḥukm* of a person missing in enemy lands, according to them, is the *ḥukm* of the captive. His wife cannot marry again and his wealth is not to be divided till his death is confirmed, except that Ashhab ruled in his case by the *ḥukm* of a person missing in Muslim lands. Regarding a person missing in wars among the Muslims, he (Mālik) said that his *ḥukm* is that of the slain person, without there being any delay, and it is said that he is to be awaited in accordance with the distance of the place where the battle took place; the maximum period in this case is a year. There are four opinions in the school about the person missing in the wars with the disbelievers: (1) That his *ḥukm* is that of a captive; (2) That his *ḥukm* is that of the slain person after a waiting period of a year, except that if he was in a place where his fate cannot remain concealed, he is to be assigned the *ḥukm* of the person missing in Muslim wars and insurrections; (3) That his *ḥukm* is that of a person missing in Muslim lands; and (4) That his *ḥukm* is that of a person slain with respect to his wife, and that of a person missing in Muslim lands with respect to his wealth, that is, for life (expectancy), after which it (his wealth) is to be inherited.

All these opinions have been structured upon the proposal of the best interest secured by the *sharᶜ*, which is known as *al-qiyās al-mursal*, and about which there is a disagreement among the *fuqahāʾ*, that is, among those who uphold analogy.

18.3.4. *Section 4: Option upon Manumission*

They agreed that if the slave-woman is manumitted when she is married to a slave, she has an option, but they disagreed whether she has an option when she is married to a freeman. Mālik, al-Shāfiᶜī, the jurists of Medina, al-Awzāᶜī, Aḥmad and al-Layth said that she has no option. Abū Ḥanīfa and al-Thawrī said that she has an option whether the husband is a freeman or a slave.

The reason for their disagreement is the conflict of the transmitted texts in the traditions of Barīra with the likelihood of the underlying cause giving rise to the option, being (her master's right of) coercion, which is there absolutely in her marriage as a slave, or (with the likelihood that there) is coercion in her marriage to a slave. Those who maintained that the underlying cause, without qualification, is coercion in marriage said that she is given an option whether she is married to a freeman or slave. Those who limit coercion to her marriage with a slave said that she has an option only when married to a slave. About the conflict with transmission, it is related from Ibn ᶜAbbās that Barīra's husband was a black slave, but it is related from ᶜĀʾisha that her husband was a freeman. Both narrations are established according to the traditionists.

They also differed about the time when the option is granted to her. Mālik and al-Shāfiᶜī said that she has an option as long as he does not have intercourse with her (after manumission). Abū Ḥanīfa said that she has the option during the session (of manumission). Al-Awzāʿī held that her option lapses with intercourse as long as she knows that her option will lapse with intercourse.

18.4. Chapter 4: Marital Rights

They agreed that among the wife's rights over her husband are maintenance and clothing, because of the words of the Exalted, "The duty of feeding and clothing nursing mothers in a seemly manner is upon the father of the child, and no one should be charged beyond his capacity",[57] and the words of the Prophet (God's peace and blessings be upon him), "They have a right over you for food and clothing in a reasonable manner", and his directive to Hind, "Take what is reasonably sufficient for you and your child".

They agreed about the obligation of maintenance, but they differed on four points: the time of the obligation, amount, for whom is it obligatory, and upon whom. With respect to the time of its obligation, Mālik said that maintenance is not obligatory upon the husband unless he has consummated the marriage with her, or he has been asked to consummate the marriage when she is legally capable for intercourse and he has attained puberty. Abū Ḥanīfa and al-Shāfiʿī said that maintenance is obligatory on one who has not attained majority if she has attained it, but when he has attained majority and she is a minor, there are two views about it from al-Shāfiʿī. One is the same as Mālik's, while the other holds that she is entitled to maintenance without qualification.

The reason for their disagreement is whether maintenance is a counter-value for (sexual) utilization, or is compensation for the fact that she is confined because of her husband, as in the case of one absent or sick.

Mālik said about the amount of maintenance that it is not determined by the law and refers to the requirements of the status of the husband and the status of the wife, and that this varies in accordance with a change in location, time and status. This was upheld by Abū Ḥanīfa. Al-Shāfiʿī maintained that it is determined, and for the person in financial ease it is two *mudd*s (a dry measure), for one with average circumstances it is one and one-half *mudd*, and for a person in difficult straits it is one *mudd*. The reason for their disagreement is the vacillation of the interpretation of maintenance for this subject between feeding in expiation and that in clothing. This is so, as they agreed that there is no limit for clothing, while for feeding there is.

They disagreed under this topic whether the maintenance of the wife's servant is upon the husband, and if it is obligatory (upon him) how much is it?

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[57] Qurʾān 2 : 233

The majority agreed that the maintenance of the wife's servant is the liability of the husband if she is of a status that needs a servant, while it is also said that the wife has to take care of the household herself. Those who held the maintenance of the wife's servant to be the liability of the husband differed about the number of servants. One group said that he should provide maintenance for one servant, but it is said that he provides for two servants if the wife is accustomed to two servants, which was upheld by Mālik and Abū Thawr. I do not know of a legal source for the obligation of maintenance of a servant except its similarity with the provision of service with residence. They agreed that residence is to be provided by the husband, because of a text laid down for its obligation in the case of a wife whose divorce is retractable.

They agreed regarding the wife for whom maintenance is necessary that it is obligatory for the free-woman, who is not recalcitrant. They disagreed about the recalcitrant woman and about the slave-woman. About the recalcitrant woman, the majority agreed that maintenance is not due to her, but a group of jurists deviated from this and said that it is due. The reason for their disagreement is the conflict of the generality with the implication of the text, as the generality of the words of the Prophet (God's peace and blessings be upon him), "They have a right over you for food and clothing in a reasonable manner", equally include the recalcitrant woman and others besides her, while the implication is that maintenance is in lieu of (sexual) utilization, which conveys that there is no maintenance for the recalcitrant.

The disciples of Mālik disputed extensively the case of the slave-woman. It is said that she is entitled to maintenance like the free woman, which is the well-known opinion, while it is said that there is no maintenance for her. It is also said that if she visits him she has maintenance, but if he visits her there is no maintenance. Further, it is maintained that she is entitled to maintenance at the time she visits him. If the husband is a freeman, they said, she has maintenance, but if he is a slave there is no maintenance for her. The reason for their disagreement is the conflict of the general meaning with analogy, as the general meaning requires the obligation of maintenance for her, while analogy dictates that her maintenance is only upon the master whom she serves, or is to be shared by them as each one of them makes use of her in different ways. It is for this reason that one group held that she is entitled to maintenance when she visits him. Ibn Ḥabīb said that the married slave-woman's master is to be ordered to allow her to visit her husband once every four days.

In response to the question, who is obliged to pay maintenance, they agreed that it is obligatory upon a husband who is present and is a freeman. They disagreed about one absent or one who is a slave. Ibn al-Mundhir said about the slave that all those jurists whose rulings he had studied agreed that the slave is obliged to pay his wife's maintenance, while Ibn al-Muṣᶜab said that there is no obligation for maintenance upon him. The reason for their disagreement is the conflict of the general principle with the fact that the slave is interdicted with respect to his wealth. The majority uphold the obligation of maintenance upon the person who is absent, but Abū Ḥanīfa said that it does not become obligatory except by the decree of the sultan.

They disagreed about the person whose statement would be acceptable in case of dispute about maintenance. This will be coming up, God willing, in the Book of *Aḥkām* (Judgments).

They agreed that among the wife's (basic) marital rights (in case of a polygamous marriage) is justice between the wives in sharing (of the husband's favours), because of the established practice of the Prophet (God's peace and blessings be upon him) who distributed his favours fairly between his wives, and also because of his words, "When a person has two wives and he feels inclined toward one of them, he will appear on the day of judgment with one of his sides inclined". It is also established that the Prophet (God's peace and blessings be upon him), when he wished to go on a journey, used to draw lots between them.

They disagreed about the period of stay of the husband with a (newlywed) wife, who may or may not be a virgin, whether in the case of a polygamous household this period should be taken into account in the process of conjugal sharing. Mālik, al-Shāfiᶜī, and their disciples said that he (the husband) stays with a newlywed virgin for seven days and with a newlywed non-virgin for three days, and that this nuptial period is not to be counted in the distribution of conjugal rights among the wives. Abū Ḥanīfa said that stay with newlyweds is equal, whether virgin or non-virgin, and that in a polygamous marriage the initial nuptial period must be taken into account. The reason for their disagreement is the conflict of the tradition of Anas with the tradition of Umm Salama. The tradition related by Anas is "that the Prophet (God's peace and blessings be upon him) when he married a virgin, he stayed with her for seven days, but when he married a non-virgin he stayed with her for three days". The tradition of Umm Salama says "that the Prophet (God's peace and blessings be upon him) married her and the next morning said to her, "You are not to suffer discrimination among your family. If you like I will stay seven days with you, and seven with (each of) them, but if you like I will stay three days with you and take turns (among them accordingly)". She said, "Stay three days". Umm Salama's tradition is Madanī, is agreed upon, and is recorded by Mālik, al-Bukhārī and Muslim. The tradition of Anas is Baṣrī and is recorded by Abū Dāwūd. The jurists of Medina adopted the tradition recorded by the scholars of Baṣra, while the jurists of Kūfa adopted the tradition recorded by the scholars of Medina. Mālik's disciples disagreed whether his stay with a virgin for seven days and with a non-virgin for three is obligatory or recommended. Ibn al-Qāsim said that it is obligatory, while Ibn ʿAbd al-Ḥakam said that it is recommended. The reason for the disagreement is the interpretation of the Prophet's case to indicate recommendation or obligation.

The rights of the husband over the wife with respect to nursing and taking care of the house are structured upon the disagreement of the jurists over this issue. This is so as one group of jurists made nursing absolutely obligatory for her, while another group did not make it obligatory at all. One group of jurists made it obligatory for a woman of lower status and not for one with a higher status, unless the infant will not feed except at her breast, which is Mālik's well-known opinion. The reason for their disagreement is the difference as to whether the verse of suckling conveys the *ḥukm* of suckling, that is, its obligation, or that it merely contains the command of suckling (but not as an obligation). Those who held that it contains only the command said that it is not obligatory upon her as there is no evidence for its interpretation as obligation. Those who held that it implies the command of suckling as well as its obligation, because it is a report meant to be a command said that suckling is obligatory upon her. Those who made a distinction between a woman of lower status and one of a higher status based it upon custom and practice. There is no obligation of suckling upon the divorced woman, unless the infant will not feed at another woman's breast, in which case suckling is binding upon her and the child's father is liable for the wages of suckling. This is a point of consensus, because of the words of the Exalted, "Then, if they give suck for you, give them their due payment and consult together in kindness".[58]

The majority maintain that custody (*ḥaḍāna*) belongs to the mother if she is divorced by the husband and the child is still in a tender age, because of the words of the Prophet (God's peace and blessings be upon him), "He who causes a separation between a mother and her child, Allāh will cause a separation between him and his loved ones on the day of judgment", and in so far as enslaved and captive women cannot be separated from their child, the case of the free-woman becomes stronger. They disagreed when the child has reached the age of discrimination. One group, and among them is al-Shāfiʿī, said that he is to be given an option (to remain with his mother or to go to the father). They argued on the basis of a tradition that is relevant to this, while the others held on to the general principle, as this tradition was not proved authentic according to them. The majority maintain[59] that her marriage to someone other than the (child's) father terminates custody, because of the report that the Messenger of Allāh (God's peace and blessings be upon him) said, "You have a prior right to him as long as you do not marry". Those for whom this tradition was not authentic pursued the general principle. There is no basis for it, that can be relied upon, about the transfer of custody from the mother to someone other than the father.

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[58] Qurʾān 65 : 6

[59] According to the editor of the original, the text following this and up to the end of the paragraph is not found in some manuscripts.

18.5. Chapter 5: Marriages Prohibited by Law, Void Marriages, and their *Ḥukm*

The marriages about which an express proscription has been laid down are four: *nikāḥ al-shighār*, *nikāḥ al-mutᶜa*, proposal during another's proposal, and *nikāḥ al-muḥallil*. They agreed about *nikāḥ al-shighār* that it takes the form of a man giving his female ward in marriage to another on the condition that he will give his ward in marriage to the first, without there being any dower except the body of one woman in exchange for that of the other. They agreed that it is a marriage that is not permitted, because of an established proscription from the Prophet. They disagreed when it did take place, whether it would entail *mahr al-mithl*. Mālik said that it is not valid and is annulled for ever, before consummation and after it. This was also al-Shāfiᶜī's opinion, except he added that if a dower is announced for one of them or for both simultaneously, then, the marriage is established on the basis of *mahr al-mithl*, and the dower announced is void. Abū Ḥanīfa said that *nikāḥ al-shighār* is valid on the fixation of *mahr al-mithl*. This was also the opinion of al-Layth, Aḥmad, Isḥāq, Abū Thawr and al-Ṭabarī.

The reason for their disagreement is whether the proscription assigned to it has the absence of a consideration (counter-value) as an underlying reason, or that it has no underlying reason. If we concede that it has no underlying (rational) reason, then rescission is binding without exemptions. If we say that the underlying reason is the absence of dower, it will become valid by fixation of dower as *mahr al-mithl*, like the contracts of marriage in return for wine or swine. They agreed unanimously that a contract of marriage for wine and swine is not rescinded if utilized with consummation, but there will be *mahr al-mithl* in it. It was as if Mālik (God be pleased with him) held the view that though dower was not a condition for the validity of the contract, the invalidity of the contract here, because of the invalidity of the dower, is peculiar for the assignment of the proscription to it, or he was of the view that the proscription is linked to the very formation of the contract, and a proscription (as a rule) indicates the invalidity of the thing proscribed.

In the marriage of *mutᶜa*, though the reports from the Messenger of Allāh (God's peace and blessings be upon him) about its prohibition have reached the level of *tawātur*, they have differed about the time of the occurrence of the prohibition. In some narrations it is stated that he prohibited it on the day of Khaybar, in some it is the day of the conquest of Mecca, in some the day of Tabūk, in some the day of the Farewell Pilgrimage, in some it is during the *umrat al-qaḍā*ʾ, and in some it is the day of Awṭās. Most of the Companions and all the jurists upheld its prohibition. Its permission by Ibn ʿAbbās became well known, and he was followed in his opinion by his disciples in Mecca and in Yemen. They related that Ibn ʿAbbās used to argue for it on the basis of the words of the Exalted, "And those of whom ye seek content (by marrying them), give unto them their portions as a duty. And there is no sin for you in what ye do by mutual agreement after the duty (hath been done). Lo! Allāh is ever Knower, Wise".[60] In one variant reading from him there is an addition of the words "till a stipulated period". It is related from him that he said, "*Mutʿa* is nothing but a mercy from Allāh, the Mighty, Glorious, through which he had mercy upon the *umma* of Muḥammad (God's peace and blessings be upon him). If ʿUmar had not prohibited it, no one would have had the urge to commit *zinā*, except the doomed". All this that is related from Ibn ʿAbbās is related by Ibn Jurayj and ʿAmr ibn Dīnār. From ʿAṭāʾ is the report that he said, "I heard Jābir ibn ʿAbd Allāh saying, 'We contracted *mutʾa* in the period of the Messenger of Allāh (God's peace and blessings be upon him), in that of Abū Bakr, and in the first half of the period of the caliphate of ʿUmar,' " but ʿUmar forbade the people from undertaking it.

Regarding the disagreement about a marriage in which a proposal was made during the proposal of another, it has preceded that there are three opinions on it. One opinion requiring rescission, another not imposing rescission, and the third making a distinction on the basis of the degree of maturity of the first proposal, which is Mālik's opinion.

Nikāḥ al-muḥallil, that is, a marriage through which the permissibility (for remarriage) of a woman divorced by three pronouncements (to her divorcing ex-husband) is sought, Mālik said that it is a marriage that is rescinded, while Abū Ḥanīfa and al-Shāfiʿī said that it is a valid marriage. The reason for their disagreement is their dispute about the meaning of the words of the Prophet, "The curse of Allāh is upon the *muḥallil*". Those who understood the word 'curse' to mean sin alone said that the contract is valid, but those who understood sin to imply the invalidity of the contract, comparing it to the proscription that implies the nullity of the thing proscribed, said that the marriage is void. These are the marriages that are declared void because of a proscription.

Marriages declared void by implication of the law are invalidated either by dropping a condition of validity of marriage, or by the alteration of a *ḥukm* that has been made obligatory by commands from Allāh Almighty, or by making an addition that leads to the nullification of one of the conditions of validity of marriage. Other additions besides these do not invalidate marriage, by agreement of the jurists, rather the jurists disagreed about the binding effect of conditions imposed in this way, for example, when a condition is stipulated for the husband that he will not marry another wife during her marriage, or will not take a slave-girl as a concubine, or move her from her place of domicile. Mālik said that if such conditions are imposed they are not binding upon him, unless they incorporate an oath to manumit or divorce, for these are binding upon him, except when they consist of a condition to manumit or divorce one for whom the oath is taken, in which case the former condition would not be binding either. The same view was expressed by al-Shāfiʿī and Abū Ḥanīfa. Al-Awzāʿī and Ibn Shubrama said that she is entitled to (enforce) her condition and compliance is binding upon him. Ibn Shihāb said that some of the jurists he came across used to issue such a ruling. The opinion of the majority is related from ʿAlī, while the opinion of al-Awzāʿī is related from ʿUmar.

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[60] Qurʾān 4 : 24

The reason for their disagreement is the conflict of a general with a particular meaning. The general meaning is conveyed in the tradition of ʿĀʾisha (God be pleased with her) "that the Prophet (God's peace and blessings be upon him) addressing the people said, 'Any condition that is not in the Book of Allāh is void, even if it were a hundred conditions.' " The particular meaning is conveyed in the tradition of ʿUqba ibn ʿĀmir from the Prophet (God's peace and blessings be upon him) that he said, "The condition having the highest priority for performance is the one with which you have made intercourse lawful". Both traditions are ahih and have been recorded by al-Bukhārī and Muslim, except that the well known view from the *uṣūliyūn* is for decision on the basis of the particular meaning, which is the binding nature of conditions and is the apparent meaning of what is found in *al-ʿUtbiya*, though the well-known opinion is against it. The school differed extensively about the conditions restricted with respect to the determination of dower, that is, whether they are binding or not, but this book of ours has not been structured for detailed cases.

Under the *ḥukm* of void marriages, when they occur, are some that are agreed upon with respect to rescission, prior to consummation and after it. These are those declared void because of dropping a condition whose existence is obligatory for the validity of the marriage, like marrying a woman who is prohibited for the man. Another category of these *fāsid* marriages is disputed because of the disagreement about the weakness and strength of the underlying reason of invalidity and why it reverts to a disregard of the conditions of validity. In this category, in many of these cases, Mālik issues the ruling of rescission prior to consummation, and of confirmation after consummation.

The principle, according to him, in these is that there is no rescission, but he is being cautious, as in the case of many sales where he considers the subject-matter to be consumed because of the fluctuation of the rates and other factors. It appears that such marriages, in his view, are abominable, otherwise there would be no reason for a distinction between consummation and its absence. The consternation within the school over these matters is extensive. It is as if this refers, according to Mālik, to the strength of the rescinding evidence and its weakness. When the evidence appears strong to him, he rescinds the marriage both before and after consummation, but when it is weak, he rescinds it before consummation and not after it, irrespective of the agreement over the rescinding evidence. In relation to this, the school differed about the right of inheritance resulting from void marriages, when death occurs prior to rescission; similarly, as to the occurrence of a divorce. On one occasion both agreement and disagreement are found, while on another occasion rescission and also its absence have been acknowledged after consummation.

We deem it appropriate to terminate our discussion of the subject here, for what we have recorded about it is sufficient for our desired purpose.

XIX

THE BOOK OF *ṬALĀQ* (DIVORCE)

The discussion on this subject is divided into four parts:
Part 1: The kinds of divorce;
Part 2: The elements of divorce;
Part 3: Revocation; and
Part 4: The *aḥkām* of divorcees.

19.1. Part 1: The Kinds of Divorce

In this part there are five chapters. The first chapter is about the identification of *bāʾin* (irrevocable) and *rajʿī* (revocable) divorces. The second chapter is about the distinction between *ṭalaq al-sunna* and *ṭalāq al-bidʿa*. The third chapter relates to *khulʿ* (redemption). The fourth chapter is about the distinction between divorce and rescission. The fifth chapter is about *takhyīr* and *tamlīk*.

19.1.1. Chapter 1: The Identification of *Bāʾin* and *Rajʿī* Divorces

The jurists agreed that divorce is of two types: *bāʾin* (irrevocable) and *rajʿī* (revocable). In the *rajʿī* divorce the husband possesses the right over her (the wife's) return, without there being a choice for her in the matter. The condition for doing this is that he should have consummated the marriage with her. They agreed about this because of the words of the Exalted, "O Prophet! When ye (men wish to) divorce women, divorce them when they can begin their waiting period, and reckon the period, and keep your duty to Allāh, your Lord. Expel them not from their houses nor let them go forth unless they commit open immorality. Such are the limits (imposed by) Allāh; and whoso transgresseth Allāh's limits, he verily wrongeth his soul. Thou knowest not: it may be that Allāh will afterward bring some new thing to pass",[61] and also because of the established tradition related by Ibn ʿUmar that the Prophet (God's peace and blessings be upon him) ordered him to take her back, when he had divorced his wife during her menstruation. There is no dispute about this.

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[61] Qurʾān 65 :1. Divorce should not take place during the time of the wife's blood discharge, or during a clear period in which copulation has occurred. If it does, such a period cannot be counted as part of the waiting period, and it will prolong the period for which a woman has to wait before she can remarry.

They agreed that the characteristic of the *bāʾin* divorce of being irrevocable is found in a divorce due to the absence of consummation, or due to the number of pronouncements of divorce, or due to the existence of a counter-value for *khulʿ*, despite the disagreement whether *khulʿ* is a divorce or rescission, as will be coming up later. They agreed that the number giving rise to an irrevocable divorce in a repudiation by a freeman is three, when made separately, because of the words of the Exalted, "Divorce must be pronounced twice, and then (a woman) must be retained in honour or released in kindness".[62] They disagreed when it occurs three times through words, but not (thrice) in (three separate) acts. Similarly, the majority agreed that slavery is effective in the reduction of the number, and the number that makes non-revocation obligatory (for those) in bondage is two. They disagreed whether this was to be acknowledged for the bondage of the husband or that of the wife, or for the bondage of either one of them. In this chapter, then, there are three issues.

19.1.1.1. Issue 1

The majority of the provincial jurists maintained that a triple divorce pronounced once has the effect of the third repudiation. The Ẓāhirites and another group maintained that it takes the *ḥukm* of a single pronouncement and the stated number has no effect. The proof for these jurists is the apparent meaning of the words of the Exalted, "Divorce may be pronounced twice (and retracted)… And if he hath divorced her (the third time), then she is not lawful unto him thereafter until she hath wedded another husband",[63] maintaining that one divorced thrice through words is actually divorced once not thrice. They also argued on the basis of what has been recorded by al-Bukhārī and Muslim from Ibn ʿAbbās, who said, "Divorce in the period of the Messenger of Allāh (God's peace and blessings be upon him), Abū Bakr and in (the first) two years of the *khilāfa* of ʿUmar, if pronounced thrice (at once) was counted as one, but ʿUmar gave it effect against them". They also argued on the basis of what is related by Ibn Isḥāq from ʿIkrima from Ibn ʿAbbās, who said, "Rukāna divorced his wife thrice in a single session, and was greatly saddened in his longing for her. The Messenger of Allāh asked him, 'How did you divorce her?' He said, 'I divorced her thrice in a single session.' He (the Prophet) said, 'That is a single divorce, bring her back by revocation' ".

Those who lent support to the majority opinion argued that the tradition of Ibn ʿAbbās that has occurred in the *Saḥīḥayn*[64] has been related from him by one of his disciples, Ṭāwūs, while the great majority of his disciples have related from him the binding nature of a divorce pronounced thrice—among them are Saᶜīd ibn Jubayr, Mujāhid, ᶜAṭāʾ, ᶜAmr ibn Dīnār, and several others—and that the tradition of Ibn Isḥāq is imaginary, for Rukāna, in fact, did not divorce his wife thrice.

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[62] Qurʾān 2 : 229

[63] Qurʾān 2 : 229, 230

[64] The compilations by al-Bukhārī and Muslim.

The reason for the disagreement is whether the *ḥukm* of irrevocability that the *sharᶜ* has assigned to the third pronouncement comes into effect by the subject imposing it upon himself by means of a single pronouncement or whether this is not the case, and that nothing in it is binding unless it is made so by the *sharᶜ*. Thus, those who compared divorce to acts for the proper performance of which the observance of conditions imposed by law is stipulated, as in marriage and sales, said that (self-imposition) is not binding. Those who compared it to consecrations and oaths, in which whatever the subject vows to do becomes binding upon him whatever its nature, made divorce binding in whatever way the subject (*mukallaf*) has deemed it to be binding upon himself. It was as if the majority imposed the strict *ḥukm* about divorce for plugging the means (of exploitation through threat of frequent use), but this view would nullify a lawful exemption whose aim is compassion, I mean, in the words of the Exalted, "[I]t may be that Allāh will afterward bring some new thing to pass".[65]

19.1.1.2. Issue 2

In their disagreement about taking into account bondage for a reduction in the number (of pronouncements) for an irrevocable divorce, there were those who said that only the bondage of males (the husband's) is taken into account. Thus, if the husband is a slave, his irrevocable divorce will take effect on the second pronouncement, irrespective of his wife being a free woman or a slave. This was upheld by Mālik and Al-Shāfiᶜī, and by ᶜUthmān ibn ᶜAffān, Zayd ibn Thābit, and Ibn ᶜAbbās from among the Companions, though there are different narrations from Ibn ᶜAbbās in this, but this is the better-known opinion. Among the jurists were those who said that the bondage taken into account pertains to women. Thus, if the wife is a slave the irrevocable divorce comes into effect on the second pronouncement, irrespective of the husband being a slave or a freeman. Those among the Companions who maintained this opinion are ᶜAlī and Ibn Masᶜūd, and from the jurists of the provinces Abū Ḥanīfa and others. Within the issue is an opinion that deviates from these two opinions: that divorce is to be effective because of the bondage of either one of them. This was upheld by ᶜUthmān al-Battī and other jurists, and it is related from Ibn ᶜUmar.

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[65] Qurʾān 65 : 1

The reason for this disagreement is whether bondage, which is effective in this, is that of the female or the male spouse. Those who maintained that effectiveness in this flows from the will of the person who possesses the right of divorce said that the status of the husband is taken into account, while those who maintained that effectiveness depends on the status of the party who faces divorce said that it is a *ḥukm* related to the woman being divorced, for which they held it similar to the (reduced) waiting period. They agreed (as we know) that the (duration of the) waiting period of women is dependent upon their status, that is, its reduction is dependent upon their bondage. The first party argued on the basis of the tradition related from the Prophet (God's peace and blessings be upon him) through Ibn ʿAbbās, in which he said, "Divorce depends on men and the waiting period (*ʿidda*) upon women". This tradition, however, has not been recorded in the ṣaḥīḥ compilations. Those who took into account the bondage of either one of the spouses considered it without qualification to be slavery of either party irrespective of the gender of the slave.

19.1.1.3. Issue 3

About considering slavery as a factor in the reduction of the number of pronouncements of divorce, a group of jurists have related that it is based upon consensus (*ʿijmā*). Abū Muḥammad ibn Ḥazm and a group of Ẓāhirite jurists, however, oppose it, maintaining that freeman and slave are equal in this.

The reason for their disagreement is the conflict of the apparent meaning with the result of the analogy. The majority adopted this position for the reduction of the number of divorces of the slave, male and female, on the analogy of mitigation of their *ḥudud*, coming to a consensus that bondage is effective in the mitigation of the *ḥadd*. The principle for the Ẓāhirites is that the *ḥukm* of the slave in all religious duties is the same as the *ḥukm* of the freeman, unless excluded by an evidence, and "evidence" in their opinion has to be the literal or apparent meaning of the Qurʾān or *sunna*, and because there is no transmitted evidence in this case, it follows that the slave remains covered by the principle.

It appears that the analogy of divorce upon *ḥadd* is off the mark, as the goal of reduction of *ḥadd* is an exemption for the slave in view of his deficient legal capacity, and an abomination committed by him is not considered as contemptible as that of a freeman. The reduction in the number of pronouncements amounts to an exacerbation (as against an exemption), for the imposition of a prohibition against a human through two pronouncements has greater severity than its imposition by three, it being likely that the action is regretted. The *sharīʿa* has adopted a middle course in this: if revocation could be practised persistently against the wife it would become a source of distress and misery for the woman, and if a single pronouncement should lead to an irrevocable separation it would be a cause of hardship and remorse for the husband, which would be intolerable for him. Allāh has reconciled, by means of this *sharīʿa*, the mutual interests of the parties. It is for this reason that we adopt the view that those who make three divorces binding through a single declaration, Allāh knows best, negate the wisdom behind this legal principle.

19.1.2. Chapter 2: The Distinction between *Sunna* and *Bidʿa* Forms of Divorce

The jurists agreed that the person divorcing his wife, with whom he has consummated the marriage, through *ṭalāq al-sunna* is one who divorces her through a single pronouncement during a period of her purity (from menstruation) in which he has not had intercourse with her. The person divorcing in a period of menstruation or in a period of purity during which he has had intercourse with her is not abiding by the *sunna* form (of divorce). They agreed unanimously about this, because of the established tradition of Ibn ʿUmar "that he divorced his wife during her menstruation in the lifetime of the Messenger of Allāh (God's peace and blessings be upon him). He (the Prophet) sent him a message saying, 'Command him to restore her status until such time she is in the period of purity, and thereafter menstruates and then reaches the next period of purity. If then you like hold on to her or if you like divorce her before you have had intercourse with her. This is the (beginning of the) time-frame (*ʿidda*) in which Allāh has permitted you to divorce women' ".

They disagreed in this topic about three points. The first point is whether it is a condition that he should not follow up with another pronouncement of divorce during the *ʿidda*. Second, whether one divorcing thrice, that is, by using the word "three" (in a single session) is divorcing according to *sunna*. Third is the *ḥukm* of the person who divorces during menstruation.

19.1.2.1. Point 1

Mālik and Abū Ḥanīfa, and those who followed them, differed on this. Mālik said that it is a condition for this form that he should not follow up with another pronouncement of repudiation during the (entire) period of waiting. Abū Ḥanīfa said that if he makes a single repudiation during each period of purity, he is acting according to the *sunna* (form). The reason for the disagreement is whether it is a condition for this form of divorce that it should be made in a state of marriage after revocation. Those who maintained that it is a condition said that he should not follow up with another pronouncement (during the *ʿidda*). Those who said that it is not a condition allowed the issuance of a second pronouncement. There is no disagreement among them that the second pronouncement (if made during *ʿidda*) does take effect.

19.1.2.2. Point 2

Mālik maintained that the person repudiating thrice through a single pronouncement is not repudiating according to *sunna*. Al-Shāfiʿī held that he is repudiating according to *sunna*. The reason for the disagreement is the conflict of the acknowledgement by the Prophet (God's peace and blessings be upon him) of a person repudiating, before him, thrice through a single pronouncement, with the meaning of the Book about the *ḥukm* of the third repudiation. The tradition relied upon by al-Shāfiʿī establishes that al-ʿAjlānī divorced his wife thrice in the presence of the Messenger of Allāh (God's peace and blessings be upon him) on the conclusion of imprecation (*liʿān*). He said that had it been an innovation (*bidʿa*) why would the Messenger of Allāh (God's peace and blessings be upon him) have confirmed it (tacitly). When Mālik saw that the person repudiating thrice is negating the exemption that Allāh has granted in terms of number, he said that it is not according to *sunna*. His disciples raised an objection about the tradition that, according to him, a separation has been caused between the imprecators through the imprecation itself, and the subsequent repudiation is in vain; it cannot be described either as *sunna* or as *bidʿa*. Mālik's opinion here is more convincing than that of al-Shāfiʿī, Allāh knows best.

19.1.2.3. Point 3

The jurists disagreed on a number of points about the case of the person who repudiates during the menstrual period. The majority held that his repudiation takes effect, while another group said that it is not to be implemented or reckoned. Those who maintained that it is implemented said that he is to be asked to take her back, but then they became divided into two groups. One of these groups held the view that this is obligatory and he is to be forced to do so. It was upheld by Mālik and his disciples. The other group said that it is recommended to him to do so, but he is not to be forced. This was upheld by al-Shāfiʿī, Abū Ḥanīfa, al-Thawrī and Aḥmad.

Those who made retraction obligatory differed about the time-period in which such compulsion is to take place. Mālik and most of his disciples, Ibn al-Qāsim and others, said that he is to be forced as long as her period of waiting is not over. Ashhab maintained that he is to be forced only up to the time of the first menstruation. Those who held that he is to be ordered to take her back differed about the time when he may do so, if he wishes to divorce her after he has taken her back. One group stipulated, as a condition for the restoration of her status, that he has to retain her till she enters the period of purity after the menstruation, menstruates thereafter and enters a period of purity another time. It is then that he may divorce her, if he likes, or retain her. This was the opinion of Mālik, al-Shāfiᶜī, and a group of other jurists. Another group said that he takes her back, and when she becomes pure after the first period of menstruation in which he divorced her, he may hold on to her if he likes or divorce her. This was Abū Ḥanīfa's opinion and that of the Kūfīs.

All those who stipulated for *ṭalāq al-sunna* that he divorce her in a period of purity during which he has not cohabited with her, did not require him to take her back if he had divorced her in a period of purity in which he had cohabited with her. In summary, there are four issues. First, whether this divorce is valid. Second, if it is so, is he to be forced to take her back or is merely required to do so? Third, when does the divorce come into effect after such compulsion or recommendation? Fourth, when is he to be compelled?

19.1.2.4. Issue 1

The majority held that if the divorce occurs during the period of menstruation, it is to be deemed a legitimate divorce, because of the words of the Prophet (God's peace and blessings be upon him) in the tradition of Ibn ᶜUmar, "Order him to take her back". They maintained that *rajᶜa* (return) does not take place, except after divorce. It is related from al-Shāfiᶜī from Muslim ibn Khālid from Ibn Jurayj that they sent someone to inquire from Nāfiᶜ whether he had taken the (report about the) repudiation of Ibn ᶜUmar, which took place during the period of the Prophet (God's peace and blessings be upon him), into account. He replied in the affirmative. It is also reported that Ibn ᶜUmar used to issue verdicts in accordance with it.

Those who did not consider such a divorce to have taken legal effect, relied upon the general implication of the words of the Prophet (God's peace and blessings be upon him), "Every act and deed not based upon our practice is rejected". They said that its rejection by the Messenger of Allāh (God's peace and blessings be upon him) implies its non-implementation and invalidity.

The reason, however, for the disagreement here is whether the conditions stipulated by the *sharᶜ* for *ṭalāq al-sunna* are conditions of validity and implementation or those of completion and perfection. Those who maintained that they are conditions of implementation said that the divorce does not take legal effect when it does not conform with this description. Those who held that they are conditions of completion and perfection said that it does take effect, but it is recommended that it take its full, perfect form. Therefore, those who upheld the occurrence of divorce, and then compelled him to retract, have contradicted themselves. Ponder over this.

19.1.2.5. Issue 2

The issue is whether he is to be compelled to take her back. Those who went by the accepted opinion, which is the obligation of what has been determined by the majority, said that he is to be compelled. Those who acknowledged the reason that we have stated, as to the validity of divorce, said that the requirement is for a recommendation.

19.1.2.6. Issue 3

The issue is when does the divorce take legal effect after he is compelled? Those who said that he is to hold on to her till she enters the period of purity, menstruates, and then enters purity, decided this because it is stated in the tradition of Ibn ᶜUmar quoted above. They said that the reason for this is that the act of taking her back should become valid by his cohabiting with her in the period of purity that follows menstruation. If he divorces her in the period immediately following menstruation, it would not lead to a waiting period from a second repudiation, and he would be like one who has repudiated prior to consummation.

They said, generally, that a condition of *rajᶜa* is the existence of a time-period in which cohabitation is proper. On the basis of this reasoning, the condition for *ṭalāq al-sunna* is that he should divorce her in a period of purity when he has not divorced her (already) in a period of menstruation that precedes it. This is one of the conditions stipulated by Mālik for *ṭalāq al-sunna* as recorded by ᶜAbd al-Wahhāb. Those who did not stipulate this decided according to what is related by Yūnus ibn Jubayr, Saᶜīd ibn Jubayr, Ibn Sīrīn and those who followed them, from Ibn ᶜUmar. In this version he said that he is to take her back, and when she is pure, he may divorce her if he likes. The reasoning in this is that he was ordered to take her back as a penalty, as he had divorced in a period of time in which divorce is considered reprehensible. When this time-period is over, the divorce will take effect without disapproval. The reason for their disagreement is the conflict of traditions laid down on this issue, and also the conflict of the meaning of the underlying causes.

19.1.2.7. Issue 4

When is he compelled (to take her back)? Mālik held that he is to be compelled to take her back throughout the waiting period, as it is a period in which he has a right to take her back. As for Ashhab, he decided this on the basis of the apparent meaning of the tradition, for it says, "Order him to take her back till she is pure", and this indicates that she is to be accepted back in that period of menstruation. In addition, he said that he was ordered to take her back so that the waiting period is not prolonged for her, because when a divorce occurs in the period of menstruation it (the period of menstruation) is not taken into account, by consensus (*ijmāʿ*). If we uphold that he can take her back in a period other than menstruation it would be a longer waiting period for her. On the basis of this reasoning, it is necessary that the occurrence of a divorce be permitted in the period of purity that immediately follows menstruation. The reason for disagreement is the dispute over the underlying cause of the decreed rejection.

19.1.3. Chapter 3: *Khulʿ* (Redemption)

The terms *khulʿ*, *fidya*, *ṣulḥ* and *mubāraʾa* all refer to the same meaning, which is "(a transaction in which) compensation is paid by the wife for obtaining her divorce". The term *khulʿ*, however, in the opinion of the jurists is confined to her paying him all that he spent on her, the term *ṣulḥ* to paying a part of it, *fidya* to paying more than it, and *mubāraʾa* to her writing off a claim that she had against him. The discussion of the principles of this mode of separation is split into four sections. First, the permissibility of its occurrence (legal effectiveness). Second, the conditions for its proper occurrence, that is, its valid occurrence. Third, about its nature, whether it is divorce or rescission. Fourth, about the *aḥkām* related to it.

19.1.3.1. *Section 1: Its Permissibility*

Most of the *fuqahāʾ* uphold its permissibility. Its sources are to be found in the Book and *sunna*. In the Book it is the words of the Exalted, "[I]t is no sin for any of them if the woman ransom herself".[66] The *sunna* is the tradition of Ibn ʿAbbās "that the wife of Thābit ibn Qays came up to the Prophet (God's peace and blessings be upon him) and said, 'O Messenger of Allāh, I do not find anything wrong with him from the religious and moral points of view, but I detest disbelief after entering the fold of Islam.' The Messenger of Allāh (God's peace and blessings be upon him) said, 'Will you return to him his orchard (that he had given to you)'. She said, 'Yes'. The Messenger of Allāh said to (Thābit), 'Accept the orchard and divorce her through a single repudiation' ". It is recorded, in these words, by al-Bukhārī, Abū Dāwūd, al-Nasāʾī, and is a tradition agreed upon for its soundness.

Abū Bakr ibn ʿAbd Allāh al-Mazīnī deviated from the majority opinion and said that it is not permitted to the husband to take anything from his wife. He argued for this on the basis of his understanding that the words of the Exalted, "[I]t is no sin for any of them if the woman ransom herself ",[67] have been abrogated by the words of the Exalted, "And if ye wish to exchange one wife for another and ye have given unto one of them a sum of money (however great), take nothing from it. Would ye take it by way of calumny and open wrong?"[68] The majority, however, maintain that this prohibition applies when it is taken without her consent, but it is permitted with her consent. The reason for disagreement here is whether this meaning of prohibition is to be assigned its general or particular implication.

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[66] Qurʾān 2 : 229
[67] Qurʾān 2 : 229

19.1.3.2. *Section 2: The Conditions for its Permissibility*

Some of the conditions of its permissibility are related to the amount permissible in this transaction, some to the quality of the thing whereby it is permissible, some to the state (of the party) in which it is permitted, and some to the qualifications of the women in whose case it is permitted, or to the qualifications of their guardians when they do not have a say in it themselves. In this section, therefore, there are four issues.

19.1.3.2.1. Issue 1

About the amount with which it is permitted to her to secure redemption, Mālik, al-Shāfiʿī and a group of jurists said that it is permitted to a woman to secure redemption with more than what has come to her from the husband, by way of dower, when she is the cause of discord, or with an equivalent amount, or less. Other jurists held that he [the husband] does not have a right to take more than what he has given her (as dower), according to the apparent meaning of Thābit's tradition. So those who compared this compensation to that in all other transactions held that the amount is dependent upon mutual consent, but those who went by the literal meaning of the tradition did not permit excess, and it was as if they considered it to be the acquisition of wealth without lawful justification.

19.1.3.2.2. Issue 2

Both al-Shāfiʿī and Abū Ḥanīfa stipulate about the description of compensation that it should be determined through description and be known to exist. Mālik permits it even when it is uncertain as to existence, amount, and availability, like a runaway slave, lost camel, and fruit that has not yet begun to ripen, or a slave whose description is not provided. The permissibility of *gharar* is related from Abū Ḥanīfa, but he prohibited it in the case of non-availability.

The reason for disagreement is the vacillation of compensation here between being a compensation in sales and that in things donated or bequeathed. Those who held it similar to compensation in sales stipulated for it what they stipulate for sales and for the consideration in sales, but those who held it similar to donated things did not stipulate such conditions.

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[68] Qurʾān 4 : 20

They disagreed when *khulʿ* takes place on the basis of things that are not permissible, like *khamr*, and *khinzīr*, whether a compensation (in lieu) is obligatory for her, although they had agreed that divorce would occur (in any case). Mālik said that she does not have a right to any compensation, which was also Abū Ḥanīfa's opinion, but al-Shāfiʿī said that she has a right to claim an amount equivalent to *mahr al-mithl.*

19.1.3.2.3. Issue 3

Regarding the conditions in which redemption is permissible, the majority held that it is permitted with the mutual consent of the parties, unless consent to pay him is obtained by fear of injury to her. The basis for this are the words of the Exalted, "O ye who believe! It is not lawful for you forcibly to inherit the women (of your deceased kinsmen), nor (that) ye should constrain them that ye may take away a part of that which ye have given them, unless they be guilty of flagrant lewdness",[69] and His words, "And if ye fear that they may not be able to keep the limits of Allāh, in that case it is no sin for either of them if the woman ransom herself. These are the limits (imposed by) Allāh".[70]

Abū Qalāba and al-Ḥasan al-Baṣrī deviated from this (opinion), with both maintaining that it is not permitted to a man to contract redemption with his wife, unless he has seen her committing fornication. They interpreted the term lewdness (*fāḥisha*) in the verse as fornication. Dāwūd said that it is not permitted, except in the case of fear that they will not be able to maintain the limits imposed by Allāh, according to the apparent meaning of the verse. Al-Nuʿmān deviated too, saying that redemption is permitted even with a threatened injury. Yet, the juristic reasoning is that *fidāʾ* (ransom) grants to a woman something equivalent to what is possessed by the man; namely, (the right to) divorce. A man possesses repudiation when he pressurizes a woman, while a woman possesses *khulʿ* when she wants to pressurize a man (her husband).

Five opinions are, thus, derived for *khulʿ*. First, that it is not permitted at all. Second, it is permitted in all circumstances, that is, even under duress. Third, it is not permitted unless fornication is witnessed. Fourth, it is permitted when there is fear that the limits imposed by Allāh will not be maintained. Fifth, that it is permitted in all circumstances, except under duress, which is the most widely accepted (*mashhūr*) opinion.

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[69] Qurʾān 4 : 19

[70] Qurʾān 2 : 229

19.1.3.2.4. Issue 4

With respect to the person to whom *khulᶜ* is permitted, there is no dispute that a woman possessing discretion (a *rāshīda*) has a right to transact redemption herself, while a slave-woman does not enter into a transaction of *khulᶜ* without the consent of her master; similarly, a prodigal woman seeks the consent of her guardian, according to those who uphold interdiction. Mālik said that a father transacts redemption on account of his minor daughter, just as he gives her away in marriage. Similarly in the case of his minor son, for according to him, it is he who repudiates on his account. There is a disagreement about the minor son. Al-Shāfiᶜī and Abū Ḥanīfa said that this is not permitted, as he (the father) does not divorce on his behalf, Allāh knows best.

The *khulᶜ* of a sick woman is permitted according to Mālik, if it involves an amount equivalent to his inheritance from her. Ibn Nāfiᶜ has related from Mālik that her *khulᶜ* is permitted to the extent of a complete third (of her wealth). Al-Shāfiᶜī said that if she transacts redemption to the extent of her *mahr al-mithl* it is permitted, but will be deducted from the liquid cash (*raʾs al-māl*), but if it exceeds this it will be from a third of the estate. About the *muhmala* (that is, one without a guardian), who has no executor or father, Ibn al-Qāsim said that her *khulᶜ* is permitted if it conforms with an amount of *khulᶜ* deemed reasonable for her status. The majority maintain that *khulᶜ* transacted by a woman possessing all rights over herself is valid. Al-Ḥasan and Ibn Sīrīn deviated saying that *khulᶜ* is not permitted except by the permission of the sultan (that is, through a court).

19.1.3.3. *Section 3: The Legal Category of Redemption*

The majority of the jurists agreed that *khulᶜ* amounts to a divorce (repudiation), which was Mālik's opinion. Abū Ḥanīfa deemed divorce and rescission equivalent. Al-Shāfiᶜī said that it is rescission, which was also upheld by Aḥmad, Dāwūd and by Ibn ᶜAbbās from among the Companions. It is related from al-Shāfiᶜī that it is an indirect declaration of intent; if he intends thereby a divorce it amounts to a divorce, otherwise it is a rescission. It is, however, related from him in a later opinion that it amounts to divorce. The reason for making the distinction is whether the number of repudiations in it is taken into account.

The majority of those who consider it to be a divorce deem it irrevocable, for had the husband possessed the right to take her back in the waiting period, the provision of ransom would have been futile. Abū Thawr said that as long as it is not transacted with the use of the word "divorce", the husband has no right to claim her back, but if it has been transacted by the use of the word "divorce" he has this right.

Those who considered it to be a divorce argued that rescission usually arises from causes of separation that do not depend upon the husband's discretion, but this relates to his discretion and is, therefore, not a rescission. Those who did not consider it to be divorce argued that Allāh, the Glorious and Exalted, has laid down in His Book that "Divorce must be pronounced twice, and then (a woman) must be retained in honor or released in kindness".[71] He then mentioned ransom, and said, "And if he hath divorced her (a third time), then she is not lawful unto him thereafter until she hath wedded another husband".[72] Thus, if redemption had been divorce, the (last mentioned) divorce, which makes his wife unlawful for him, except after marrying another husband, would have amounted to a fourth divorce. According to these jurists, rescission takes place with consent, on the analogy of rescission in sales, that is, *iqāla*. In the opinion of their opponents the verse includes the *ḥukm* of ransom, as a factor that is linked to all kinds of divorces, not that it is something other than divorce.

The reason for disagreement is whether the association of compensation with this kind of separation removes it from the category of separation caused by divorce to a category of separation caused by rescission.

19.1.3.4. *Section 4: The* Aḥkām *Associated with Redemption*

A large number of cases are linked with redemption, but we shall mention out of these the most prominent. Among these is the issue whether repudiation is to be pronounced for the woman who has transacted *khulᶜ*? Mālik said that redemption is not to be followed up with repudiation, unless it is a statement immediately following the agreement (of *khulᶜ*). Al-Shāfiᶜī held that it is not to be made even if immediate. Abū Ḥanīfa said that the pronouncement is to be made, and he did not distinguish between immediate or delayed statements.

The reason for disagreement is that the waiting period, according to the first opinion, forms part of the *aḥkām* of divorce, while it is a part of the *aḥkām* of marriage, in Abū Ḥanīfa's opinion, because of which it is not permitted to marry the divorced woman's sister (during the waiting period). Those who considered it as one of the *aḥkām* of marriage ruled for the pronouncement of divorce, while those who did not consider it a *ḥukm* of marriage did not require pronouncement.

One of the issues relates to the consensus of the jurists that the husband does not have the right to take back the woman granted redemption during her waiting period, except what is related from Saᶜīd ibn al-Musayyib and Ibn Shihāb, who said that if he returns what he has taken from her, it is testimony of his taking her back. The distinction lies in what we related from Abū Thawr about using the words of repudiation. Another issue is the agreement of the majority that he has a right to marry her during her waiting period with her consent, but a group of the later jurists said that neither he nor anyone else can marry her during the waiting period. The reason for disagreement is whether the prohibition of marrying during the waiting period is a kind of ritual non-rational obedience or whether it has an underlying (rational) cause. They disagreed about the waiting period of a woman granted *khulᶜ*, and this will be coming up shortly.

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[71] Qurʾān 2 : 229

[72] Qurʾān 2 : 230

They disagree when the husband and wife have a dispute about the amount of compensation upon which *khulᶜ* has been transacted. Mālik said that his statement is to be accepted, if there is no supporting testimony. Al-Shāfiᶜī said that they take oaths and then she is obliged to pay mahral-mithl. Al-Shāfiᶜī held their dispute to be similar to that of the parties to a sale, while Mālik said that she is the defendant and he is the plaintiff.

The issues in this chapter are many, but further details do not suit our purpose.

19.1.4. Chapter 4: The Distinction between Divorce and Rescission

The views of Mālik (God bless him) differed, into two opinions, about the distinction between rescission that is not taken into account in the three repudiations and divorce that is taken into account in the three repudiations. First, if the marriage is disputed in law, and it is well known that in Mālik's opinion it would not be permissible, the separation taking place in it amounts to a divorce. In the cases, for example, of a woman contracting her marriage herself or of marriage within the prohibited degree, the separation, according to this (first) narration, amounts to a divorce and not a rescission. In the second opinion the consideration is of the cause giving rise to separation. If the cause does not refer to the willingness of the spouses, that is, even if they desire to maintain the marriage it cannot be valid, then, it is a case of rescission, for example, marriage prohibited due to fosterage, or a marriage during an *ᶜidda*. When it is possible for the spouses to maintain the marriage, like the case of rejection due to defects, it amounts to a divorce.

19.1.5. Chapter 5: *Takhyīr* and *Tamlīk*

Procedures that are counted among the categories of divorce, and which are considered to have specific *aḥkām*, are *takhyīr* (granting a choice) and *tamlīk* (granting possession of the right). According to Mālik there is a difference between *tamlīk* and *takhyīr* (in this context). *Tamlīk*, in his view, is the granting of a right to a woman to pronounce (her own) divorce. This may be interpreted as one repudiation or more, thus, the man is entitled to deny her the right to more than one repudiation. *Khiyār* is different from this, as far as it implies the execution of divorce leading to the termination of the nuptial tie, unless it is a restricted form of *takhyīr*, like his saying to her: "choose for yourself, a single repudiation, or two repudiations". In the case of unrestricted choice, according to Mālik, she only has the choice to choose her husband or opt for irrevocable separation from him through the pronouncement of three repudiations, but she is not entitled to choose a single repudiation.

The right under *tamlīk*, according to him (Mālik) in one narration, is not annulled even if it is not exercised by the authorized woman for a long period of time, or till they part from the session. According to a second narration from him, the right under *tamlīk* stays with her till she revokes it or exercises it through repudiation. The difference, in Mālik's view, between *tamlīk* and granting of a power of attorney (*tawkīl*) to her to exercise repudiation is that in an agency he can revoke the power of attorney before she exercises such power, but in *tamlīk* he does not have that right. Al-Shāfiʿī said that statements like, "choose yourself" or "your affair is in your hands" mean the same thing, but this does not amount to granting the right of repudiation, unless he intends it to be so, and whatever he intends takes effect: if he intends it to be a single repudiation it is so and if he intends three repudiations, then, that will be the case. He is entitled, according to al-Shāfiʿī, to deny her the right of repudiation itself, or restrict her with respect to the number (of repudiations) in both *takhyīr* and *tamlīk*.

According to him (al-Shāfiʿī), if she divorces herself it amounts to a revocable divorce, which is also the case according to Mālik in *tamlīk*. Abū Ḥanīfa and his disciples said that granting a choice does not amount to divorce, but if she divorces herself even through a single repudiation in *tamlīk*, it amounts to an irrevocable divorce. Al-Thawrī said that *khiyār* and *tamlīk* are the same thing and there is no difference between them.

It is said that the acceptable statement is hers about the number of repudiations in *tamlīk* and the husband cannot rebut her statement. This opinion is related from ʿAlī and Ibn al-Musayyib, and it was also adopted by al-Zuhrī and ʿAṭāʾ. It is said that the woman, in the case of *tamlīk* is not entitled to divorce herself, except through a single repudiation. This is related from Ibn ʿAbbās and ʿUmar, may Allāh be pleased with them both. It is reported that a man came to Ibn Masʿūd and said, "There was between me and my wife, the kind of relationship that exists between people (normally). She said (to me), 'Had the power that you possess over me, been in my hands, you would have known how I would treat you.' I said to her, 'In that case, the authority that I possess over you is now in your hands.' She said, 'Then you are divorced thrice' ". Ibn Masʿūd replied, "I consider this to be a single repudiation, and you have a right over her as long as she is in her *ʿidda*; I will, however, consult the *Amīr al-Muʾminīn*, ʿUmar". He then met ʿUmar and related the case to him. ʿUmar said, "Allāh has given men what He did. If they desire to place in the hands of women, what Allāh has placed in their authority, then, dust is in their jaws. How did you decide it?" He said, "I held it to be a single repudiation, and that he still has a right over her". ʿUmar said, "I hold it to be the same, and if you had decided it differently I would have considered you to be wrong".

It is said that *tamlīk* has no legal force, as it is not permitted that the authority placed in the hands of a man be passed on to the authority of a woman by the act of the assigner. Similarly in the case of *takhyīr*, which is the opinion of Abū Muḥammad ibn Ḥazm. Mālik's opinion about the woman authorized under *tamlīk* is that she has a choice between divorce and holding fast to the nuptial tie as long as she is in the session (of assignment), which is also the opinion of al-Shāfiʿī, Abū Ḥanīfa, al-Awzāʿī, and a group of other jurists of the provinces. According to al-Shāfiʿī, *tamlīk* is like agency *wakāla*, when he intends divorce, and he has the right to retract it whenever he likes, as long as divorce has not come into effect.

The majority decided in favour of *tamlīk* and *takhyīr* and deemed it to be a provision for women, because of what is established about the *takhyīr* of the Messenger of Allāh (God's peace and blessings be upon him) in the case of his wives. ʿĀʾisha said that the Messenger of Allāh (God's peace and blessings be upon him) granted us a choice, and we chose him so it did not amount to a divorce". The Ẓāhirites, however, maintain that the meaning of this would be that if they had opted for themselves, the Messenger of Allāh (God's peace and blessings be upon him) would have divorced them, not that they could divorce themselves by the very option of divorce.

The majority also maintained the validity of *takhyīr* and *tamlīk*, and permitted the granting of these rights to women as the implication of customary usage is that one who transfers the ownership of a right to another, to the effect that he may exercise it or he may not, has granted that person a choice. Mālik, however, is of the opinion that his saying, "choose me or choose yourself", would amount, in legal usage, to a choice for irrevocable repudiation within the meaning of the Messenger of Allāh's option for his wives, and the meaning implied by this option is of irrevocability.

Mālik was of the view, in the case of *tamlīk*, that the husband's statement, to the extent that he did not intend divorce thereby, is not to be accepted (in case of dispute) when he makes such a claim, for it is an authorization clear in its meaning about placing of the right of divorce in her hands. Al-Shāfiʿī, because the words used are not explicit for him, attached weight to intention.

So the basis for the dispute is whether weight should be attached to the apparent meaning of the text or to intention. He did the same in *takhyīr*.

They agreed that he has the right to deny her the (maximum) number (of repudiations), that is, through the implication of the word *tamlīk*, as it does not carry an additional meaning beyond the literal. Mālik and al-Shāfiʿī held that if she divorced herself through his assignment of authority to her, with a single repudiation, it would be a revocable divorce, as divorce in legal usage is *ṭalāq al-sunna*. Abū Ḥanīfa held that it is irrevocable, for if it is revocable it is of no use in view of what she expects from it and also in view of what he intends thereby.

Those who maintained that she has the right to divorce herself thrice through *tamlīk*, and that the husband does not have the right to deny her this, because the meaning of *tamlīk*, according to them, considers all the authority possessed by the man to have passed on to the woman, said that she has a choice in the number of repudiations she pronounces. Those who deemed *tamlīk* to be a single repudiation or a choice (restricted to it), held that it is the minimum (number) to which the term can be applied, as a precaution for the sake of men, because the underlying reason for granting the authority of divorce to men is the weaker rationality of women, their being normally overpowered by emotions, and their inclination to disturb normal life.

The majority of the jurists maintained that if the woman chooses her husband, it (her choice) cannot revert to divorce, because of ʿĀʾisha's preceding tradition. It is, however, related from al-Ḥasan al-Baṣrī that if she chooses her husband it amounts to a single repudiation, but if she chooses herself it amounts to a triple repudiation.

In summation of the issue, we find that there is disagreement on three points. First, that divorce does not result from either category (*tamlīk* or *takhyīr*). Second, that both categories cause separation (divorce) between the two (husband and wife). Third, that there is a distinction between *takhyīr* and *tamlīk* with respect to the right acquired by the woman, that is, through *takhyīr* she possesses the right to an irrevocable divorce, and through *tamlīk* what is less than that. When we concede that it is an irrevocable divorce, it is said that she possesses a single repudiation, and it is said that she possesses a triple repudiation; when it is conceded that she possesses a single repudiation, it is said that it leads to a revocable divorce, and it is said to an irrevocable divorce.

The words that a woman pronounces in *takhyīr* and *tamlīk* refer to the *ḥukm* of words with which divorce is pronounced in so far as they are explicit, indirect, or equivocal. The details will come up in the discussion of words used for divorce.

19.2. Part 2: Words Used for Divorce

In this part there are three chapters. The first chapter is about the words of divorce and their conditions. The second chapter is about the details of the person whose divorce is valid. The third chapter is about the details of women against whom a divorce is effective and those against whom it is not.

19.2.1. Chapter 1: Words Used for Divorce and their Conditions

There are two sections in this chapter. First, the kinds of words used for an unrestricted divorce. Second, the kind of words used for a contingent divorce.

19.2.1.1. *Section 1: Words Used for an Unrestricted Divorce*

The Muslim jurists agreed that divorce becomes effective when it is accompanied by an intention and the use of unambiguous words. They disagreed whether it can become effective with intention accompanied by words that are not manifest, or with intention without words, or with words without an intention. Those who stipulated the existence of an intention in it as well as unequivocal words did so observing the letter of the law, similarly those who substituted the words with apparent meanings in place of manifest meanings. Those who held it similar to a declaration of a vow, or to a an oath, deemed the divorce effective with intention alone, while those who held suspicion to be operative in this case deemed it effective through words only.

The majority agreed that the words of an unrestricted divorce are of two types: manifest, and indirect. They disagreed about the distinction between manifest and indirect words, about their effect, and about the duties arising from such use. We have, however, aimed at the discussion of the widely known issues, and of those that resemble general principles.

Mālik and his disciples said that the manifest term is the word *ṭalāq* alone, and whatever is besides this is indirect. The latter, according to Mālik, is of two types: obvious and equivocal; which is also Abū Ḥanīfa's opinion. Al-Shāfiʿī said that the manifest words for divorce are three: divorce, separation, and release; and they are mentioned in the Qurʾān. Some of the Ẓāhirite jurists (also) said that divorce cannot occur, except by the use of these three words. This, then, is their dispute about words that are manifest in conveying the meaning of divorce and those that are not.

They agreed that the word *ṭalāq* (divorce) is manifest in meaning, as the implication for this meaning has been assigned to it by the *sharʿ*, and it, therefore, forms a foundation for this issue. The terms *firāq* and *sarāḥ*, on the other hand, vacillate between being words employed by the *sharʿ*, that is, they indicate the meaning of divorce through legal usage, and between being words retaining their literal meaning. If they are used in this meaning, that is, in the sense of divorce they are metaphorical as that is the meaning of being indirect, which means a word that is metaphorical in its application.

Those who held that divorce is not effective, except by the use of these three words, did so as the *sharᶜ* employed only these three words and their use is a kind of a predetermined ritual in which the use of words is a condition (and is not subject to rationalization). Thus, it is obligatory that such use be confined to the words laid down by the *sharᶜ*. In their disagreement about the *aḥkām* of manifest words for divorce, there are two widely known issues. Mālik, al-Shāfiᶜī, and Abū Ḥanīfa agreed about the first issue, but they disagreed about the second.

19.2.1.1.1. Issue 1

Mālik, al-Shāfiᶜī, and Abū Ḥanīfa said that if the repudiator uses the word *talāq*, saying to his wife, "You are divorced", he is not allowed to say that he did not intend divorce thereby. Similar is the case in the use of the words *firāq* and *sarāḥ*, according to al-Shāfiᶜī. The Mālikites, however, made an exemption saying that if there is circumstantial evidence related to the situation or to the woman indicating the truth of his claim (that he did not intend divorce), for example, when she asks him to release her from her shackles, and he says to her: "you are free" (the context showing that it is freedom from a physical tie).

The juristic reasoning underlying the issue, according to al-Shāfiᶜī and Abū Ḥanīfa, is that divorce is not dependent upon intention, but according to Mālik, in the well-known narration from him, it is dependent upon intention. In this case he did not assign intention because of doubtful circumstances. His verdict related to doubt is based upon the principle of prevention of the means (*sadd al-dharīᶜa*), in which he was opposed by al-Shāfiᶜī and Abū Ḥanīfa. Thus, it is obligatory upon those who do stipulate intention and do not issue a verdict in case of doubt that they should accept the claim of the repudiator.

19.2.1.1.2. Issue 2

This issue relates to their disagreement about the person who says to his wife, "you are divorced", and claims that he intended thereby more than one divorce, either two or three. Mālik said that it will be what he intended and that is what is binding upon him. This was also al-Shāfiᶜī's opinion, unless the man adds the words: "*ṭalqa wāḥida*" (a single divorce). The latter opinion is preferred by his disciples. Abū Ḥanīfa said that the use of the word *ṭalāq* does not convey more than one repudiation as words applied to single categories do not imply (multiple) numbers, either in their indirect or their manifest application.

The reason for their disagreement is whether divorce becomes effective with intention without the use of words, or with intention accompanied by equivocal words. Those who upheld (the effectiveness) of intention deemed it to be three (repudiations) if he pretends that he meant three; similarly, those who upheld (the effectiveness of) intention accompanied by equivocal words, and maintained that the word *ṭalāq* implies (more than one) number. Those who held that it does not denote numbers, and that the stipulation of the use of words in divorce is a must, said that multiple numbers are not implied even if the repudiator intended them to be so.

This issue over which they disagreed is one that relates to the conditions for the words of divorce, that is, the stipulation of intention along with words, or the stipulation of each of them separately. The well-known opinion from Mālik is that divorce does not become effective except by words used with intention. This was also Abū Ḥanīfa's opinion, however, it is related from him that it becomes effective with words without intention. In al-Shāfiʿī's view manifest words of divorce are not dependent upon intention.

Those who held intention to be sufficient argued on the basis of the words of the Prophet (God's peace and blessings be upon him), "Acts are dependent on intentions". Those who did not take intention into account along with words argued on the basis of the words of the Prophet, "Liability of my *umma* has been removed for mistake, forgetfulness, and inner resolve", as intention is less than inner resolve. They said that the stipulation of intention in the former tradition does not make it conclusive that intention alone is sufficient.

Mālik's school disagreed whether the pronouncement of the words of divorce imply an irrevocable divorce for a woman with whom marriage has been consummated, when that is the intention of the repudiator and there is no compensation in the case. It was said that it is counted as irrevocable if intended, and it was said that it is not. This is an issue related to the *aḥkām* of manifest words in divorce.

Some of the words of divorce that are not manifest are obviously indirect, according to Mālik, while others are probably so. Mālik's view is that if the repudiator, after use of obviously indirect expressions, claims that he did not intend divorce, his statement is not to be accepted, unless there is circumstantial evidence to indicate this, as is his opinion about the use of manifest words. Similarly, it is not acceptable in so far as he claims to have repudiated less than thrice in the case of obviously indirect expressions. This is the case of the woman with whom marriage has been consummated, though he maintained this in the case of *khulʿ* also. In the case of the woman whose marriage is not consummated, his statement is accepted in a claim for being less than thrice, when indirect expressions have been used, as the divorce of such a woman is irrevocable. The examples of such words are: you have a free rein, you are otherwise, and you are released and absolved.

Al-Shāfiʿī's opinion about indirect expressions is based upon what the repudiator intends, if he had intended divorce it would amount to a divorce, if he had intended three pronouncements it is so, and if one it is taken to be one; he is to be considered truthful in what he claims. Abū Ḥanīfa's opinion in this case is the same as al-Shāfiʿī's, except that on the basis of his principles, when the repudiator intended one or two pronouncements these will be considered as a single irrevocable repudiation, and if there is circumstantial evidence indicating divorce and the repudiator claims that he did not intend it, his statement is not accepted, that is, unless she was in the process of discussing divorce (with him). Abū Ḥanīfa permits divorce with all indirect expressions when supported by the context, except four: you have a free rein, start your waiting period, you are absolved, and veil your face. These expressions, according to him, are ambivalent and not manifest. In ambivalent expressions of divorce, Mālik takes intention into account, as is the case with al-Shāfiʿī for indirect expressions. The majority of the jurists opposed him in this saying that such words have no legal value, even if the repudiator intended divorce.

Three opinions are, thus, arrived at in obviously indirect expressions. The first opinion is that the repudiator's claim is to be confirmed without qualification. This is al-Shāfiʿī's view. The second opinion is that the repudiator's claim is not to be confirmed at all unless there is supporting circumstantial evidence. This is Mālik's view. The third opinion is that his claim is confirmed, unless he was in the process of negotiating divorce. This is Abū Ḥanīfa's opinion.

Within the school, there is disagreement about issues that vacillate between being manifest or equivocal, and there is a disparity in their force or weakness in indicating irrevocability. Dispute, therefore, arose about these issues and it is based upon the following principles. Mālik decided that the statement of the repudiator, in the case of obviously indirect expressions, is not to be accepted in so far as he claims that he did not intend divorce, as both literal and legal usage bear testimony to the fact that these are the words generally employed by people, and they imply divorce, except when there is circumstantial evidence indicating the contrary. He decided that his statement is not to be accepted when he claims that he did not intend three pronouncements, because the manifest meaning in these expressions is that of irrevocability, and an irrevocable divorce, according to him, does not take place unless it is by way of *khulʿ* or is pronounced thrice, so in the absence of compensation, which means it is not a case of *khulʿ*, it is still counted as thrice. This is the case where marriage stands consummated with the woman. It is to be derived from the opinions in the school that an irrevocable divorce takes place without there being compensation (as in *khulʿ*) or multiple pronouncements; the claim of the repudiator in a single pronouncement is to be accepted and will be deemed irrevocable.

Al-Shāfiʿī's argument is that when consensus has occurred that his statement is to be accepted for a claim of less than three repudiations, when manifest expressions of divorce have been used, it is more appropriate that his claim be accepted in the case of his indirect expression, as the indicative force of the manifest expression is greater than that of an indirect expression. It appears that the Mālikites say that a manifest expression, even though it is manifest for purposes of divorce, it is not so for the number of pronouncements. Al-Shāfiʿī's proof in this is the tradition of Rukāna that has preceded, which is ʿUmar's opinion in a case of "you have a free rein". Al-Shāfiʿī came to the decision that a divorce pronounced through manifest expressions, when the intention is for less than three repudiations, is revocable on the basis of the preceding tradition of Rukāna. Abū Ḥanīfa decided that it is irrevocable as the purpose in it is the severance of the bond; he did not consider it to be three repudiations as that has a meaning beyond irrevocability for him.

The reason for disagreement is whether literal usage is to have precedence over intention, or intention is to have precedence over literal usage. If we give precedence to literal usage, does it imply irrevocability alone or multiple repudiations also? Those who gave precedence to intention did not give a ruling according to literal usage, while those who gave precedence to the obvious literal usage did not have recourse to intention. One of the things in this topic, that is, among the category of issues included in this topic, about which the jurists of the first generation and those of the provinces disagreed, was the use of the term "prohibition"—I mean, when a person says to his wife, "you are prohibited for me". Mālik said that for a woman whose marriage stands consummated it is to be construed as decisive, that is, as three repudiations, and for the one whose marriage is not consummated, it is to be referred to the intention (of the repudiator). This is an analogy based upon his preceding view about obviously indirect expressions. It is also the opinion of Ibn Abī Laylā, Zayd ibn Thābit and ʿAlī, from among the Companions, and has been upheld by his disciples, except for Ibn al-Mājishūn, who said that intention is not to be considered for a woman whose marriage has not consummated and is to be taken as three repudiations. This is one of the views on the issue.

The second opinion is that if he (the repudiator) intended by it three repudiations, it is to be taken as three, and if he intended it as a single repudiation, it is treated as one repudiation, but irrevocable; if he intended it to be an oath, it is considered as such and for which there is expiation (*kaffāra*), but if he did not intend anything thereby, neither divorce nor oath, it has no value and is a lie. This was also al-Thawrī's opinion. The third opinion also relates it to intention. If he intended a single repudiation it is taken as one, if three repudiations they are considered as three, but if he did not intend anything thereby it is taken as an oath for which he offers expiation. This was al-Awzāᶜī's opinion. The fourth opinion is that intention is to be relied upon for two things: the intention to divorce and the number of repudiations. It will be as he has intended. If he intended one repudiation, it will treated as one revocable repudiation, but if he intended her prohibition without divorce he has to pay expiation for breaking an oath. This is al-Shāfiᶜī's opinion. The fifth opinion also considers it to be an intention of two things: divorce and number of repudiations. If he intended one repudiation, it is considered as such, but as irrevocable. If he did not intend divorce, it is considered as an oath and he is financially liable, and if he intended it to be a lie, it has no legal value. This was Abū Ḥanīfa's opinion and that of his disciples. The sixth opinion is that it is an oath and he is liable for the usual expiation fixed for an oath, but some of those jurists who upheld this opinion said that there is enhanced expiation for the oath. This is the opinion of ᶜUmar, Ibn Masᶜūd, Ibn ᶜAbbās and a group of the *Tābiᶜūn*. Ibn ᶜAbbās, when he was asked about it, said, "In the Messenger of Allāh (God's peace and blessings be upon him), you have an excellent example". It is recorded by al-Bukhārī and Muslim. He supported this with the words of the Exalted, "O Prophet! Why bannest thou that which Allāh hath made lawful for thee, seeking to please thy wives? And Allāh is Forgiving, Merciful".[73] The seventh opinion is that prohibiting a woman is just like the prohibition of water (in imposing prohibition of what Allāh has made permissible), there is no expiation in it nor is there any divorce, because of the words of the Exalted, "O ye who believe! forbid not the good things which Allāh hath made lawful unto you, and transgress not. Lo! Allāh loveth not transgressors".[74] This is the opinion of Masrūq, al-Ajdaᶜ, Abū Salama ibn ᶜAbd al-Raḥmān, al-Shaᶜbī and others. Some of those who did not enhance it imposed in it the liability of *ẓihār*, while others imposed the (the liability of) freeing of a slave. The reason for disagreement is whether it is an oath or an indirect expression, or whether it is not an oath nor an indirect expression.

These are the principles over which disagreement has occurred concerning the words of divorce.

19.2.1.2. *Section 2: Words Used for a Contingent Divorce*

A contingent divorce is of two types: contingent upon a conditional statement and contingent upon an exemption. Contingency based upon a conditional statement may depend either upon the will of the person exercising a choice, or it may be depend on the occurrence of a future happening, or upon the coming into existence of a non-existent thing in the way it is claimed by the person making the divorce contingent and which cannot be known except after its emergence into the world of the senses or by coming into actual existence, or it may depend upon the occurrence of a thing about the possibility of which there can be no prediction.

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[73] Qurʾān 66 : 1

[74] Qurʾān 5 : 87

When divorce is made contingent upon volition, it may either be contingent upon the will of Allāh or upon the will of a mortal. If it is made contingent upon the will of Allāh, either in the form of a condition, like saying "You are divorced if Allāh so wills", or by way of an exemption, like saying, "You are divorced, unless Allāh wills the contrary", then Mālik said that the exemption has no effect upon the repudiation, which comes into effect necessarily. Abū Ḥanīfa and al-Shāfiʿī said that if the repudiator makes an exemption dependent upon the will of Allāh, the divorce will not take effect.

The reason for the disagreement is whether an exemption relates to acts, which occur in the present, in the same way as it relates to acts occurring in the future. This is so as divorce is an act occurring in the present time. Those who maintained that it does not relate to present acts said that an exemption has no effect upon the repudiation nor does the stipulation of volition. Those who maintained that it (the exemption) does relate to present acts said that it has an effect upon the occurrence of the repudiation.

If the repudiator makes divorce dependent upon the will of a person who can be lawfully authorized, and information to the effect reaches her (the wife), then there is no dispute in Mālik's school that the divorce will be dependent upon the will of the person authorized. There is disagreement in the school about linking divorce to the will of a person who is not capable of exercising such will. It is said that divorce will be binding upon him (the husband) and it is said that it will not be binding. The minor and the insane are included in the meaning of such authorization. Those who compared such a divorce to a divorce pronounced in jest, when a divorce pronounced in jest is binding in their view, said that this divorce is legally effective. Those who took into account the existence of the condition said that such a divorce does not take effect as the condition is missing in this case.

When divorce is made contingent upon future acts, such acts are found to be of three types. First, the acts that may or may not happen, like entering a house or the appearance of Zayd. In such a case the coming into effect of the divorce is dependent, without doubt, upon the fulfilment of the condition. In acts that are bound to occur like the rising of the sun in the morning, divorce takes immediate effect in Mālik's view, while it takes effect according to Abū Ḥanīfa and al-Shāfiʿī when the condition is fulfilled. Those who compared it to a condition, the occurrence of which is possible, said that it will not take effect unless the condition comes to pass, while those who compared it to intercourse occurring through a contract of *mutʿa* during a stipulated period, when it is permitted for that period, said that the divorce comes into effect (immediately). The third type, which are the most common in practice, are those (acts) dependent upon the fulfilment of the condition. In such cases divorce may not take effect, as in the case of delivery of the child or the passing of the menstrual period or that of purity. There are two narrations from Mālik on this. In the first he maintains the occurrence of divorce immediately and in the second upon the fulfillment of the condition imposed by him, which is a view conforming with the views of Abū Ḥanīfa and al-Shāfiʿī. The view upholding immediate divorce in this case is weak as it is held similar, according to him, to the case in which the condition must come to pass; the disagreement about this (in the school) is intense.

In the suspension of divorce upon a condition the occurrence of which is uncertain, if there is no way of knowing of such occurrence, like his saying that "if Allāh creates today a whale of such and such a description in the Red Sea you are divorced", then there is no dispute in the school, that I know of, that divorce does take place in such a case, but when he links it to a happening the existence of which is likely to be known, like his saying that "if you give birth to a female you are divorced", the divorce is dependent upon the coming into existence of the condition. If he vows to divorce her if she gives birth to a female, then the divorce comes into effect immediately, according to him (Mālik), even though she does give birth to a female (later); this is considered to be a deterrent, though analogy would require that divorce be dependent upon the happening of an event or upon its opposite.

One of Mālik's opinions is that if he (the husband) makes the pronouncement of divorce binding upon himself if he should commit a certain act, he is not liable until he commits the act. But, if he makes a vow to give up the commission of a certain act, then he is liable for breaking a vow till he complies (with it) and is to refrain from intercourse with his wife. If he refuses to act till a time-period that exceeds the period of *al-īlāʾ*, the rules of the period of *al-īlāʾ*, are to be imposed on him, but the divorce does not take effect unless the act is given up, if it is one that can be given up. Some jurists hold the view that he does not violate the vow till the act has come to pass. If it is something that does not come to pass, he remains in that state until his death.

In this topic is their disagreement about the partially divorced woman, and about partial divorce or of a serial divorce. With respect to the question of the partially divorced woman, Mālik said that if he were to say that your hands, feet, or hair are divorced, she stands divorced for him. Abū Ḥanīfa said that she is not divorced, except when a part of the body is mentioned that is used to imply the whole body, like the head, heart, or genitals. According to him, she is divorced when it is a mathematical portion, like a third or a fourth. Dāwūd said that she cannot be divorced by such pronouncements. Similarly, if he were to say, "I have pronounced for you half a divorce", then, according to Mālik she stands divorced, as this cannot be split up in his view, while according to the contender when it is split up it does not take legal effect. If he were to say, "you are divorced, you are divorced, you are divorced", in successive statements, they amount to three divorces according to Mālik. Abū Ḥanīfa and al-Shāfiʿī said that only one has taken place. Those who held the repetition of words to be the same as pronouncing the numbers, that is, like saying "you are divorced thrice", said that divorce has taken place thrice, while those who held that she is irrevocably divorced through a single pronouncement said that the second and third do not take effect. There is no disagreement among the Muslim jurists about successive divorces in *ṭalāq rajʿī*.

Divorce contingent upon an exemption is to be conceived with relation to number only. If he has made several repudiations, it cannot go beyond three cases. He may make an exemption for the same number, like saying, "you are divorced thrice except thrice, or twice except twice", or he may exempt a lesser number. If he exempts a lesser number, he may exempt it from a larger number or he may exempt the larger number from the smaller number. When he exempts the smaller from the larger number there is no dispute, that I know of, that the exemption is valid and the exempted number of pronouncements are cancelled. When he exempts the larger number from the smaller, there are two opinions on it. First, that the exemption is not valid, and this is based on the view of those who prohibit the exemption of a larger from the smaller number. The second is that the exemption is valid, which is Mālik's opinion.

When he is exempting the same number, like saying "you are divorced thrice, except thrice", Mālik holds that the divorce comes into effect as he has created a suspicion that it is a retraction on his part, but when he is not creating a suspicion and his intention is to indicate the impossibility of divorce, divorce is not effective against him, like saying "you are divorced, but not divorced", at the same time, for the occurrence of a thing and its opposite at the same time is impossible.

Abū Muḥammad ibn Ḥazm deviated (from these views) and said that divorce does not come into effect (when associated) with events that have not yet come to pass or with an act that has not yet occurred, as divorce is not effective except at the time it is pronounced by the repudiator. There is no evidence in the Book, *sunna*, or *ijmāʿ* that divorce will come into effect at a time other than that at which it is pronounced by the repudiator, for he has imposed on himself its coming into effect at that particular time. If we uphold such imposition it is binding to await that time and then pronounce it. This is analogy drawn from his opinions and arguments by me, though I do not remember at the moment his supporting evidence for it.

19.2.2. Chapter 2: The Repudiator whose Pronouncement is Valid

They agreed that the repudiator has to be the husband who is sane, major (*bāligh*), a freeman, and not under duress. They disagreed about the repudiation of one intoxicated, coerced, or ill, and about the person about to reach puberty.

They agreed that the repudiation of the *marīḍ* (the sick person) is valid if he recovers, but they disagreed whether she will inherit from him if he dies. The repudiation of the person under coercion does not come into effect according to Mālik, al-Shāfiʿī, Aḥmad, Dāwūd and a group of jurists, and it was the opinion of ʿAbd Allāh ibn ʿUmar, Ibn al-Zubayr, ʿUmar ibn al-Khaṭṭāb, ʿAlī ibn Abī Ṭālib and Ibn ʿAbbās. The disciples of al-Shāfiʿī made a distinction based on whether he intended to divorce. In the case of his intention to divorce there are two opinions of which the better view is that it is binding. When he did not intend divorce there are (again) two opinions of which the better view is that it is not binding. Abū Ḥanīfa and his disciples said that it comes into effect as does his manumission, though not his sale, and thus they made distinctions between sale, divorce, and manumission.

The reason for disagreement is whether the person under coercion possesses a will, for there is no coercion in the pronouncement and the words have been uttered of his own volition. The person coerced does not, in fact, possess a will for the performance of anything. Both parties argue on the basis of the words of the Prophet (God's peace and blessings be upon him), "Liability is removed from my *umma* for mistake, forgetfulness, and for what they have been coerced to do". It is obvious, however, that the person coerced into repudiating, though he pronounces the words of his own volition, is one whom the law designates as the coerced, because of the words of the Exalted, "[S]ave him who is forced thereto and whose heart is still content with Faith".[75] Abū Ḥanīfa, however, made a distinction between sale and divorce, as divorce is a solemn matter, and that is why seriousness and jest about it have been deemed similar.

The widely known opinion of Mālik about the repudiation of the minor is that it does not take effect till he attains majority. According to the *Mukhtaṣar mā laysa fiʾl Mukhtaṣar* it is binding upon him if he has approached (the age of) ejaculation. This was also Aḥmad ibn Ḥanbal's opinion, who held it to be the time when the boy could keep the fasts of Ramaḍān. ʿAṭāʾ said that when he reaches the age of twelve his repudiation is valid, which is also related from ʿUmar ibn al-Khaṭṭāb (God be pleased with him).

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[75] Qurʾān 16 : 106

About the divorce of the intoxicated person, the majority of the jurists maintain that it comes into effect. One group of jurists, and among them are al-Muzanī and the disciples of Abū Ḥanīfa, said that it is not effective. The reason for their disagreement is whether his *ḥukm* is the *ḥukm* of the insane person or that there is a difference between them. Those who maintained that he and the insane person are similar, for both have lost their senses, and the condition of liability is *ᶜaql* (sanity), said that it does not come into effect. Those who maintained that there is a distinction between them because the intoxicated person has muddled his senses by his own volition, the case of the insane being different, said that it is not effective. This is the case of enhanced liability for him.

The jurists disagreed about the *aḥkām* applicable to the intoxicated person as a whole. Mālik said that he is liable for divorce, manumission, and retaliation for injuries and homicide, but his marriage and sale are not valid. Abū Ḥanīfa held him liable for all things. Al-Layth was of the opinion that there is no liability for all that has resulted from the speech of the intoxicated person and, therefore, he is not liable for divorce, manumission, marriage, sale or the *ḥadd* for *qadhf*, but he is liable for all physical acts, thus, he is to be awarded the *ḥadd* for drinking, homicide, unlawful intercourse, and theft. It is established from ᶜUthmān ibn ᶜAffān (God be pleased with him) that he did not uphold divorce pronounced under the effect of intoxication. Some of the jurists believed that no one from among the Companions opposed ᶜUthmān in this. The opinion that "each repudiation is valid, except that of the idiot", does not make the divorce of the intoxicated person binding as he is an idiot of a kind. This was upheld by Dāwūd, Abū Thawr, Isḥāq and a group of the *Tābiᶜūn*, that is, his divorce is not effective. Both opinions are related from al-Shāfiᶜī and most of his disciples have selected the opinion conforming with that of the majority, while al-Muzanī elected the opinion that his divorce is not effective.

About the *mariḍ*, who pronounces an irrevocable divorce and then dies from his illness, Mālik and a group of jurists said that his wife inherits from him, while al-Shāfiᶜī and a group do not allow her to inherit. Those who permitted her inheritance are divided into three groups. One group said that she is entitled to inherit as long as she is in her waiting period.[76] Those who maintained this are Abū Ḥanīfa, his disciples, and al-Thawrī. The second group said that she is entitled to inherit as long as she has not married (again). Those who upheld this are Aḥmad and Ibn Abī Laylā. The third group said

[76] This may appear meaningless, however, it is another way of saying that though the divorce of the *mariḍ* is effective, the woman is technically his wife as long as the waiting period lasts, and is, therefore, entitled to inheritance. We may also note here that this opinion is attributed to the Ḥanafites and in their law a divorce pronounced in any circumstances is valid, even one pronounced under coercion. It is possible that they make a minor exemption in this case.

that she inherits whether she is still in the waiting period, and whether she has married. This is the opinion of Mālik and al-Layth.

The reason for disagreement is based upon their dispute over following the principle of preempting the means (*sadd al-dharīᶜa*). This is so as the *marīḍ* may have divorced his wife in his illness out of covetousness to cut her off from her share of the inheritance. Those who upheld the principle of *sadd al-dharīᶜa*, therefore, held her inheritance to be obligatory, but those who did not uphold it, and took into account the binding nature of the divorce, denied her inheritance. The latter group maintained that if the divorce has come into effect, it must be enforced with all its *aḥkām*. They added that he would not be inheriting from her if she died (before him). On the other hand, if the divorce is not effective, the conjugal relationship is maintained with all its *aḥkām*. This group (inconsistently) holds that the repudiator does not inherit from her if she should die (before him), but if divorce is not effective, then, marriage should survive together with all its *aḥkām*.

The contender must answer this in one of two ways, as he is constrained to do. First, it is inconceivable to claim that there is a kind of divorce in the law, which has some of the *aḥkām* of marriage as well as some *aḥkām* of divorce. A more difficult reply than that would be to postpone the *ḥukm* of repudiation till the repudiator recovers, holding divorce to be effective in such a case, or to postpone it till he dies, in which case the divorce is held to be ineffective, as in this situation it would be a divorce that is suspended till it can be determined whether it is valid. Such claims would be difficult to justify in the *sharᶜ*. Yet, those who upheld it identified a decision rendered by ᶜUthmān and ᶜUmar, so much so that the Mālikites believed it to be the consensus of the Companions, but their claim is not justified, as opposition to this opinion from Ibn al-Zubayr is widely known.

Those who maintained that she inherits (if the repudiator dies) during the waiting period do so because the waiting period is subject to some of the *aḥkām* of marriage, and it was as if they held her to be similar to a woman whose divorce has been retracted. This opinion is related from ᶜUmar and from ᶜĀʾisha. Those who stipulated for her inheritance that she should not have married, took into account for this view the consensus of the Muslim jurists that one woman cannot inherit from two husbands; and also because their reasoning incorporates suspicion (about the husband's intentions).

They disagreed when she asked for divorce herself or the husband had delegated her the right through which she divorced herself. Abū Ḥanīfa said that she does not inherit in both cases, while al-Awzāᶜī made a distinction between *tamlīk* and divorce (by the husband), saying that she does not inherit in the case of authorization (*tamlīk*), but she does in repudiation.

Mālik did not make a distinction in these cases, and said that if she dies, he does not inherit from her, but if he dies she inherits from him. This is very much opposed to the general principles.

19.2.3. Chapter 3: Women Affected by Divorce

They agreed about the women against whom divorce becomes effective that these are the women who are in the protection of their husbands, and those whose waiting periods have not terminated in a revocable divorce. They agreed that it has no effect against women who are strangers, that is, a conditional divorce. About the divorce of strange women upon the condition of marriage, like saying that "if I marry so and so, she is divorced", the jurists have three opinions. First, that divorce does not affect strange women, whether it is made general for all or is specific. This is the opinion of al-Shāfiʿī, Aḥmad, Dāwūd and a group of jurists. Second, that it is effective upon the condition of marriage whether made general for all women or specific. This is Abū Ḥanīfa's opinion and that of a group of jurists. Third, that if he has made it general for all women, it is not binding upon him, but it is binding when he makes it specific, which is Mālik's opinion and also of a group of jurists. For example, if he says that "any woman I marry from such and such a tribe or from such and such a land is divorced", and also when he stipulates a time, then, these women stand divorced, if married, according to Mālik.

The reason for disagreement is whether ownership of marital rights prior to the time of divorce is a condition for divorce to be effective. Those who maintained that it is a condition said that divorce does not affect women strangers, while those who said that the only condition is the existence of ownership (not prior) said that it can be effective against strangers.

The distinction between making it general (for all women) or specific is based on the exercise of *istiḥsān* grounded upon the doctrine of *maṣlaḥa*. If divorce of all strange women is made effective we would be imposing upon him a general rule through which he will not find a means to permissible marriage; it would cause inconvenience and hardship for him, and would amount to a vow to commit a sin. When he makes it specific, the case is different if we make divorce binding against him.

Al-Shāfiʿī argued on the basis of the tradition of ʿAmr ibn Shuʿayb from his father from his grandfather, who said, "The Prophet (God's peace and blessings be upon him) said 'There is no divorce, except after marriage' ". Another version states, "There is no divorce without ownership, nor manumission without ownership". The tradition has been related from ʿAlī, Muʿādh, Jābir ibn ʿAbd Allāh, Ibn ʿAbbās and ʿĀʾisha. But an opinion similar to that of Abū Ḥanīfa is related from ʿUmar and Ibn Masʿūd, though some have considered the narration from ᶜUmar (God be pleased with him) to be weak.

19.3. Part 3: Retraction after Divorce

As divorce is of two types, irrevocable and revocable, and the *aḥkām* of retraction after an irrevocable divorce are different from those of retraction after a revocable divorce, it is necessary that under this category there be two chapters: the first chapter is about the *aḥkām* of retraction after a revocable divorce and the second about the *aḥkām* of retraction after an irrevocable divorce.

19.3.1. Chapter 1: Retraction after a Revocable Divorce

The Muslim jurists agreed that the husband possesses the right to have recourse to his wife after a *ṭalāq rajᶜī* as long as she is in her waiting period, even without her consent, on the basis of the words of the Exalted, "And their husbands would have a greater right to take them back in that case if they desire a reconciliation".[77] It is a condition for this kind of divorce that the wife must have been wed to the husband, that is, their marriage must have been consummated before divorce.

They agreed that recourse (*rujūᶜ*) is by words and by witnessing. They disagreed whether witnessing was a condition for this. Similarly, they disagreed whether recourse is valid through intercourse. As to witnessing, Mālik held that it is recommended, while al-Shāfiᶜī said that it is obligatory. The reason for disagreement is the conflict of analogy with the apparent meaning of the text. The apparent meaning is found in the words of the Exalted, "Then, when they have reached their term, take them back in kindness or part from them in kindness, and call to witness two just men from among you, and keep your testimony upright for Allāh",[78] which imply an obligation. A comparison of this right with all other rights that a human being possesses indicates that there be no obligatory witnesses. The reconciliation between analogy and the verse leads to construing the meaning of the verse as a recommendation.

Regarding their disagreement about how recourse is achieved, a group of jurists said that recourse is only by words, which was al-Shāfiᶜī's opinion. Another group of jurists said that recourse may be through intercourse. These jurists are divided into two groups. The first group said that recourse is not valid through intercourse, unless he intended it to be so, as an act according to them can only be equivalent to words when accompanied by intention.

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[77] Qurʾān 2 : 228

[78] Qurʾān 65 : 2

This is Mālik's opinion. Abū Ḥanīfa permitted recourse through intercourse when he (the husband) meant it to be so, without manifest intention. Al-Shāfiʿī held recourse to be analogous to marriage and said that Allāh has ordered the presence of witnesses, and such witnesses only bear witness to a declaration.

The reason for disagreement between Mālik and Abū Ḥanīfa is that Abū Ḥanīfa considers recourse as making intercourse permissible on the analogy of a woman repudiated through *al-īlāʾ* and *ẓihār*, and also because the ownership has not been alienated, because of which inheritance is permissible among them. According to Mālik intercourse with a woman after a revocable divorce is prohibited, unless there is recourse, and, therefore, he stipulated intention for it. This is their disagreement about the conditions of validity of recourse.

They disagreed about what part of the divorced wife's body can the repudiating husband look at, as long as she is in her waiting period. Mālik said that he cannot be alone with her and he cannot visit her except by her permission, he cannot look at her hair, but there is no harm if they eat together, as long as there is someone else with them. Ibn al-Qāsim has related that he withdrew the permission of eating with her. Abū Ḥanīfa said that there is no harm if the woman adorns herself for her husband, uses perfume, reveals the tips of her fingers, and uses cosmetics for him. This was also the opinion of al-Thawrī, Abū Yūsuf and al-Awzāʿī. All of them said that he is not to go into her (quarters) unannounced either through words or movement, like clearing his throat or the sound of his shoes.

In this topic, they differed about the case of a person who repudiates his wife through a revocable divorce and takes her back, when he is absent. She then comes to know of the repudiation, but not the retraction, and upon the termination of her waiting period she gets married. Mālik held that she belongs to the person who has now contracted marriage with her, irrespective of the consummation of such marriage. This is his opinion in *al-Muwaṭṭaʾ*. It is also the opinion of al-Awzāʿī and al-Layth. Ibn al-Qāsim has related from him (Mālik) that he withdrew his earlier opinion and said that the first husband has a prior right, unless the second husband has consummated the marriage with her. The first opinion was adopted by his disciples in Medina, who said that he did not retract from this opinion and confirmed it in his *al-Muwaṭṭaʾ* till he died as it used to be read out to him, and that it is also an opinion of ʿUmar ibn al-Khaṭṭāb from whom it was related by Mālik in *al-Muwaṭṭaʾ*.

Al-Shāfiʿī and the Kūfīs, Abū Ḥanīfa and the others, said that the first husband has a superior right to her, irrespective of the second husband having consummated the marriage with her. This is also the opinion of Dāwūd and Abū Thawr. It is related from ʿAlī, and is obviously the better opinion. It is related from ʿUmar ibn al-Khaṭṭāb (God be pleased with him) that he said, "The husband who had recourse to her has an option to take her back as his wife or demand what he had paid her as her dower".

The evidence for Mālik in the first opinion is what has been related by Ibn Wahb from Yūnus from Ibn Shihāb from Saʿīd ibn al-Musayyib, who said that "There is a precedent about the person who divorces his wife and then takes her back without letting her know about it till such time that she is free to marry, and she does marry a second husband, that he has no right over her and she belongs to the person who has now married her". It is, however, said that this tradition is related from Ibn Shihāb alone. The argument of the other group is that the jurists agreed unanimously that recourse is valid even when the woman is not aware of it. This is based on the evidence of their agreement that the first has a prior right to her before she gets married. If the retraction was valid then the second marriage is void, and the second marriage has no affect in nullifying the retraction, either before consummation or after it. This is better, God willing. It is supported by what is recorded by al-Tirmidhī from Samura ibn Jundub that the Prophet (God's peace and blessings be upon him) said, "When a woman is married to two men, she belongs to the first, and when one sells something to two persons, it belongs to the first".

19.3.2. Chapter 2: Retraction after an Irrevocable Divorce

A divorce with less than three repudiations is effective without dispute against a woman with whom marriage has not been consummated, but there is disagreement about the (nature of the divorce of a) woman granted redemption (*khulʿ*). Can an irrevocable divorce occur without compensation? About this too there is dispute. The *ḥukm* of retraction for this type of divorce is the same as that of a new marriage, that is, regarding the stipulation of dower, guardianship, and consent. The termination of the waiting period, however, is not taken into account by the majority, while a group deviated from this saying that a woman granted redemption is not to be married by her husband either during the waiting period or after it. It was as if these jurists viewed the prohibition of marrying within the waiting period as a religious ritual having a non-rational underlying cause.

All the jurists agreed about the woman divorced irrevocably with a triple repudiation that she is not permitted to her first husband, unless she has intercourse (with a second husband through a lawful marriage), because of the tradition of Rifāʿa ibn Samawʾal that he divorced his wife Tamīma daughter of Wahb during the period of the Messenger of Allāh (God's peace and blessings be upon him) through a triple repudiation and she married ʿAbd al-Raḥmān ibn al-Zubayr, who abandoned her and was not able to have intercourse with her and separated from her. After this, the first husband

Rifāʿa wanted to marry her, and mentioned this to the Messenger of Allāh (God's peace and blessings be upon him), who prohibited him from marrying her, saying, "She is not permissible for you, unless she tastes the sweetness of another". Saʿīd ibn al-Musayyib deviated from this and said that it is permitted to her to return to her first husband by merely entering into a contract of marriage (without intercourse), because of the general meaning of the words of the Exalted, "[U]ntil she hath wedded another husband", as the term *marriage* is applied to mean the contract. All of them (those who stipulated intercourse) said that the mere contact of the genitals (penetration) makes her permissible (for the first husband), but al-Ḥasan al-Baṣrī maintained that she does not become permissible without intercourse and accompanying ejaculation, but the majority of the jurists maintain that intercourse, which imposes *ḥadd*, nullifies fasting and *ḥajj*, makes permissible a divorced wife, converts the spouses to *muḥṣans*, and makes dower obligatory is that in which there is simple penetration.

Mālik and Ibn al-Qāsim added that a divorced woman does not become permissible, unless the intercourse is permissible, which results from a valid contract and is not committed during a fast, *ḥajj*, menstruation or *iʿtikāf*. A *dhimmī* woman (in their view) does not become permissible for a Muslim through marriage with a *dhimmī*, nor a woman who has intercourse (through marriage) with a minor. In all this they (Mālik and Ibn al-Qāsim) were opposed by al-Shāfiʿī, Abū Ḥanīfa, al-Thawrī and al-Awzāʿī, who said that intercourse makes her permissible even if it occurs in a void marriage or at a time in which it is not permissible. Similarly, intercourse with an adolescent makes her permissible, as does the intercourse of a *dhimmiyya* with a *dhimmī*, so also the intercourse of an insane person or of a castrated individual, as long as there is some part which penetrates. The disagreement in all this refers to the question whether the term intercourse (*nikāḥ*) includes all kinds of deficient intercourse.

Within this subject they disagreed about marriage with the *muḥallil*, that is, one who marries her upon the condition that he would make her permissible for her first husband. Mālik said that the marriage is void and is rescinded before consummation and after it, and the condition too is void, and cannot make her permissible. In this case, according to him, it is not the intention of the woman that is considered, but the intention of the man. Al-Shāfiʿī and Abū Ḥanīfa said that the marriage is valid and intention is not relevant in it, which was also the opinion of Dāwūd and a group of jurists. They said that he makes her permissible for the husband who has repudiated her thrice. Some of them said that the contract is valid, but the condition (that the *muḥallil* divorce her) is void, that is, he will not make her permissible. It is the opinion of Ibn Abī Laylā, and is related from al-Thawrī.

Mālik and his disciples argued on the basis of what is related from the Prophet (God's peace and blessings be upon him) through a narration of ʿAlī ibn Abī Ṭālib, Ibn Masʿūd, Abū Hurayra, and ʿUqba ibn ʿĀmir that he (the Prophet) said, "The curse of Allāh is upon the *muḥallil* and upon the person for whom he is making her permissible". This curse is the same as the curse upon the person who indulges in usury or one who drinks wine; it indicates a proscription, and a proscription indicates the invalidity of the thing prohibited (the contract in this case). The term legal marriage is not applied to a marriage that is prohibited. The other party relied on the general meaning of the words of the Exalted, " [U]ntil she hath wedded another husband",[79] saying that this person is contracting a marriage. They added that there is nothing in the proscription of the intention to make permissible, anything that indicates that its absence is a condition for the validity of marriage, just as the proscription of praying in usurped property does not indicate that a condition for the validity of prayer is the ownership of the site or the permission of the owner. They said that if the proscription does not indicate the invalidity of the marriage contract, it is appropriate that it should not indicate the nullification of *taḥlīl*.

Mālik did not take the intention of the woman into account, because if the man did not comply with her intention, her intention would have no significance, as she does not possess the power of divorce.

They disagreed whether marriage to a *muḥallil* negates less than three repudiations. Abū Ḥanīfa said that it does, while Mālik and al-Shāfiʿī said that it does not, that is, if the wife marries a second husband before the third repudiation, and the first husband decides to take her back, is the *ḥukm* of less than three repudiations the same? Those who maintained that it was something specific, in law, to the third repudiation said that the husband does not negate what is less than three. Others held that if he could negate the third, it is proper that he be able to negate what is less than that. Allāh knows best.

19.4. Part 4: Waiting Period (*ʿIdda*) and the Gift of Consolation (*Mutʿa*)

In this part there are two chapters. The first is about the waiting period, while the second is about compensation for a divorced woman (*mutʿa*).

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[79] Qurʾān 4 : 230

19.4.1. Chapter 1: The Waiting Period (*ᶜIdda*)

The discussion in this chapter is undertaken in two sections. The first section is about the determination of the waiting period, while the second about the *aḥkām* of the waiting period.[80]

19.4.1.1. *Section 1: The Determination of the Waiting Period*

The discussion of the waiting period for wives is divided into two categories. First, the waiting period for wives and second the identification of the waiting period of those in the *milk al-yamīn* (slave-girls).

19.4.1.1.1. Category 1: The waiting period for wives

A wife may be a free woman or a slave. The marriage of each one of them may have been consummated or it may not have been consummated. There is no waiting period, by consensus, for a divorced wife whose marriage has not been consummated, because of the words of the Exalted, "O ye who believe! If ye wed believing women and divorce them before ye have touched them, then there is no period that ye should reckon. But content them and release them handsomely".[81]

The divorced woman whose marriage stands consummated may or may not be one who menstruates. If she does not menstruate, she may be a minor or beyond the age of menstruation. Those who menstruate may be pregnant or they may be undergoing their usual periods of menstruation. (In the latter case) their menstruation may have ceased (recently) or it may be continuing. Those who menstruate, but their menstruation has ceased, may have conceived, that is, it can be felt from (the changes in) their body, or they may not have conceived. Those who have not conceived may know the reason for the cessation of blood such as suckling or illness, or they may not know the reason.

The waiting period of free women, who menstruate according to their usual cycles, is three periods (*qurūᶜ*), but those among them who are pregnant, their waiting period is up to the time of delivery. The waiting period for those among them who are beyond the age of menstruation is three months. There is no dispute about this as it is explicitly stated in the words of the Exalted, "Women who are divorced shall wait, keeping themselves apart, three (monthly) courses"[82] and His words, "And for such of your women as despair of menstruation, if ye doubt, their period (of waiting) shall be three months, along with those who have it not. And for those with child, their period shall be till they bring forth their burden. And whosoever keepeth his duty to Allāh, He maketh his course easy for him".[83]

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[80] The text under this section had to be switched with that under the following heading. Apparently it had been mixed up through a scribe's error.

[81] Qurʾān 33 : 49

[82] Qurʾān 2 : 228

In these verses, they differed about the meaning of the term "periods"(sing. *qurʾ*). Some jurists said that these are the periods of purity, that is, the periods between two menses. Some said that these are the periods of menstruation itself. Among the jurists of the provinces, those who said that the periods are those of purity, are Mālik, al-Shāfiʿī, most of the jurists of Medina, Abū Thawr and a group of jurists; and among the Companions are Ibn ʿUmar, Zayd ibn Thābit and ʿĀʾisha. Among the jurists of the provinces, who said that the periods are those of menstruation, are Abū Ḥanīfa, al-Thawrī, al-Awzāʿī, Ibn Abī Laylā, along with a group of other jurists; and among the Companions are ʿAlī, ibn al-Khaṭṭab, Ibn Masʿūd and Abū Mūsā al-Ashʿarī. Al-Athram has related from Aḥmad that he said, "The foremost Companions of the Messenger of Allāh (God's peace and blessings be upon him) said, 'The periods are menstruation' ". It is also related from al-Shaʿbī that it is the opinion of eleven or twelve Companions of the Messenger of Allāh (God's peace and blessings be upon him). As for Aḥmad ibn Ḥanbal, the narration from him has differed. It is related from him that he used to say, "The periods are (the days) of purity in the opinion of Zayd ibn Thābit, Ibn ʿUmar and ʿĀʾisha, but now the judgment is reserved, because of the opinion of Ibn Masʿūd and ʿAlī to the effect that it is menstruation".

The difference between the two opinions is (based on the reason) that those who held it to be purity said that once the divorced woman begins her third menses, the husband would have no right to have recourse to her in a retractable divorce and she would be free to marry again, while those who held it to be menstruation prohibited her remarriage until the third period of menstruation had terminated.

The reason for disagreement is the equivocality of the term '*qurʾ*', for it is applied to both purity and menstruation in Arabic usage. Each group desired to show that the meaning of the term in the related verse is obviously what each considers it to be. Those who held that it is the period of purity said that this pattern of plural (*qurūʾ*) is specific to purity, because the term *qurʾ*, which has *aqrāʾ* as its plural and not *qurūʾ*, applies specifically to menstruation. They related this from Ibn al-Anbārī. They also added that *ḥayḍa* (menstruation) is feminine, while *ṭuhr* (purity) is masculine, thus, had the term *qurʾ* denoted menstruation the feminine letter *tāʾ* could not have survived in the numerical word *thalāthata* (three) annexed to the term *qurūʾ*, according to the rule.[84] They also said that etymology indicates it too, for the phrase "to gather water in the pond", means to collect it; the period of collecting blood is the period of purity. All the above are the strongest arguments that the first party advanced about the adoption of what they believed to be the obvious meaning of the verse.

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[83] Qurʾān 65 : 4

[84] That is, when the numerical Arabic words denoting three, four... ten, are annexed to a masculine term,

About the meaning adopted by the second party, they said that the words of the Exalted, "three periods", or "three courses" obviously imply the completion of each of the three periods, for the term "period" cannot be applied to a part of the period, except by way of metaphor. If the periods are designated as the periods of purity, it is possible that the waiting period may result in two periods and a part of a period, for according to them (the first party) she reckons the duration in time in which she was divorced, even if most of it was over. If that is the case, the term "three" cannot be applied to it without violation and the term three is manifest for the completion of each of the periods, which cannot be unless the term "period" is applied to the period of menstruation, because of the consensus that if she is divorced during menses she is not to take that period into her reckoning.

So each party has equally strong arguments regarding the word "period" (*qur*ʾ) and that which satisfies the astute jurists is that the verse is unelaborated (and needs explanation) and the explanatory evidence should be sought from a different aspect. The strongest evidence adduced by those who view that the periods mean periods of purity is the preceding tradition of Ibn ʿUmar and also the words of the Prophet (God's peace and blessings be upon him), "Order him to take her back (and wait) till she has her menses then the period of purity then menses and then the period of purity. He may then divorce her if he likes before cohabiting with her. This is the waiting period which Allāh has commanded you to observe when you divorce women". They also added that there is consensus that *ṭalāq al-sunna* takes place only in a period in which the divorcing husband has not cohabited with her and the words of the Prophet, "This is the period in which Allāh has commanded you to divorce women (if you should divorce them)", is a clear evidence that the waiting period is that of purity so that the repudiation falls within the waiting period. It is possible that the words of the Prophet, "This is the ʿ*idda*", that is, this is the post-divorce waiting period, imply the commencement of the ʿ*idda* so that the period is not split up due to a repudiation during menses.

The strongest argument adduced by the second party is that ʿ*idda* has been ordained for (ascertaining) the vacation of the womb and such vacation is decided through menstruation not through purity. It is for this reason that the ʿ*idda* of one whose menstrual period has ceased is reckoned in days. It is,

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it is followed by the feminine term *ta*. When annexed to a feminine word, the numerical term cannot carry the feminine *ta*ʾ. In the Qurʾānic verse here *thalāthata* (three) annexed to *qurū*ʾ has the feminine *ta*ʾ.

therefore, menstruation that is the basis for the *ʿidda* being reckoned in periods, which makes it necessary that the "periods" be those of menstruation.

Those who maintained that the "periods" are those of purity, argued (in response) that the factor taken into account for the vacation of the womb is the transition from purity to menstruation not the termination of menstruation, therefore, the (length of the) last period of menstruation has no significance. The stipulation is for the completion of the three periods, thus, the actual stipulation is for periods of purity not of menstruation.

Both parties have lengthy arguments and the opinion of the Ḥanafites is better from the aspect of reason, while their arguments based on transmission are equally strong, or almost equal.

Those who maintained that *ʿidda* is based on the periods of "purity" did not disagree that it (*ʿidda*) terminates with her entering the third period of menstruation. Those who maintained that it is based on the periods of menstruation differed. It is said that it terminates with the cessation of bleeding in the third menstruation. This was al-Awzāʿī's opinion. It is also said that it terminates after she takes a bath when the third period of menstruation is over. This was held, from among the Companions, by ʿUmar ibn al-Khaṭṭab, ʿAlī and Ibn Masʿūd and, from among the *fuqahā*ʾ, by al-Thawrī and Isḥāq ibn ʿUbayd. It is said that (it extends) till the time of prayer, prior to which she has entered the period of purity, is over. It is maintained that the husband has the right of retraction even if she delays taking a bath for twenty years. This is related from Shurayk. It is also said that it terminates upon her entering the third period of menstruation, which is a deviant opinion.

This, then, is the position of the menstruating woman, who is having her usual periods.

The divorced menstruating woman whose periods have ceased, but she is in the age group where menstruation is likely and there is no suspicion about the cessation of menstruation due to suckling or illness, waits in Mālik's opinion for nine months. If she does not have her menses in this time, she undergoes her *ʿidda* for three (further) months. If she menstruates during these months, she is to reckon on the basis of menstruation and awaits it (the next course). If another nine months pass before she has menstruated a second time, she undergoes an *ʿidda* of three months. If she menstruates before the three months of the second year are over, she is to await the third menstruation. If nine months go by before she has menstruated again, she undergoes *ʿidda* for three months. If she menstruates in these three months, she has fulfilled her *ʿidda* on the basis of menstruation and the waiting period is over. Her husband has a right to take her back as long as she is not free to marry. The narration from Mālik as to when she begins to reckon nine months has differed. It is said that she does so from the day she is divorced, which is his opinion in *al-Muwaṭṭa*ʾ. Ibn al-Qāsim has reported from him that this time is the day when her menstruation ceases.

Abū Ḥanīfa, al-Shāfiʿī and the majority said about the woman whose menstruation has ceased and she has not recently undergone a menopause, that she continues to await menstruation till she enters the age when she would despair of menstruation. It is then that she undergoes the *ʿidda* for three months, unless she menstruates prior to this.

Mālik's opinion has also been related from ʿUmar ibn al-Khaṭṭāb and Ibn ʿAbbās, while the opinion of the majority has been related from Ibn Masʿūd and Zayd. Mālik's argument by way of reasoning is that the purpose of *ʿidda* is to ascertain the vacation of the womb through an overwhelming probability, because even a pregnant woman may sometimes menstruate. If this is the case then the *ʿidda* of pregnancy is sufficient to ascertain the vacation of the womb, in fact, it is definitive in indicating this. She may then undergo the *ʿidda* of one who has despaired of menstruation. If she menstruates before the end of the year, she is subject to the *ḥukm* of women who menstruate. She reckons this to be one period and awaits the second period, or she waits for a year till the three periods are complete.

The majority decided according to the apparent meaning of the words of the Exalted, "And for such of your women as despair of menstruation, if ye doubt, their period (of waiting) shall be three months, along with those who have it not. And for those with child, their period shall be till they bring forth their burden. And whosoever keepeth his duty to Allāh, He maketh his course easy for him".[85] The woman who is likely to menstruate is not among those who have despaired. This opinion invokes difficulty and harm. If it had been said that she is to undergo *ʿidda* for three months, it would have been better, if the meaning of "one who has despaired" is that the woman is not positive about the menopause. The meaning of the words of the Exalted, "if ye doubt", refers to the (doubt about the) *ḥukm* and not to menstruation, as interpreted by Mālik. If (the meaning of) a despairing woman is one who is certain that she is not one of those who menstruate, then, it would appear as if Mālik did not make his opinion conform with his interpretation of the verse, since this (such certainty) comes only at a certain age. It is for this reason that he deemed the words of the Exalted, "if ye doubt", to refer to the *ḥukm* and not menstruation, that is, "if ye are in doubt about their *ḥukm*". He then elaborated that the woman who did not menstruate for nine months, though she was within the age-span for menstruation, should reckon her waiting period by way of months.

His disciples, Ismāʿīl and Ibn Bukayr, held that the reference to doubt (in the verse) is about menstruation and in the usage of the Arabs, the woman who despairs is one to whom the *ḥukm* of what she has despaired of is not certain. By doing this they brought their opinion to conform with the verse and with Mālik's view. What they did was good, for if the meaning of despair is to be understood to imply certainty, then it is necessary that she should await menstruation and remain in the waiting period till she reaches the age, that is, the age of despair, but if uncertainty is to be understood from it, then, the woman whose menstruation has ceased while she is within the age-group in which menstruation is likely, she undergoes the waiting period on the basis of months. This is an analogy upon the opinion of the Ẓāhirites, for the woman who has despaired is not among those who undergo a waiting period, neither by (menstrual) periods nor by months. The distinction between the two, regarding what is prior to nine months and what is after it, is based upon *istiḥsān*.

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[85] Qurʾān 65 : 4

Mālik's widely known opinion about the woman whose menstruation has ceased because of suckling or illness, is that she awaits menstruation, whether the period is short or prolonged. It is said that the sick woman's case is the same as one whose menstruation has ceased without a reason.

In Mālik's view, the *ʿidda* of a woman with extended menstruation is a year when a distinction cannot be made between the two kinds of bleeding (the normal blood discharge and bleeding due to sickness). When a distinction can be made between the two kinds of bleeding, there are two opinions from him. First, that her *ʿidda* is for a year. The other opinion is that she is to abide by the distinction and undergo *ʿidda* by periods. Abū Ḥanīfa said that her *ʿidda* is based upon periods, if she can distinguish, but if she cannot then it is three months. Al-Shāfiʿī said that her *ʿidda* is based upon distinction. When the blood is separated from her it will be a deep red in the days of menstruation and yellowish in the days of purity. If the blood discharge continues without distinction, she undergoes a waiting period on the basis of (the length of) her (previous) menstruation when she was in good health. Mālik upheld the waiting period of a year for he deemed her to be similar to a woman who does not menstruate, when she is one of those who should. Al-Shāfiʿī upheld that the woman who can identify her days of menstruation is to be subject to their identification, on the analogy of prayer, because of the words of the Prophet (God's peace and blessings be upon him) to a woman with extended menstruation: "Relinquish prayer in the days of your (previous) periods and when these days are over, resume the performance of prayers, but wash away the blood".

Those who took into account this distinction did so because of the words of the Prophet (God's peace and blessings be upon him) to Fāṭima daughter of Ḥubaysh, "If it is the blood of menstruation, it is dark and can be identified.

If it is so, refrain from prayer, but if it is of the other kind, perform ablutions and pray for it is merely blood". It is recorded by Abū Dāwūd. Those who maintained that her ʿ*idda* is to be reckoned by months when she cannot distinguish between the two kinds of blood, argued that if it is commonly known that she menstruates every month her ʿ*idda* is to be reckoned by months, because Allāh has fixed ʿ*idda* by months upon the cessation of menstruation and its reduction is just like its cessation.

The suspecting woman, I mean, one who can sense from her body that she is pregnant, is to wait for the longest gestation period, but they differed about it. It is said in the school that it extends up to four years, while it is also held to be five years. The Ẓāhirites said that it is for nine months. There is no dispute, however, that the termination of the waiting period of the divorced pregnant women is at the time of delivery, on the basis of the words of the Exalted, "And for those with child their period shall be till they bring forth their burden".[86]

19.4.1.1.2. Category 2: The waiting period for those in bondage

The wives who are not free women are divided into exactly the same categories, that is, with respect to menstruation, despair, extended menstruation and those whose menses have ceased but they have not despaired as yet.

The majority maintain about menstruating (slave) women who are still undergoing their monthly courses that their ʿ*idda* is two periods. Dāwūd and the Ẓāhirites maintained that their ʿ*idda* is also for three menstrual periods like free women. This was also Ibn Sīrīn's opinion.

The Ẓāhirites relied upon the general implication of the words of the Exalted, "Women who are divorced shall wait, keeping themselves apart, three (monthly) courses",[87] saying that these woman are also covered by the term "divorced". The majority relied upon the restriction of this general meaning through *qiyās al-shabah*. They compared (the waiting for a number of) menstruation(s) to a repudiation and the *ḥadd*, both of which are reduced into halves on the basis of bondage. Thus, they reduced the ʿ*idda* of the female slave to two menstruations, not one and one-half, as a single menstruation cannot be divided up into halves.

About the slave-woman who has despaired of menstruation, or one who is a minor, Mālik and most of the jurists of Medina said that her ʿ*idda* is three months. Al-Shāfiʿī, Abū Ḥanīfa, al-Thawrī, Abū Thawr and a group of jurists held that her waiting period is a month and a half, being one-half of the *ʿidda* of the free woman, which is based upon analogy, if we concede the restriction of the general meaning. It appears that Mālik's opinion differed in an irregular way. He adopted the general meaning once, that is, in the case of despairing women, while he adopted analogy in the case of menstruating women, whereas analogy should lead to consistent conclusions. With respect to the slave-woman whose menstrual cycle has ceased without a reason, the opinion is the same as that in the case of the free woman, but there is disagreement in this; so also in the case of the woman with extended menstruation. They agreed in the case of a slave-woman divorced prior to consummation that there is no waiting period for her.

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[86] Qurʾān 65 : 4

[87] Qurʾān 2 : 228

The disagreed about the case of the person who takes back his wife during the waiting period after a revocable divorce and then divorces her before cohabiting with her, whether she is to start a fresh *ʿidda* or continue the earlier one. The majority of the jurists of the provinces said that she is to start a new *ʿidda*. A group of jurists said that she remains in her *ʿidda* following the first divorce, which is one opinion of al-Shāfiʿī. Dāwūd said that she does not have to complete her *ʿidda* nor does she undergo a new one.

As a whole, according to Mālik, each retraction demolishes the *ʿidda*, even if there is no cohabitation, except in the case of *al-īlā*. Al-Shāfiʿī said that if he divorces her after retraction and prior to cohabitation, she remains in her first waiting period. Al-Shāfiʿī's opinion is better.

Similarly, according to Mālik, a person who is unable to provide maintenance, the validity of his retraction rests upon his ability to provide maintenance, if he can provide maintenance his retraction is valid and the waiting period is annulled when it is a case of divorce, but if he cannot provide maintenance, she remains in her first waiting period. If she marries again during her waiting period, then, from Mālik there are two opinions. The first upholds the merging of the two waiting periods, while the other opinion holds the negation of the merger. The basis for the first is the vacation of the womb, as this is achieved by merging the two waiting periods. The basis for the second is that *ʿidda* is a kind of ritual (non-rational *ḥukm*), therefore, it must be renewed with each lawful cohabitation. If the slave-woman is emancipated during the waiting period of divorce, she continues within the waiting period of a slave and does not move to that of a free woman. Abū Ḥanīfa said that she does move to the waiting period of a free woman in a revocable divorce, but not in an irrevocable divorce. Al-Shāfiʿī said that she moves to it in both cases.

The reason for disagreement is whether *ʿidda* falls under the *aḥkām* of marriage or under the *aḥkām* of its dissolution. Those who maintained that it relates to the *aḥkām* of marriage said that her *ʿidda* is not transferred, while those who maintained that it relates to the dissolution of marriage said that it is transferred, as if she was emancipated while she was married and was divorced thereafter. In the case of those who distinguished between revocable and irrevocable divorces the reason is obvious. In a revocable divorce there is a likelihood of continued protection, as it is agreed that she is entitled to inheritance if he dies while she is undergoing the *ʿidda* of a revocable divorce and then she would move to the *ʿidda* for a widow.

This is the first section out of the two sections relating to the study of the waiting period.

19.4.1.2. *Section 2: The* Aḥkām *of the Waiting Period*

In the topic of the *aḥkām* relating to waiting periods, they agreed that a woman undergoing a waiting period after a revocable divorce is entitled to maintenance and residence, similarly, the pregnant woman (separated by divorce or death), because of the words of the Exalted, "Lodge them where ye dwell, according to your wealth and harass them not so as to straiten life for them", and His words, "And if they are with child, then spend for them till they bring forth their burden".[88]

They disagreed about providing residence to the woman divorced irrevocably and also about her maintenance when she was not pregnant, into three opinions. First, that she has maintenance and residence, which is the opinion of the Kūfīs. Second, that there is neither residence nor maintenance for her, which is the opinion of Aḥmad, Dāwūd, Abū Thawr, Isḥāq and a group of jurists. Third, that she is entitled to residence, but not maintenance, which is the opinion of Mālik, al-Shāfiʿī and a group of jurists.

The reason for their disagreement is the conflict of different versions of the tradition of Fāṭima bint Qays and also the conflict of the apparent meaning of the Book with this tradition. Those who did not assign to her residence or maintenance argued on the basis of the tradition of Fāṭima bint Qays, who said, "My husband divorced me thrice during the period of the Messenger of Allāh (God's peace and blessings be upon him). I went up to the Prophet (God's peace and blessings be upon him), but he neither granted me residence nor maintenance". This is recorded by Muslim. In some narrations it is laid down that the Messenger of Allāh (God's peace and blessings be upon him) said, "Residence and maintenance are for one whose husband has a right to take her back". This opinion is related from ʿAlī, Ibn ʿAbbās and Jābir ibn ʿAbd Allāh. Those who made residence obligatory for her to the exclusion of maintenance, argued on the basis of a version of the preceding tradition of Fāṭima related by Mālik in his *al-Muwaṭṭaʾ*, which states, "The Messenger of

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[88] Qurʾān 65 : 6

Allāh (God's peace and blessings be upon him) said, 'You are not entitled to claim maintenance from him' ". He ordered her to undergo her waiting period in Umm Maktūm's son's house. This narration does not relinquish her right of residence and, therefore, conforms with the generality of the words of the Exalted, "Lodge them where ye dwell, according to your wealth and harass them not so as to straiten life for them".[89] They said that the underlying cause for the Prophet's command that she stay during her *ʿidda* at Umm Maktūm's son's house was her foul tongue.

Those who made residence as well as maintenance obligatory for her determined the obligation of residence for her from the general meaning of the words of the Exalted, "Lodge them where ye dwell, according to your wealth and harass them not so as to straiten life for them",[90] and they upheld her right for maintenance, as an obligation consequential to residence, since it is the case of a revocable divorce, of pregnancy and of marriage itself. Thus, wherever residence becomes obligatory in the law, maintenance becomes obligatory too. It is related from ʿUmar that he said, "We cannot relinquish our Prophet's Book and his practice for the narration of a woman", intending thereby the words of the Exalted, "Lodge them where ye dwell, according to your wealth and harass them not so as to straiten life for them".[91] Moreover, the Prophet's practice is well known that he always granted maintenance whenever residence became obligatory.

In this issue there are two opinions; namely, that she is entitled to both (residence and maintenance) relying upon the apparent meaning of the Book and the well-known *sunna*. It is also said that this general meaning be restricted by the preceding tradition of Fāṭima. The distinction between residence and maintenance is difficult and the basis for this difficulty is the weakness of the evidence.

It is essential to know that the Muslim jurists agreed that *ʿidda* results from three cases: divorce, death and the option granted to the (married) slave-woman when she is emancipated. They disagreed in the case of rescinded contracts, with the majority upholding its obligation.

19.4.1.2.1. Case 1: Waiting period following (husband's) death

As the discussion of the waiting period is related to the *aḥkām* of *ʿidda* following (the husband's) death, we deem it appropriate to discuss it here. We, therefore, say: The Muslim jurists agreed that the waiting period for a free woman, because of (the death of) her husband who is a freeman, is four months and ten days, on the basis of the words of the Exalted, "Such of you as die and leave behind them wives, they (the wives) shall wait, keeping themselves apart, four months and ten days".[92] They disagreed about the waiting period of the pregnant woman and about the waiting period of the slave-woman, as to what is her *ḥukm* when she did not receive her menses during the four months and ten days. Mālik said that a condition for the completion of her waiting period is that she have one menstrual course during this period, if she does not she is considered to be under the doubt of conception and has to undergo the entire waiting period of a pregnant woman. It is also related from him that she may neither be menstruating nor be under a doubt of conception. This is the case when her usual menstrual cycle exceeds the duration of the *ʿidda*. This either does not occur or it is rare. This is in case her menstrual course exceeds the period of four or more than four months. The narrations from him differ about a woman who actually finds herself in this situation. It is said that she waits for the next menstrual course, but Ibn al-Qāsim has narrated from him that she is to marry if after the *ʿidda* of death she does not find herself to be pregnant. This is the opinion of the majority of the jurists of the provinces, Abū Ḥanīfa, al-Shāfiʿī and al-Thawrī.

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[89] Qurʾān 65 : 6
[90] Qurʾān 65 : 6
[91] Qurʾān 65 : 6

19.4.1.2.2. Case 2: Pregnancy and the waiting period following death

The majority and all the jurists of the provinces said that the waiting period of the pregnant woman whose husband has died extends up to the time she delivers her burden, on the basis of the words of the Exalted, "And as for the conceiving women, their term shall be the delivery of their burden",[93] though the verse is related to divorce. They also relied on the tradition of Umm Salama, "that Subayʿa al-Aslamiyya gave birth one-half month after the death of her husband". This tradition states that "She came to the Messenger of Allāh (God's peace and blessings be upon him) who said to her: 'You are now free so marry whom you like' ".

Mālik has related from Ibn ʿAbbās that her *ʿidda* extends to the end of the two periods (the time of delivery and the end of the four months and ten days), intending thereby that it extends to the greater of the two periods (whichever is later), either the (termination of) pregnancy or the termination of *ʿidda* after death. A similar opinion is related from ʿAlī ibn Abī Ṭālib (God be pleased with him). Their argument is that this is what is required by the reconciliation between the general meaning of the verses; namely, that relating to pregnant women and the verse relating to those whose husbands have died.

When the person for whom the *ama* was permissible has died, she may either be a wife or owned through the *milk yamīn* (bondage) or an *umm al-walad* (a slave-girl who conceives from her master) or just a slave other than the *umm al-*

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[92] Qurʾān 2 : 234

[93] Pickthall's translation has been changed here.

walad. About the wife, the majority said that her *ʿidda* is one-half that of the free woman on the analogy of *ʿidda* (after divorce). The Ẓāhirites said that her *ʿidda* is the same as that of the free woman; the same is the case, according to them, of the waiting period after divorce following the general meaning (of the texts).

About the *umm al-walad*, Mālik, al-Shāfiʿī, Aḥmad, al-Layth, Abū Thawr and a group of jurists said that her *ʿidda* is one menstrual course, which was the opinion of Ibn ʿUmar. Mālik said that if she is one of those who do not menstruate, she is to wait for three months, during which she is entitled to residence. Abū Ḥanīfa, his disciples and al-Thawrī said that her *ʿidda* extends up to three menstrual courses, which is the opinion of ʿAlī and Ibn Masʿūd. A group of jurists said that her *ʿidda* is one-half the waiting period of the free woman whose husband has died, while another group said that her waiting period is the same as that of the free woman, four months and ten days.

Mālik's argument is that she is not a wife so that she may undergo the *ʿidda* following death, nor is she divorced so that she may wait up to three menstrual courses, thus, nothing is left except the confirmation of the vacation of her womb and this takes place through one menstrual course comparing her to the slave-woman whose master has died, about which there is no dispute. Abū Ḥanīfa's argument is that the waiting period became obligatory upon her because she is free, she is not a wife that she may undergo the *ʿidda* following death, nor is she an *ama* so that she may undergo the *ʿidda* of the *ama*, it is, therefore, necessary that the vacation of her womb be established through the *ʿidda* of a free woman.

Those who imposed upon her the (regular) *ʿidda* following death argued on the basis of the tradition of ʿAmr ibn ʿĀṣ, who said, "Do not confuse for us the practice of our Prophet, the *ʿidda* of the *umm al-walad*, when her master has died, is four months and ten days". Aḥmad considered this tradition to be weak and did not follow it. Those who imposed upon her one-half the *ʿidda* of a free woman did so comparing her to the slave-woman who is a wife. The reason for disagreement is that she is not expressly mentioned in the texts and her case vacillates between those of the *ama* and the free woman. Those who compared her *ʿidda* with that of the slave-woman who is a wife, made a weak comparison and weaker than that is its comparison with the *ʿidda* of a divorced free woman, which is Abū Ḥanīfa's opinion.

19.4.2. Chapter 2: Gift of Consolation Paid to a Divorced Woman (*Mutʿa*)

The majority maintain that a gift of consolation is not obligatory for each woman divorced, while a group of the Ẓāhirites said that it is obligatory for each woman divorced. Another group said that it is recommended, but not obligatory, which was upheld by Mālik. Those who considered it obligatory in the case of some categories of divorced women differed about this. Thus, Abū Ḥanīfa said that it is obligatory in the case of the woman divorced prior to consummation, when no dower was fixed for her. Al-Shāfiʿī said that it is obligatory for each woman divorced, when the separation is initiated by him, except for the case of the woman whose dower was fixed, but she was divorced prior to consummation. This is (also) the opinion of the majority.

Abū Ḥanīfa argued on the basis of the words of the Exalted, "O ye who believe! If ye wed believing women and divorce them before ye have touched them, then there is no period that ye should reckon. But content them and release them handsomely".[94] Thus, *mutʿa* was stipulated in the absence of consummation. Further, Allāh, the Exalted, said, "If ye divorce them before ye have touched them and ye have appointed to them a portion, then (pay the) half of that which ye have appointed".[95] This indicates that there is no compensation for her in the case of fixation (of dower) and divorce prior to consummation and as dower is not obligatory for her it is more appropriate that compensation should not be obligatory. This, upon my life, is conjectural, for when dower was no longer obligatory for her, compensation (*mutʿa*) was substituted for it, but if she or the one who possesses her marriage tie decide to forgo one-half dower, she is entitled to nothing more.

Al-Shāfiʿī construed the commands, laid down about compensation, in the words of the Exalted, "Provide for them, the rich according to his means and the straitened according to his means, a fair provision",[96] in their general meaning for every divorced woman, except one for whom the dower is fixed and is divorced prior to consummation.

The Ẓāhirites interpreted the command in its general meaning, while the majority maintain that there is no compensation (*mutʿa*) for a woman separated through redemption (*khulʿ*), as she is the payer and her case is like that of the woman divorced prior to consummation and after the fixation of dower. The Ẓāhirites maintain that it is the (general) law, she may take and give at the same time.

Mālik interpreted the command for compensation to mean recommendation, because of the words of the Exalted at the end of the verse, "(This is) a bounden duty for those who do good",[97] that is, the generous and the gracious and whatever falls under the category of generosity is not obligatory.

They disagreed whether mourning (*iḥdād*) is obligatory for a divorced woman undergoing *ʿidda*. Mālik said it is not.

[94] Qurʾān 33 : 49
[95] Qurʾān 2 : 237
[96] Qurʾān 2 : 236
[97] Qurʾān 2 : 236

19.4.3. Chapter 3: Appointment of Arbitrators

The jurists agreed about the permissibility of appointing arbitrators in case of discord between the spouses, when their positions are not known, as to which one of the couple is right and who is wrong, because of the words of the Exalted, "And if ye fear a breach between them twain (the man and wife), appoint an arbiter from his folk and an arbiter from her folk. If they desire amendment Allāh will make them of one mind. Lo! Allāh is ever Knower, Aware".[98] They agreed that the arbiters could only be from the families of the spouses, one representing the husband and the other the wife, except when no one in their families is to be found who can negotiate a settlement between them, in which case someone else is to be appointed.

They agreed that if the arbiters were not unanimous their decision would not be implemented and they also agreed that their decision to maintain the marriage tie is to be executed without there being a specific delegation of powers to them by the spouses. They disputed the agreed decision of the arbiters to separate them, whether it would require the consent of the husband. Mālik and his disciples said that their decision about separation and union is valid without specific delegation by the spouses and without their consent. Al-Shāfiʿī, Abū Ḥanīfa and their disciples said that they have no right to separate them, except when the husband delegates such authority to them.

The evidence for Mālik is what he has related from ʿAlī ibn Abī Ṭālib about this, when he said about arbitrators that "they have a right to cause a separation or a union between the spouses". The evidence for al-Shāfiʿī and Abū Ḥanīfa is that as a fundamental principle, the right to divorce does not belong to anyone but the husband or to one whom the husband has delegated such power.

Mālik's disciples disagreed about the case where the arbiters repudiate thrice. Ibn al-Qāsim said that it amounts to a single repudiation, while Ashhab and al-Mughīra said that it is a triple repudiation if they have pronounced it thrice.

The principle, however, is that divorce is a right possessed by the husband, unless evidence to the contrary is adduced. Al-Shāfiʿī and Abū Ḥanīfa argue on the basis of a verdict by ʿAlī, when he said to the arbiters, "Do you know what (authority) you possess? If you decide to maintain their union, you may do so and if you decide to cause a separation between them you may do so". In response to this, the woman said, "I agree to abide by the Book of Allāh and by what is in it for me and against me". The husband said, "I disagree about separation". ʿAlī said, "By Allāh, you will not go till you agree in the same way in which the woman has agreed". This was taken as his consent for this. Mālik, on the other hand, compares the arbiters to the sultan and the sultan has the right to divorce because of harm, according to Mālik, when it becomes manifest.

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[98] Qurʾān 4 : 35

XX

THE BOOK OF *AL-ĪLĀʾ* (VOW OF CONTINENCE)

The basis for this subject are the words of the Exalted, "For those who forswear their wives, there is a period of waiting of four months; then if they change their mind, lo! Allāh is Forgiving, Merciful".[99] *Al-īlāʾ* is the swearing of an oath by a man that he will not have intercourse with his wife, either for a period in excess of four months, or for a period of four months, or for an unlimited period, over which there is (juristic) dispute, as will be discussed in what follows.

The jurists of the provinces differed about *al-īlāʾ* on a number of points. One of these is whether a woman is to be considered as divorced by the person taking the oath after the completion of the period of four months laid down in the text, or whether she is divorced if he abstains from it even after the period of four months—after which he may return to her (*fāʾa*) or divorce her. Another point is whether *al-īlāʾ* comes into effect with any oath, or only through oaths that are considered permissible by the law (*sharʿ*). If he exercises continence without taking the oath, will he be considered to have taken the oath? Is the person swearing considered to be covered by *al-īlāʾ* if he specifies the period of four months, or is the period to be in excess of that? And what if he has not specified a period at all? Is the divorce resulting from *al-īlāʾ* revocable or irrevocable? If he refuses to divorce or to return, is the *qāḍī* to divorce on his behalf? Does *al-īlāʾ* recur if he divorces her and then takes her back without a new vow of continence in the renewed marriage tie? Is it a condition for retraction by the person taking the vow of continence that he have intercourse with her during the waiting period? Does the vow of continence by a slave give rise to the same *ḥukm* as is applicable to a freeman? If he divorces her after the completion of the period of *al-īlāʾ*, is it binding on her to undergo a waiting period?

These are the issues related to *al-īlāʾ* over which disagreement among the *fuqahāʾ* of the provinces is widely known. These issues act as the principles underlying this subject and we shall discuss in each, as is our aim, the disagreement, the major evidence and the reasons for disagreement.

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[99] *Qurʾān 2 : 226. Pickthall's translation changed for this verse.*

20.1. Issue 1

About their disagreement whether divorce comes into effect by the end of the four-month period itself, or divorce does not take effect, in which case the *ḥukm* is suspended till he returns to her or divorces her, Mālik, al-Shāfiʿī, Aḥmad, Abū Thawr, Dāwūd and al-Layth held that the *ḥukm* is suspended till he returns to her or divorces her. This was the opinion of ʿAlī and Ibn ʿUmar, though other opinions have also been related from them, but this is the correct record. Abū Ḥanīfa, his disciples, al-Thawrī and the Kūfīs generally held that divorce comes into effect at the time of the completion of the four-month period, unless he approaches his wife during that period. This was the opinion of Ibn Masʿūd and a group of the *Tābiʿūn*.

The reason for disagreement is whether the words of the Exalted, "Then if they change their mind, lo! Allāh is Forgiving, Merciful",[100] imply that they should change their minds before the completion of four months or after it. Those who understood them to mean before the completion of the period said that divorce comes into effect (upon completion of the period). According to these jurists the term "decide" in the words of the Exalted, "And if they decide upon divorce (let them remember that) Allāh is Hearer, Knower",[101] imply that he has not changed his mind during that period. Those who understood by the stipulation of return as its being effective after the end of the period said that the meaning of the words "if they decide upon divorce" imply "if they pronounce divorce with words" then "Allāh is Hearer, Knower".

The Mālikites have four arguments related to the verse. First, that the period of waiting has been deemed to be the right of the husband and not that of the wife; it, therefore, resembles the period of delay in debts. Second, that Allāh has made divorce dependent upon his (the husband's) act, while according to the others it does not result from his act except by way of infraction, that is, it is not attributed to him according to the opinion of the Ḥanafites except as an infraction and it cannot be interpreted as a metaphorical use from the apparent meaning except with supporting evidence. The third evidence is that the words of the Exalted, "And if they decide upon divorce (let them remember that) Allāh is Hearer, Knower",[102] imply that divorce occurs in a way that it can be heard, through words and not by the completion of the period. Fourth, that the conjunction *fāʾ* (then) in the words of the Exalted, "then if they change their mind, lo! Allāh is Forgiving, Merciful",[103] implies consequential action, which indicates that changing his mind (returning) is after the period. Perhaps, they compared this period to the period in manumission.

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[100] Qurʾān 2 : 226
[101] Qurʾān 2 : 227
[102] Qurʾān 2 : 227
[103] Qurʾān 2 : 226

Abū Ḥanīfa relied in this upon the resemblance of this period with the period in a revocable divorce, the period being stipulated so that he may not do something regrettable. On the whole, they compared *al-īlāʾ* with a revocable divorce and compared the period here with *ʿidda*, which is a strong resemblance. This is also related from Ibn ʿAbbās.

20.2. Issue 2

About their disagreement over the oath through which *al-īlāʾ* takes place, Mālik said that it (*al-īlāʾ*) occurs through every kind of oath, while al-Shāfiʿī said that it can only be invoked through oaths permissible under the law, like swearing by Allāh or by one of His attributes. Mālik relied upon the general meaning, that is, the general meaning implied by the words of the Exalted, "Those who forswear their wives must wait four months". Al-Shāfiʿī, on the other hand, compared *al-īlāʾ* with the oath of expiation. The reason is that both kinds of oath lead to a legal *ḥukm*, thus, it becomes obligatory that the oath upon which the *ḥukm* of *al-īlāʾ* was based be the same as the oath upon which the *ḥukm* of expiation was structured.

20.3. Issue 3

With respect to the application of the *ḥukm* of *al-īlāʾ* to the husband who gives up cohabitation with his wife without swearing an oath, the majority maintain that the *ḥukm* of *al-īlāʾ* is not applicable to him without the oath. Mālik makes it applicable if he intends to harm his wife by abstention, even without swearing the oath. The majority relied upon the apparent meaning, while Mālik considered the underlying reason, as the *ḥukm* has been applied to him because of practising continence, whether such an act has been strengthened with a vow or is undertaken without it. The harm is caused in both ways.

20.4. Issue 4

In their dispute about the duration of *al-īlāʾ*, Mālik and those who agreed with his opinion held that the period for *al-īlāʾ* must be in excess of four months, as returning (changing his mind), according to them, takes place after four months. For Abū Ḥanīfa the period of *al-īlāʾ* is only four months, as returning to the wife takes place, according to him, within this period. Al-Ḥasan and Ibn Abī Laylā said that if he swears an oath for any determined period, even when such a period is less than four months, the period assigned for him will be four months from the time when he swore the oath. It is related from Ibn ʿAbbās that the person taking the oath of *al-īlāʾ* is one who swears not to cohabit with his wife, ever.

The reason for their disagreement is the unrestricted implication of the verse. Their disagreement about the time of return, the nature of the oath and its duration arises because the verse assigns general meanings to these terms or it does not provide details. Similarly, their dispute about the description of the person taking the oath and the woman against whom it is sworn and also about the kind of divorce resulting from it, as will be coming up in what follows. The reason for disagreement, thus, is due to the silence about these things, which are the essential elements of *al-īlāʾ*, that is, the identification of the kind of oath, the time of return, the duration, the description of the man taking the oath, the woman who is the object of the oath and the kind of divorce resulting from it.

20.5. Issue 5

According to Mālik and al-Shāfiʿī the divorce resulting from *al-īlāʾ* is revocable, as the principle dictates that any divorce under the law is to be interpreted as being revocable, unless evidence indicates that it is irrevocable. Abū Ḥanīfa and Abū Thawr said that it is irrevocable. The reason being that if it were revocable the harm caused by it would not be removed from her, as he would be able to force her to come back to him. The reason for disagreement is the conflict of the interest to be secured by the law of *al-īlāʾ* with a well-known principle in divorce. Those who preferred the principle said it is revocable, while those who preferred the secured interest said that it is irrevocable.

20.6. Issue 6

Does the *qāḍī* pronounce the divorce when he refuses to return or to divorce her, or is he to be imprisoned till he divorces her. Mālik said that the *qāḍī* is to pronounce the divorce, while the Ẓāhirites said that he is to be confined till he divorces her himself. The reason for disagreement is the clash of an established principle with a secured interest. Those who preserved the declared principle in divorce said that a divorce does not take place except when pronounced by the husband, while those who took into account the inherent harm caused to women said that the sultan is to divorce in view of the general interest to be secured. This is what is known as *qiyās mursal* and its practice is related from Mālik when many other jurists rejected it.

20.7. Issue 7

Does *al-īlāʾ* recur if he divorces her and then takes her back? Mālik said that if he takes her back and does not cohabit with her, *al-īlāʾ* becomes operative against him again. This is the case, according to him, in both revocable and irrevocable divorces. Abū Ḥanīfa said that an irrevocable divorce annuls *al-īlāʾ*, which is also one of al-Shāfiʿī's opinions and is the opinion selected by al-Muzanī. A group of jurists maintain that *al-īlāʾ* does not recur after divorce, except by the repetition of the vow.

The reason for their disagreement is the clash of *maṣlaḥa* with an apparent condition of *al-īlāʾ*. The reason is that there is no vow of continence under the law unless it occurs within the same marriage tie, not a renewed contract (after an irrevocable divorce). But when we take this into account, the harm that was desired to be removed through *al-īlāʾ* is found to exist. It is for this reason that Mālik applied the *ḥukm* of *al-īlāʾ* in the absence of the vow when the meaning of *al-īlāʾ* was to be found (in the act).

20.8. Issue 8

Is the *ʿidda* binding upon the wife of the person swearing continence? The majority maintain that *ʿidda* is binding upon her. Jābir ibn Zayd said that *ʿidda* is not binding upon her if she has menstruated thrice in the four-month period. A group of jurists adopted his opinion, which is also related from Ibn ʿAbbās. His argument is that *ʿidda* has been prescribed to verify the vacation of the womb and vacation is established for the woman in such a case. The majority's argument is that she is a divorced woman and it is necessary that she undergo *ʿidda* like all other divorced women. The reason for disagreement is that *ʿidda* combines in itself a *maṣlaḥa* as well as non-rational obedience. Those who took into account the secured interest did not prescribe *ʿidda* for her, while those who gave prominence to obedience (worship) made *ʿidda* obligatory for her.

20.9. Issue 9

About the vow of continence by the slave, Mālik said that the period for *al-īlāʾ* of the slave is two months, one-half the period for a freeman on the analogy of *ḥudūd* and divorce in his case. Al-Shāfiʿī and the Ẓāhirites said that the period in his vow is the same as that of the freeman—four months, taking into account the general implication (of the verse). The apparent rule is that the swearing of oaths by the slave and the freeman are the same and *al-īlāʾ* is an oath; so also on the analogy of the duration of impotence. Abū Ḥanīfa said that the inherent harm caused in *al-īlāʾ* is to be considered from the view of women not men, as in the case of *ʿidda*. If the woman is free, the period of *al-īlāʾ* will be that of a free-woman, even if the husband is a slave, but if she is a slave, the period will be one-half.

The analogy of *al-īlāʾ* upon *ḥadd* is not good, because the *ḥadd* of the slave is less than the *ḥadd* of the freeman, as an offence on his part is less offensive, while it is more offensive when committed by a freeman. The period of *al-īlāʾ*, on the other hand, combines in it flexibility for the husband and the removal of harm from the wife. If we stipulate a period narrower than this, it would be confining for the husband and enhanced in its removal of harm from the wife, but the freeman too is entitled to relief and protection from harm.

It follows from this analogy that the period of *al-īlāʾ* can only be reduced when the husband is a slave or the wife is a free woman, but this is an opinion proclaimed by none. A compromise is, therefore, necessary.

Those who maintained the effectiveness of bondage in the reduction of the period of *al-īlāʾ*, disagreed about the elimination of bondage after the vow, whether it would convert into the period prescribed for freemen. Mālik said that it would not be converted from the period of slaves to the period for freemen. Abū Ḥanīfa said it will; according to him, if the slave woman is emancipated after her husband has sworn a vow of continence against her, the period will be converted to the period of free persons.

Ibn al-Qāsim said that there is no operation of the vow of continence against a minor girl at whose age cohabitation is not practised. If, however, an oath is sworn and he persists with it, the four months will be counted from the day she attains puberty. He said this because there is no harm being caused to her as a result of continence. He also said that there is no operation of the vow in the case of a castrated man and also in the case of one who is not capable of intercourse.

20.10. Issue 10

Is it a condition for retraction by the person making a vow of continence that he cohabit with his wife during her *ʿidda*? The majority maintained that this is not one of the conditions. Mālik, however, said that if he does not cohabit with her, without a cause of illness or something similar to it, his retraction (of divorce after *al-īlāʾ*) will not be valid and she will continue with her *ʿidda* and there would be no chance of his taking her back if the *ʿidda* is completed.

The argument of the majority is that after retraction *al-īlāʾ* may be repeated by him during the *ʿidda* or it may not be. If he repeats it, the first one is not taken into account and is renewed from the time of retraction, that is, the period of *al-īlāʾ* is calculated from the time of retraction. If he does not repeat the vow, the first one is not taken into account at all, except according to the opinion of those who maintain that *al-īlāʾ* can take place without an oath. Thus, whatever the case, the four months are counted from the time of the retraction. Mālik said that every retraction from divorce is meant to avoid harm and the validity of this retraction is to be taken into account for the removal of this harm. The principle is the same as that in the case of one in straitened circumstances. If a divorce is pronounced against him and he retracts it, his retraction will only be valid if he has attained financial ease. The reason for disagreement is *qiyās al-shabah*. The basis is that those who compared it to a renewal of the contract of marriage made the renewal of *al-īlāʾ* obligatory in it, while those who held this retraction to be similar to the retraction of a person divorced because of harm and from whom the cause of the harm has not been removed, said that he maintains the original status.

XXI

THE BOOK OF *ẒIHĀR* (INJURIOUS ASSIMILATION)

The sources for (the *aḥkām* of) *ẓihār* are the Book and the *sunna*. In the Book, it is the words of the Exalted, "Those who put away their wives (by saying they are as their mothers) and afterward would go back on that which they have said, (the penalty) in that case (is) the freeing of a slave before they touch one another. Unto this they are exhorted; and Allāh is informed of what ye do".[104] In the *sunna* it is the tradition of Khawla bint Mālik ibn Thaʿlaba, who said, "My husband, Uways ibn al-Ṣāmit, pronounced *ẓihār* against me, so I went up to the Messenger of Allāh (God's peace and blessings be upon him) and complained to him. The Messenger of Allāh argued about the matter with me and said, 'Fear Allāh, for he (your husband) is the son of your uncle'. As soon as I left, Allāh sent down the verse, 'Allāh hath heard the saying of her that disputeth with thee (Muḥammad) concerning her husband and complaineth unto Allāh. And Allāh heareth your colloquy. Lo! Allāh is Hearer, Knower—(followed by the next three verses)' ".[105] He (the Prophet) said, 'He must set free a slave'. She replied, 'He does not have one'. He said, 'He should fast consecutively for two months'. She said, 'O Messenger of Allāh, he is an old man and is not able to fast'. He said, 'Then he must feed sixty needy persons'. She replied, 'He does not have anything that he can give away as charity'. He said, 'I will support him with a load of dates'. She said, 'And I will support him with another'. He said, 'You have done well, go and feed sixty needy ones on his behalf'. It is recorded by Abū Dāwūd. Another (similar) tradition is that of Salama ibn Ṣakhr al-Bayāḍī from the Messenger of Allāh (God's peace and blessings be upon him).

The discussion about the principles of *ẓihār* is dealt with in seven sections: the words of *ẓihār*; the conditions of the obligation of expiation in it; persons in whose case *ẓihār* is effective; what is prohibited for the person pronouncing *ẓihār*; is *ẓihār* renewed by the renewal of marriage; is *al-īlāʾ* applicable to him; and the discussion of the *aḥkām* of the penance of *ẓihār*.

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[104] Qur'ān 58 : 3

[105] Qur'ān 58 : 1

21.1. *Section 1: Words Used for* Ẓihār

The jurists agreed that if the man says to his wife, "You are for me like my mother's back", it amounts to *ẓihār*. They disagreed when he mentions another part of the body, or when he mentions the back of women, other than the mother, who are perpetually prohibited for him. Mālik said it is *ẓihār*, while a group of jurists said that it does not amount to *ẓihār*, except by the employment of the words "back" and "mother". Abū Ḥanīfa said that it amounts to *ẓihār* by naming any part of the body, which it is prohibited to look at.

The reason for disagreement is the conflict of the underlying meaning with the literal interpretation. On the one hand, the mother and other prohibited women, as well as the backs of women and their other limbs are similarly prohibited. Yet, according to the law, *ẓihār* only applies when the words "back" and "mother" are used.

If, however, he says that she is like his mother, but does not use the word "back", Abū Ḥanīfa and al-Shāfiʿī say that his intention is to be taken into account, as he may mean to indicate his respect and love for her. Mālik said that this is *ẓihār*. If the person compares his wife to a strange woman who is not prohibited to him perpetually, it is *ẓihār* according to Mālik, but according to Ibn al-Mājishūn it is not. The reason for disagreement is whether the comparison of the wife with a prohibited woman, who is not prohibited perpetually, is the same as comparing her to one prohibited perpetually.

21.2. *Section 2: Conditions for the Obligation of Expiation (*Kaffāra*)*

As a condition of the obligation of expiation, the majority maintain that it does not become obligatory without retraction. Mujāhid and Ṭāwūs deviated from this saying that it becomes obligatory even without retraction. The evidence for the majority are the words of the Exalted, "Those who put away their wives (by saying they are as the backs of their mothers) and afterwards would go back on that which they have said, (the penalty) in that case (is) the freeing of a slave before they touch one another. Unto this they are exhorted; and Allāh is informed of what ye do".[106] This text is explicit about the relationship of expiation with retraction. It is also obvious by way of analogy, as (expiation in) *ẓihār* resembles expiation in an oath; just as expiation becomes binding by going against the oath or by the resolve to go against it, the same is the case in *ẓihār*.

The argument of Mujāhid and Ṭāwūs is that it is an act invoking the extreme type of expiation, it is, therefore, necessary that it should give rise to it on its own and not through any additional reason, the same as the expiation of homicide and the violation of a fast. They also said that it was a form of divorce during *jāhiliyya* and it was annulled by means of expiation, which is the meaning of the words of the Exalted, "and afterwards would go back on that which they have said". Going back here, for them, is like going back into the fold of Islam.

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[106] Qurʾān 58 : 3. Pickthall's parenthetical phrase changed slightly.

Those who uphold the stipulation of retraction in the obligation of expiation, disagreed as to how it is constituted. There are three narrations from Mālik about it. First, that he resolves to keep her and to have intercourse with her. Second, that he resolves to have intercourse with her. This is the correct and widely known narration from his disciples and is also the opinion of Abū Ḥanīfa and Aḥmad. The third is that retraction occurs through intercourse itself (irrespective of resolve) and this is the weakest of the three narrations, according to his disciples. Al-Shāfiʿī said that retraction is the act of retaining her. He said that when considerable time has passed in which he could have divorced her, but did not, he is to be assumed to have gone back (on what he said) and is obliged to make expiation, as his waiting for a period of time in which he could have divorced and did not do so is to be taken as a substitute for his resolve to take her back, or it is an indication of it. Dāwūd and the Ẓāhirites said that retraction is by repeating the words of *ẓihār* a second time.[107] If he does not do so, he has not retracted and is not liable for expiation.

The evidence, for the widely known narration from Mālik, is structured upon two principles. The first is that the concept of *ẓihār* requires that the obligation of expiation should arise from the resolve of the man to go back to what he has prohibited to himself and which is intercourse. If that is the case, it is necessary that going back be through intercourse itself, or through the determination and resolve to revert to it. The second principle is that it is not possible that going back itself should be intercourse, because of the words of the Exalted, "(the penalty) in that case (is) the freeing of a slave before they touch one another".[108] Intercourse is, therefore, prohibited till expiation. They (Mālik's disciples) said that had (the resolve of) retraction itself meant taking her back, then, *ẓihār* would have prohibited taking her back, which would mean that *ẓihār* amounted to divorce.

The solution, on the whole, according to them, in this issue is what is referred to by the *fuqahāʾ* as *sabr wa al-taqsīm* (division and elimination). This takes place by saying that the meaning of going back may either be the repetition of the word, as is held by Dāwūd, or intercourse itself, or taking her back, or the resolve of having intercourse. It cannot be the repetition of the word (*ẓihār*), for this is mere emphasis and emphasis cannot obligate expiation, nor can it be the resolve to take her back for intercourse and the act of taking her back is present in any case. It, therefore, remains that it is the resolve for intercourse and even if he has decided to take her back for purpose of intercourse, he still intends intercourse. It is, therefore, established that retraction means (resolve for) intercourse.

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[107] That is, incorporating the words within the retraction.

[108] Qurʾān 58 : 3

The reliance of the Shāfiᶜites in considering the intention to hold on to her as being the intention of intercourse is on the point that holding on to her itself makes intercourse necessary. Thus, they considered the consequence of the thing to be the thing itself and assigned them the same *ḥukm*. This opinion comes close to the second narration (from Mālik). Perhaps, the Shāfiᶜites argued that the intention of retaining her is the cause of the obligation of expiation and the obligation is removed with the removal of the intention to retain her. This is the case when he divorces her following *ẓihār*. It is for this reason that Mālik was cautious in the second narration and deemed retraction the resolve to do both things, I mean, intercourse and retaining her.

The opinion that retraction is intercourse itself is weak and opposed to the text. The reliance in this is on the similarity of *ẓihār* with an oath, that is, just as the expiation for the oath becomes obligatory upon breaking it, the same is the case here, which is *qiyās al-shabah* that is opposed by the text.

Dāwūd went by the literal meaning of the words of the Exalted, "and afterwards would go back on that which they have said".[109] These words imply going back upon the word itself. According to Abū Ḥanīfa it is going back to the *jāhiliyya* practice of *ẓihār* after coming into the fold of Islam, in accordance with what has preceded about their practice of *ẓihār* in *jāhiliyya*, while according to Mālik and al-Shāfiᶜī it is the underlying meaning of the words "and afterwards would go back on that which they have said".

The reason for disagreement, on the whole, is the conflict of the literal with the underlying meaning. Those who considered the underlying meaning deemed retraction to be the resolve for intercourse, or of retaining her (without divorce). The meaning of the letter *lām* in the words of the Exalted, "*thumma yaᶜūdūna li-mā qālū*—and afterwards would go back on that which they have said", was interpreted to mean the same as the preposition *fī* to be read as the letter *fāʾ* (standing for "because of what"). On the other hand, those who considered the literal meaning deemed going back to be the repetition of the word and as going back a second time, which is second with respect to the first that was in *jāhiliyya* (that is, doing the same thing as was done in *jāhiliyya*). For those who interpreted it to be either of these two meanings, it is proper for them to believe that expiation becomes obligatory with the act of *ẓihār* itself, as was understood by Mujāhid, unless an implied word is assumed, which is the intention of keeping her.

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[109] Qurʾān 58 : 4

Here, then, we have three opinions: that retraction may either be the repetition of the words, or it should be the intention to hold on to her, or it may be the retraction that was in Islam. These two, that is, the first and the third are divided in two ways. First, that an implied word be assumed in the verse, which is the intention of keeping her and thus stipulate this condition in the obligation of expiation. Second, that no implication is assumed and expiation becomes obligatory by the act of *ẓihār* itself.

In this topic they differed about cases. The first arises when he divorces her before forming an intention of keeping her, or when the woman dies (before this), is he obliged to make expiation? The majority of the jurists maintain that there is no expiation for him, unless he divorces (her) after forming an intention to retract or after taking her back through the passage of a long period, as is the view of al-Shāfiʿī. It is related from ʿUthmān al-Battī that he is liable for expiation after divorce, but if she dies before the intention to retract, he is not entitled to inherit from her, except when he makes expiation. This is a deviation opposing the text. Allāh knows best.

21.3. *Section 3: Persons in Whose Case* Ẓihār *is Effective*

They agreed about the effectiveness of *ẓihār* in the case of a wife who is in the protection of the husband, but they differed in the case of *ẓihār* related to a slave-woman and about one not under protection. Similarly, they disagreed about *ẓihār* of a woman against a man.

About *ẓihār* related to a slave-woman, Mālik, al-Thawrī and a group of jurists said that the consequences of *ẓihār* in her case are the same as those in the case of a wife who is a free woman. Same is the case of a *mudabbara*, or that of an *umm al-walad*. Al-Shāfiʿī, Abū Ḥanīfa, Aḥmad and Abū Thawr said that *ẓihār* does not apply to a slave-woman. Al-Awzāʿī said that if he uses the slave-woman as a concubine, then, his *ẓihār* is applicable to her, otherwise it amounts to an oath and there is expiation of an oath in it. ʿAṭāʾ said that his *ẓihār* is effective (in her case), but there is one-half the amount of expiation in it.

The evidence of those who give effect to *ẓihār* in the case of a slave-girl is found in the general application of the words of the Exalted, "Those who put away their women (by saying they are as their mothers)",[110] as slaves are among these women. The argument of those who do not consider *ẓihār* in her case to be effective is based on their agreement that the word *nisāʾ* in the words of the Exalted, "Those who forswear their wives must wait four months",[111] is applied to wives; similarly, the word *nisāʾ* in the verse of *ẓihār*.

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[110] Qurʾān 58 : 4. The word "wives" now changed to "women" in Pickthall's translation so that it may conform with the author's discussion.

[111] Qurʾān 2 : 226

The reason for disagreement is the conflict of *qiyās al-shabah* with the general meaning, that is, the comparison of *ẓihār* with *āl-īlā*ʾ and the general meaning of the word *nisā*ʾ, I mean, the general meaning implies the inclusion of the slave-women in *ẓihār* and the comparison with *āl-īlā*ʾ implies their exclusion from *ẓihār*.

Mālik's opinion about the question whether it is a condition of *ẓihār* that the woman be in the protection of the person swearing against her is that it is not a condition and one who identifies a particular woman and proclaims *ẓihār* against her upon the condition of future marriage has made *ẓihār* effective against her. Similarly, when he does not identify a particular woman and says that any woman he may marry is like his mother's back for him. This is contrary to the rule in divorce. Abū Ḥanīfa, al-Thawrī and al-Awzāʿī went by Mālik's opinion. Others said that *ẓihār* does not operate, except in that which is owned by a man. Among those who held this opinion are al-Shāfiʿī, Abū Thawr and Dāwūd. One group made a distinction saying that if he makes a categorical statement he is not liable for *ẓihār*, for example, he says: "Any woman that I will marry is for me like my mother's back". If he qualifies it, it becomes binding against him, like his naming a woman, or naming a village or a tribe. Those expressing this opinion are Ibn Abī Laylā and al-Ḥasan ibn Ḥayy.

The evidence of the first group are the words of the Exalted, "Abide by your agreements", as this is an agreement with the condition of ownership and becomes likely when he comes to own. Further (evidence is) the saying that the believers have to abide by their conditions, which is ʿUmar's view. Al-Shāfiʿī's argument is based on the tradition of ʿAmr ibn Shuʿayb from his father from his grandfather "that the Prophet (God's peace and blessings be upon him) said, 'There is no divorce except in what is owned, no manumission except in what is owned, no sale except in what is owned and no performance of a vow except in what is owned' ". It is recorded by Abū Dāwūd and al-Tirmidhī. Another argument is that *ẓihār* resembles divorce, which is the opinion of Ibn ʿAbbās.

Those who made a distinction between generalization and specification held that categorical statements in *ẓihār* lead to harm and Allāh, the Exalted, has said, "He hath chosen you and hath not laid down for you in religion any hardship".[112]

Within this topic they also disagreed over whether a woman can also proclaim *ẓihār* against a man. There are three opinions of the jurists about it. The best known is that there can be no *ẓihār* initiated by her, which is the opinion of Mālik and al-Shāfiʿī. Second, that she will be liable to expiation for an oath. Third, that she is liable for the expiation of *ẓihār*. The reliance of the majority is upon the similarity between *ẓihār* and divorce. Those who made it effective in her case held *ẓihār* to be similar to an oath. Those who made a distinction, did so as they held that the minimum obligation for her in this is the expiation of an oath, which is weak. The reason for disagreement is the conflict of similarities in this concept.

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[112] Qurʾān 22 : 78

21.4. *Section 4: Prohibitions for the Person Pronouncing* Ẓihār

They agreed that sexual intercourse (with penetration) is prohibited to the person pronouncing *ẓihār*, but they disagreed about what is less than sexual intercourse, like fondling, playing with the sexual organs and looking at the woman with lust. Mālik held that sexual intercourse and all kinds of sexual gratification that is less than intercourse, like playing with the sexual organs, fondling, kissing and looking with lust at parts of the body other than the face, hands and forearms is prohibited. This was also the opinion of Abū Ḥanīfa, though he considered only the looking at genitals as reprehensible. Al-Shāfiʿī said that to the person pronouncing *ẓihār* only the agreed upon intercourse with penetration is prohibited and not the other acts, which was also the opinion of al-Thawrī, Aḥmad and a group of jurists.

Mālik's evidence is in the words of the Exalted, "before they touch one another".[113] The apparent meaning of touching implies physical contact and what is more than that. In addition it (*ẓihār*) is a word by which she becomes prohibited for him and it, therefore, resembles divorce. The evidence for al-Shāfiʿī's opinion is that touching here is a figurative use alluding to sexual intercourse, upon the evidence of their consensus that it is intercourse that is prohibited. If it indicates intercourse, it cannot indicate what is besides that, for it may either indicate sexual intercourse or indicate what is besides it, which is a metaphorical meaning. As they agreed that it indicates intercourse, the metaphorical implication is negated, for a word cannot imply two things at the same time, the actual and the metaphorical.

I would say: For those who hold that the equivocal word has a general implication, it is possible for a word to indicate two meanings at the same time, that is, actual and metaphorical, though it is not normal in the Arab usage. It is for this reason that an opinion based upon it is considered weak. If, however, it is known that the law has used it in this way, it would be permitted. In addition to this *ẓihār* resembles *āl-īlāʿ*, it is, therefore, necessary according to them that it be confined to sexual intercourse.

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[113] Qurʾān 58 : 3

21.5. *Section 5: Renewal of* Ẓihār *with the Renewal of Marriage?*

There is disagreement about the recurrence of *ẓihār* after divorce, that is, if he divorces her after *ẓihār* before retracting it and then takes her back, does *ẓihār* come into force again, so that he cannot touch her till he retracts it? Mālik said that if he divorces her less than three times and thereafter takes her back during the waiting period or after it, he is to offer expiation. Al-Shāfiʿī said that if he takes her back during the *ʿidda*, he is liable for expiation, but if he takes her back in a time other than the waiting period he is not liable for expiation. There is another opinion from him identical to Mālik's opinion. Muḥammad ibn al-Ḥasan said that *ẓihār* recurs whether he marries her after three repudiations or after one. This issue resembles the case of the person who takes an oath to divorce, after which he pronounces the divorce and then takes the woman back, is the earlier oath still in force to his detriment?

The reason for disagreement is whether divorce eliminates all the *aḥkām* of the marriage bond and annuls them. Some jurists were of the opinion that the irrevocable divorce, resulting from a triple-repudiation annuls them, but a divorce that is less than that does not. There are also others who believe that no form of divorce annuls those *aḥkām* and I think it is the Ẓāhirites who maintain that all forms of divorce annul such *aḥkām*.

21.6. *Section 6: The Operation of* al-Īlāʾ *in* Ẓihār

Does *al-īlāʾ* become operative in *ẓihār* if he persists in his injurious act? This occurs when he does not retract when he is capable of doing so. There is disagreement in this too. Abū Ḥanīfa and Al-Shāfiʿī said that the two separate *aḥkām* cannot be combined, as the *ḥukm* of *ẓihār* is different from the *ḥukm* of *al-īlāʾ*. It is the same for them whether his act entails an injurious intention. This was also the opinion of al-Awzāʿī, Aḥmad and a group of jurists. Mālik said that *al-īlāʾ* can be imposed upon *ẓihār* on the condition that his intention is to inflict harm. Al-Thawrī said that *al-īlāʾ* is enforced in *ẓihār* in which case she becomes divorced from him irrevocably on the termination of the period of four months, without considering his intention to harm.

There are, thus, three opinions. First, that *al-īlāʾ* can be imposed upon *ẓihār* without qualifications. Second, it cannot be enforced at all. Third, that it can be enforced in case of an intention to harm, but not in its absence. The reason for disagreement is the concern for the underlying reason and consideration of the apparent meaning. Those who went by the apparent meaning said that the two cannot be combined, while those who regarded the underlying reason said that they can be combined when the intention is to inflict harm.

21.7. *Section 7: The* Aḥkām *of Expiation for* Ẓihār

The study of expiation of *ẓihār* involves a number of things: the number and kinds of expiation and their priority; the conditions of their different kinds, that is, the conditions of validity; and when do single and multiple expiations become obligatory?

They agreed that the kinds of expiation are three: setting free a slave; fasting for two months; and the feeding of sixty needy persons, in this order of priority. First comes the manumission of a slave; if he cannot afford it then fasting (is obligatory) and if he cannot sustain it then the feeding of needy persons. This applies to the freeman. They disagreed about the slave whether he can offer expiation through manumission or feeding, after they had agreed that he begins with fasting, thus, can he do so if he is not able to fast? Abū Thawr and Dāwūd permitted the slave to manumit a slave if he was authorized by his master to do so, but all the other jurists disallowed this. Mālik permitted him feeding when he fed them with the consent of his master, but Abū Ḥanīfa and al-Shāfiʿī did not allow this. The reason for disagreement in this issue arises from their dispute whether the slave can own (property) under the law.

Their disagreement about the validating conditions includes the dispute over the effect of intercourse if it should take place during the fasting of two months, whether he has to start the fast all over again, not counting the days he kept the fasts before the incident. Mālik and Abū Ḥanīfa said that he would have to renew the fasting, but he (Abū Ḥanīfa) did stipulate intentional violation for this. Mālik, on the other hand, did not differentiate between intention and forgetfulness, while al-Shāfiʿī said that he would not renew fasting in any circumstances.

The reason for disagreement is the similarity between the expiation of *ẓihār* with the expiation for an oath and the condition laid down for the expiation of *ẓihār*, that is, it should be performed before cohabitation. Those who considered this condition said that he should renew the fasts, but those who compared it to the expiation for an oath said that he is not to renew fasting, as the expiation for an oath eliminates the effect of violation, by agreement, even after it has occurred. They also disagreed over the issue whether it is a condition that the slave to be set free be a believer. Mālik and al-Shāfiʿī held that it is a condition of validity. Abū Ḥanīfa said that fulfilment can be achieved when the slave is a non-believer, but not if he is an idolater or an apostate.

The argument of the first party is that the purpose of emancipation here is seeking the pleasure of Allāh, it is, therefore, obligatory that the slave be a Muslim; the basis being the emancipation in the case of homicide. It may be argued, however, that this is not a case of analogy, but of interpreting an absolute term as restricted. Restriction of the slave with the qualification of faith occurred in the case of the expiation for homicide, whereas it has been rendered absolute here. It follows that this should also be restricted. Yet, there is a disagreement about restricting an absolute term in this manner and the Ḥanafites do not permit it, as the causes in the two cases are different.

The argument of the Ḥanafites is based upon the apparent general implication and according to them there is no clash between the absolute and the restricted meaning. It is, therefore, necessary that the terms be assigned their existing meanings, in their view.

Their disagreement also includes the issue whether the slave being emancipated should be free of defects. And what are those defects the absence of which is stipulated? The majority maintain that defects adversely affect the validity (or the fulfilment of) manumission. A group of jurists, however, maintained that defects have no such effect. The argument of the majority is based upon its similarity with (*ᶜĪd*) sacrifices and vows, all of which seek the pleasure of Allāh. The argument of the other party is based upon the unrestricted form of the term in the verse. The reason for disagreement is the conflict of the obvious implication with *qiyās al-shabah*.

Those who maintained that defects are effective in preventing the validity (of expiation) fulfilment, disagreed about the kind of defect that is to be taken *into account for the presence or absence of validity. There is no disagreement* among them that (total) blindness or the loss of both hands or feet preclude validity, but they differed about lesser defects. Is the lack of one hand permitted? Abū Ḥanīfa permitted it, but Mālik and al-Shāfiᶜī did not. About the loss of one eye, Mālik said that it is not permitted, while ᶜAbd al-Malik said that it is. Expiation (by emancipation) of a slave with slitted ears is not valid in Mālik's view, while the disciples of al-Shāfiᶜī said that it is. There is dispute about the deaf slave in Mālik's school; it is said that it is valid, while it is said that it is not. Emancipation of a dumb slave (for expiation) is not valid in Mālik's opinion, while there are two opinions about him in al-Shāfiᶜī's school. The (emancipation of the) insane slave will not lead to validity. About the castrated slave, Ibn al-Qāsim said that it did not appeal to him, while others said that it is not valid, but al-Shāfiᶜī held that it is. The emancipation of a minor is permitted (for this purpose) according to the majority of the jurists of the provinces, while its insufficiency is related from some of the earlier jurists. Slight limping does not affect validity, according to the school (Mālik's), but obvious lameness does. The reason for disagreement is their dispute over the extent of the defect that is effective in this ritual obligation. It has no basis in the law, except (the analogy upon) sacrificial animals.

In the same way, it is not valid (in expiation) to emancipate a slave who is jointly owned, or one who is partly free, as in the case of *kitāba* and *tadbīr*, because of the words of the Exalted, "the freeing of a slave", for setting free means emancipation *ab initio* and when there are existing contracts of freedom, like *kitāba*, it would amount to completion not emancipation. Similarly, in the case of partnership, as part of a slave is not a (full) slave. Abū Ḥanīfa said that if the *mukātab* has made part of the payment of *kitāba*, it is not permitted, but when he has not paid it is.

They disagreed whether it is valid for him to emancipate a *mudabbara*. Mālik, comparing it to *kitāba*, said that it is not, as it is a contract that he cannot undo. Al-Shāfiʿī said that it is valid. According to Mālik, it is not sufficient to manumit an *umm al-walad*, nor is it sufficient to emancipate a slave with a period of delay. The reason is that the contract of an *umm al-walad* is stronger than the contracts of *kitāba* and *tadbīr*. The evidence is that these can be revoked; the contract of *kitāba* because of the inability to pay the instalments and *tadbīr* when the value exceeds a third of the estate. The contract of emancipation with a period, however, is an agreement in which the period cannot be curtailed.

Mālik and al-Shāfiʿī differed with Abū Ḥanīfa on the sufficiency of a slave who is to be necessarily set free by him, because of descent (for example, when his father has become his slave). Mālik and al-Shāfiʿī said that it is not valid, while Abū Ḥanīfa said that if he resolves to set him free on account of *ẓihār* it is valid. Abū Ḥanīfa compared this to the case of the slave whose emancipation is not obligatory, as in both types of slave it is not obligatory upon him to buy them and to pay their value with the object of emancipation, thus, if he intends expiation thereby it is permitted. The Mālikites and Shāfiʿites held that if he buys someone whose emancipation is obligatory upon him without regard for his intention to emancipate him, it is not valid. Abū Ḥanīfa held the intention to buy to be a substitute for the intention to emancipate, but they said that he must form the intention of emancipation itself. In both cases he is designated an emancipator by choice, but in one he is emancipating through a primary choice, while in the second he is emancipating through a consequence of the choice and it is as if he has emancipated through a secondary choice. The buyer (intending expiation) exercises the primary choice, while in the other case it is the opposite. Mālik and al-Shāfiʿī differed about the person who is emancipating one-half of two slaves. Mālik said that this is not permitted, while al-Shāfiʿī said that it is, for it amounts to one slave. Mālik held on to the apparent meaning of the term.

This is their disagreement about the conditions of emancipated slaves.

In the stipulation of feeding, they disagreed about the amount of food that would be sufficient in the case of each of the sixty needy persons who have been mentioned in the text. There are two narrations in this from Mālik. The widely known report is that it is one *mudd*, measured by the *mudd* of Hishām, which would amount two *mudds* used by the Prophet (God's peace and blessings be upon him), but it is said that it is less, while it is said that it is one and one-third mudd. The second narration is that it is one *mudd* for each needy person in accordance with the *mudd* used by the Prophet and that is also al-Shāfiʿī's opinion. The basis for the first narration is the consideration of hunger generally, that is lunch and dinner, while the basis for the second narration is the comparison of this expiation with that of the expiation in an oath.

This, then, is their disagreement about the conditions of validity of the obligations arising out of this form of expiation.

In their disagreement about its multiplicity and unity (of several), one of the points of disagreement is that if he pronounces *ẓihār* with a single statement with respect to more than one woman, is a single expiation sufficient, or will he have to offer expiation according to the number of women involved? According to Mālik a single expiation will be sufficient, while according to al-Shāfiʿī and Abū Ḥanīfa the number of expiations must conform with the number of women denounced through *ẓihār;* if they are two he has to offer two expiations, if they are three he offers three and if they are more he offers more. Those who considered it similar to divorce made an expiation obligatory for each woman, but those who considered it similar to *al-īlāʾ* considered one expiation to be sufficient. The resemblance with *al-īlāʾ* is stronger.

Another point is that if he pronounces *ẓihār* for his wife in different sessions, is he liable for a single expiation or for the number of times that he has pronounced *ẓihār*? Mālik said that he is liable for a single expiation, except when he pronounces *ẓihār* then retracts from it and then pronounces it again, in which case he is liable for expiation a second time. This was also upheld by al-Awzāʿī, Aḥmad and Isḥāq. Abū Ḥanīfa and al-Shāfiʿī said that there is to be expiation for each *ẓihār*. When this takes place in a single session, there is no dispute in Mālik's school that there is a single expiation for it. Abū Ḥanīfa said that this depends upon his intention, if his purpose was emphasis there is only one expiation, but if he intended the renewal of *ẓihār*, it will be as he intended and he will be liable for expiation according to the number of pronouncements of *ẓihār*. Yaḥyā ibn Saʿīd said that expiation becomes binding according to the number of pronouncements, irrespective of the number of sessions in which this took place.

The reason for this disagreement is that a single *ẓihār*, in actual fact, occurs through a single pronouncement for a single woman and at one time. Two pronouncements, without dispute, would be through two utterances for two women at separate times. Therefore, if the word is repeated with respect to one wife, does it lead to multiple pronouncements of *ẓihār*? Similarly, when a single statement is used, but the women involved are more than one? Thus, the question is equipoised between these two extremes and so those for whom one extreme had greater weight, they gave preference to the *ḥukm* of that extreme, but those for whom the other extreme carried greater weight, they assigned it the relevant *ḥukm*.

Another issue is that if he pronounces *ẓihār* against his wife and then cohabits with her without offering expiation, is he liable to a single expiation? The majority of the jurists of the provinces, Mālik, al-Shāfiᶜī, Abū Ḥanīfa, al-Thawrī, al-Awzāᶜī, Aḥmad, Isḥāq, Abū Thawr, Dāwūd, al-Ṭabarī and Abū ᶜUbayd maintained that there is a single expiation in this case. Their evidence is the tradition of Salama ibn Ṣakhr al-Bayāḍī "that he pronounced *ẓihār* against his wife in the time of the Messenger of Allāh (God's peace and blessings be upon him) and then cohabited with her before offering expiation, he then came up to the Messenger of Allāh (God's peace and blessings be upon him) and mentioned it to him. He ordered him to offer a single expiation". A group of jurists said that he has to offer expiation twice, an expiation for the resolve to commit intercourse and an expiation for actually committing intercourse, for that intercourse was prohibited. This is related from ᶜAmr ibn al-ᶜĀṣ, Qabīṣah ibn Dhuʾayb, Saᶜīd ibn Jubayr and Ibn Shihāb. It is also said that he is not liable for anything, neither for retraction nor for intercourse, as Allāh has stipulated the validity of expiation prior to cohabitation when he cohabits with her, the time for expiation is over and it can only be imposed with a new command and such a *ḥukm* is absent from the issue. This is deviant. Abū Muḥammad ibn Ḥazm said that the person for whom the obligation is feeding, for him cohabitation is not prohibited before such feeding; cohabitation is prohibited only for those whose obligation it is to manumit or to fast.

XXII

THE BOOK OF *LIʿĀN* (IMPRECATION)

The discussion in this book, after the explanation of the obligation of *liʿān*, extends over five sections. The first section is about the kinds of complaints giving rise to it and their conditions. The second section is about the description of the imprecators. Third is about the description of *liʿān*. Fourth is about the refusal of either of them (the spouses) to take the oath. Fifth is about the *aḥkām* necessary for the completion of *liʿān*.

The source for the legitimacy of *liʿān* in the Book are the words of the Exalted, "As for those who accuse their wives but have no witnesses except themselves; let the testimony of one of them be four testimonies (swearing) by Allāh that he is of those who speak the truth; and yet a fifth, invoking the curse of Allāh on him of those who lie. And it shall avert the punishment from her if she bear witness before Allāh four times that the thing he saith is indeed false and a fifth (time) that the wrath of Allāh be upon her if he speaketh the truth".[114] The *sunna* is found in what was related by Mālik and other recorders of the *ṣaḥīḥ* traditions about the tradition of ʿUwaymir al-ʿAjalānī "when he came up to ʿĀṣim ibn ʿAdiyy al-ʿAjalānī, a man from his tribe and said to him, 'O ʿĀṣim, what do you think about the man who finds another man with his wife. Should he kill him, so that he may be executed himself? What is he to do? Ask the Messenger of Allāh (God's peace and blessings be upon him) about this, O ʿĀṣim'. ʿĀṣim asked the Messenger of Allāh (God's peace and blessings be upon him) about it and when he returned to his people, ʿUwaymir came up and said, 'O ʿĀṣim, what did the Messenger of Allāh (God's peace and blessings be upon him) tell you'. He said, 'You have not brought me something good (he said). The Messenger of Allāh looked down upon the issue I asked him about'. He said, 'By Allāh, I will not stop till I have asked him about it'. He set off till he came up to the Messenger of Allāh (God's peace and blessings be upon him) when he was in the midst of people. He said, 'O Messenger of Allāh, what do you think about the man who finds another man with his wife. Should he kill him, so that he may be executed himself? What is he to do?' The Messenger of Allāh (God's peace and blessings be upon him) said, 'The Qurʾān has been revealed about you and your wife, so go and bring her here' ". Sahl says that "They underwent the *liᶜān* procedure, when I was among the people with the Messenger of Allāh (God's peace and blessings be upon him). When they had completed the procedure, ᶜUwaymir said, 'I would be lying against her, O Messenger of Allāh, if I retain her' ". He then divorced her thrice, before the Messenger of Allāh had ordered him to do so. Mālik related from Ibn Shihāb the report that this has continued (since then) to be the *sunna* for the imprecators. Similarly, by way of a rational evidence, as marriage is the basis for the association of paternity, there was a need for the people to have a method by which they could negate it when they had established corruption in it. This method is *liᶜān*.

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[114] Qurʾān 24 : 6-9

Thus, *liᶜān* is a *ḥukm* established by the Book, *sunna*, *qiyās* and *ijmāᶜ*. I do not know of any dispute about this. This, then, is the discussion about the establishment of its *ḥukm*.

22.1. *Section 1: Kinds of Complaints Leading to* Liᶜān *and their Conditions*

The complaints that can give rise to *liᶜān* are of two types: first is the complaint of *zinā* and second, the denial (of paternity) of the foetus. The complaint of *zinā* may be based upon testimony, that is, he (the husband) alleges that he saw her committing *zinā*, or it may be a general complaint. If he denies the (paternity of) the embryo, he may also be denying it absolutely or may allege that he did not approach her after she was free of menstruation. These are four simple cases and all the other complaints are structured upon them. For example, he accuses her and denies the paternity of the foetus, or he may acknowledge the paternity of the foetus and accuse her of *zinā*.

There is no dispute about the validity of *liᶜān* after the accusation of *zinā* (*qadhf*), when he claims that he witnessed it. The Mālikites said that this is possible if he claims that he did not have intercourse with her afterwards. The majority, that is, al-Shāfiᶜī, Abū Ḥanīfa, al-Thawrī, Aḥmad, Dāwūd and others, permit the operation of *liᶜān* by *qadhf* alone. The widely known opinion from Mālik is that *liᶜān* does not arise from the complaint of *qadhf* alone. Ibn al-Qāsim said that it is permitted and it is also another narration from Mālik.

The argument of the majority is based upon the general meaning of the words of the Exalted, "As for those who accuse their wives but have no witnesses except themselves; let the testimony of one of them be four testimonies (swearing) by Allāh that he is of those who speak the truth". *Zinā* here has not been qualified with different characteristics, as was the case in the obligation of the *ḥadd* of *qadhf*. Mālik's argument is based on the apparent meaning of the traditions relevant to this issue. Among these is the tradition of (Sahl ibn) Saᶜd, "What do you think of the man who finds another man with his wife ...", and the tradition of Ibn ᶜAbbās, which says, "He came up to the Messenger of Allāh (God's peace and blessings be upon him) and said, 'By Allāh, O Messenger of Allāh, I saw it with my own eyes and heard it with my own ears'. The Messenger of Allāh disliked what he reported and then the verse, 'As for those who accuse their wives ...', was revealed". Further, the complaint itself is a kind of evidence like testimony.

Within this issue is a case about which Mālik's opinion differed. It is a case where she is found to be pregnant after the complaint of *liʿān* and there are two opinions about it from Mālik. First, that the association of the foetus with him is discarded. Second, that it (the paternity of the foetus) is associated with him.

They agreed, as far as I know, that a condition for the complaint of *zinā* giving rise to *liʿān*, where the act has been witnessed, is that the wife still be in his protection. They disagreed about the person who makes a complaint of *zinā* against his wife and then divorces her, whether *liʿān* can take place between them. Mālik, al-Shāfiʿī, al-Awzāʿī and a group of jurists said that *liʿān* proceedings may be instituted, while Abū Ḥanīfa said that there is to be no *liʿān* between them, unless he denies the paternity of the child and there is no *ḥadd* in this case. Makḥūl, al-Ḥakam and Qatāda said that he is to be awarded *ḥadd*, but there is no *liʿān*.

If he denies paternity of the embryo, then, as we have said the case has two aspects. First, he may claim that he had avoided her since her menses and did not have intercourse with her after that. There is no dispute in this case. Mālik's opinion differed about the nature of *istibrāʾ* (assuring the vacation of the womb). He said once that this is through (avoiding her for a duration of) three menstrual periods, but at another time he said it is through one. The well-known opinion of Mālik about absolute denial is that *liʿān* is not necessary for it; he was opposed in this by al-Shāfiʿī, Aḥmad and Dāwūd, who said that this does not mean much as a woman may be pregnant, even when blood can be noticed. ʿAbd al-Wahhāb has related from the disciples of al-Shafiʿī that an absolute denial of paternity is not permitted without accompanying *qadhf*.

They disagreed in this topic about a sub-issue, which is the time of denying paternity of the embryo. The majority said that he should deny it while she is still pregnant. Mālik further stipulated that if he does not deny while the pregnancy continues, he cannot deny it later through the process of *liʿān*. Al-Shafiʿī said that if the husband came to know about the pregnancy and the judge granted him the opportunity to invoke *liʿān*, but he did not do so, he is not entitled to deny paternity through *liʿān* after birth. Abū Ḥanīfa said that paternity of the child is not to be denied till birth.

Mālik's argument and the argument of those who held the same opinion, is based upon *mutawātir* traditions, like the traditions of Ibn ʿAbbās, Ibn Masʿūd, Anas and Sahl ibn Saʾd "that the Prophet (God's peace and blessings be upon him) when he ordered *liʿān* proceedings between two imprecators said, 'Whenever she (the woman) comes in such and such condition (i.e. pregnant), I have always seen that he is telling the truth' ". They said that this indicates her being pregnant at the time of *liʿān*. Abū Ḥanīfa's argument is that the womb may become bloated or subside (for different reasons) and there is no cause for *liʿān*, except in the case of certainty. One of the arguments of the majority is that the law has made a number of *aḥkām* dependent upon pregnancy, like maintenance, waiting period and prohibition of intercourse; it is, therefore, necessary that the analogy for *liʿān* be the same. According to Abū Ḥanīfa, he may proceed with *liʿān* without denying paternity, except at the time of birth or close to it, but he did not fix a time for this. His disciples, Abū Yūsuf and Muḥammad, did fix a time saying that he may deny paternity in the forty nights before (expected) birth.

Those who made *liʿān* obligatory upon the appearance of pregnancy agreed that he has to deny paternity during the period of tie (of marriage), but they disagreed about the denial of paternity after divorce. Mālik held that he may do this in the entire period during which the child can be associated with the conjugal relationship, which is the maximum period of gestation, according to him and that is four years or five years. Similar is the *ḥukm*, according to him, for the denial of (the paternity of) the child after divorce, if he persists in denying it. An almost similar opinion was expressed by al-Shāfiʿī. A group of jurists said that he does not have the right to deny the paternity of the embryo, except during the *ʿidda*. If he denies it in a period other than the *ʿidda* he is to be awarded *ḥadd* (for *qadhf*) and the child is to be attributed to him. The *ḥukm*, then, according to the majority in which this is possible is the maximum length of the gestation period, despite their accompanying disagreement about it (the length). The Ẓāhirites held that the maximum[115] period of gestation in which the *ḥukm* is obligatory is the usual period and it is equivalent to nine months or close to it.

There is no dispute among them that the *ḥukm* becomes obligatory during the time of protection (of marriage), which is not less than six months after the time of actual consummation, that is, the woman should give birth within six months of the time of consummation or the likelihood of consummation and not the time of the contract. Abū Ḥanīfa deviated from this and said that it is from the time of the contract, even when it is known that intercourse was not possible, so much so that according to him if a man in the remote west is married to a woman in the remote east and she gives birth to a child after six months from the time of the contract, the child will be attributed to him, unless he denies paternity through *liʿān*. He is being too literal in this issue, for he relies upon the general meaning of the words of the Prophet, "*al-walad lil-firāsh*",[116] and the woman in this case is associated with him through a conjugal relationship. It was as if he considered this not to be subject to rationalization. This is something that is weak.

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[115] The original text says "minimum", however, the word should be "maximum". This is the well-known opinion of the Ẓāhirites. The author himself says a few lines below that there is no dispute among the jurists that the minimum period is six months, which is based on the interpretation of Qurʾānic texts.

Mālik's opinion differed within this issue about a sub-issue. If he claims that she committed *zinā*, but he acknowledges paternity of the embryo, then, there are three narrations from Mālik. First, that he is to be awarded *ḥadd* (for *qadhf*), the child is attributed to him and he cannot invoke *liʿān*. Second, that he is to invoke *liʿān* and deny paternity. Third, that the child is attributed to him, but he is to invoke *liʿān* in order to avoid the *ḥadd* penalty. The reason for the difference is whether he can establish paternity along with a denial of its cause, that is, his claim of *zinā*.

They disagreed in this topic about another issue. If testimony about *zinā* has been rendered, is he to invoke *liʿān* too? Abū Ḥanīfa and Dāwūd said that he does not invoke *liʿān*, as *liʿān* is a substitute for witnesses, because of the words of the Exalted, "As for those who accuse their wives but have no witnesses except themselves ...". Mālik and al-Shafiʿī said that he is to invoke *liʿān* as the witnesses have no affect upon the denial of paternity.

22.2. *Section 2: The Qualifications of the Imprecators*

About the qualifications of the imprecators, a group of jurists said that *liʿān* is permissible between spouses, whether they are free or slave, or when one of them is free and the other a slave, whether they have been subjected to *ḥadd* or are virtuous, or when one of them is such and when they are Muslims or when the husband is a Muslim and the wife a *kitābiyya*. There is no *liʿān* between disbelievers, unless they bring the matter before the Muslim court. Among those who held this opinion are Mālik and al-Shāfiʿī, while Abū Ḥanīfa and his disciples said that *liʿān* is only possible between free, *ʿadl*, Muslims. As a general rule, according to them, *liʿān* is possible between people who qualify as witnesses.

The argument of the first group is based upon the general meaning of the words of the Exalted, "As for those who accuse their wives but have no witnesses except themselves", and the verse did not add any condition to this. The reliance of the Ḥanafites is on the argument that *liʿān* is testimony, so the conditions of testimony are to be stipulated for *liʿān* and Allāh too has called them witnesses, "let the testimony of one of them be four testimonies (swearing) by Allāh that he is of those who speak the truth". They also say that *liᶜān* is only possible between persons who can be liable for *qadhf* that may come to exist between them.

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[116] Literally: The child belongs to the bed. The phrase conjugal relationship is being used here, but this only indicates the relationship of marriage and not the relationship with female slaves, which is included in the maxim. The phrase actually means that paternity is attributed to the person who has legal access to the woman for sexual intercourse.

They agreed that the slave is not subjected to *ḥadd* because of his *qadhf*; similarly the disbeliever. They compared a person qualified for *liᶜān* to one who may be liable for the *ḥadd* of *qadhf*, as *liᶜān* has been ordained for the evasion of *ḥadd* along with the denial of descent. Perhaps, they argued on the basis of what is related by ᶜAmr ibn Shuᶜayb from his father from his grandfather that the Messenger of Allāh (God's peace and blessings be upon him) said, "There is no *liᶜān* between four persons: two slaves and two disbelievers". The majority maintain that it (*liᶜān*) is like an oath, even though it has been termed as testimony, as no one testifies for himself and an oath is sometimes referred to as testimony, which is obvious from the words of the Exalted, "When the hypocrites come unto thee (O Muḥammad), they say: We bear witness that thou art indeed Allāh's messenger. And Allāh knoweth that thou art indeed His messenger and Allāh beareth witness that the Hypocrites are speaking falsely",[117] followed by, "They make their oaths a pretext so that they may turn (men) from the way of Allāh".[118]

They agreed about the validity of the *liᶜān* of the blind, but disagreed about that of the dumb. Mālik and al-Shafiᶜī said that the deaf can invoke *liᶜān*, if their gestures are comprehensible. Abū Ḥanīfa said that they cannot invoke *liᶜān* as they are not a qualified witnesses. They agreed unanimously that among the conditions are sanity and the attainment of the age of majority (*bulūgh*).

22.3. *Section 3: The Procedure of* Liᶜān

The descriptions of *liᶜān*, given by the majority, are almost similar and there is not much difference, because of the obvious implications of the verse.

The husband takes an oath swearing four times by Allāh that he saw her committing unlawful intercourse and the child that she carries is not because of him. In the fifth oath he says that may the curse of Allāh be upon him if he is lying. The woman then swears four times rebutting him (to evade the *ḥadd*) and swears the fifth invoking the wrath of Allāh (in case she is lying). All this is agreed upon. Some jurists differed whether it is permitted to substitute wrath for curse, curse for wrath, swearing for testifying and one of the attributes of Allāh for "by Allāh". The majority maintained that none of the substitutions is permitted, but only the words which are mentioned in the text, the basis being the number of testimonies. They agreed that a condition for its validity is that it (*liᶜān*) should be invoked under orders from the judge.

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[117] Qurᵓān 63 : 1

[118] Qurᵓān 63 : 2. Pickthall translates it as "They make their faith a pretext so that they may turn (men) from the way of Allāh". The text says "*aymānahum*," "their oaths," not "*īmānahum*," "their faith".

22.4. *Section 4: Refusal to Take the Oath and Retraction*

If the husband refuses to take the oath, the majority maintain that he is to be subjected to *ḥadd*. Abū Ḥanīfa said that he is not to be subjected to *ḥadd*, but is to be confined (imprisoned).

The basis for the majority opinion is the general implication of the words of the Exalted, "And those who accuse honourable women but bring not four witnesses, scourge them (with) eighty stripes and never (afterwards) accept their testimony—They indeed are evil doers". This is general with respect to a stranger as well as a husband and the imprecation of the husband is substituted for the testimony of witnesses. It is, therefore, necessary that when he refuses to swear he should be considered as one who has committed *qadhf* and does not have four witnesses, I mean, that he should be awarded the *ḥadd*. They also relied on the traditions of Ibn ᶜUmar and others about the incident of al-ᶜAjalānī and the words he said to the Prophet (God's peace and blessings be upon him) "If I kill him I would be killed, if I speak out I will be whipped and if I remain silent I will do so with anger".

The other party argued that the verse of *liᶜān* does not include his liability for *ḥadd* when he refuses to swear and the proposal for its obligation is an addition to the text; an addition for them amounts to abrogation and an abrogation is not possible through analogy or through individual narrations. They added that if *ḥadd* is imposed there is no utility in *liᶜān*, nor will it have any effect in its avoidance, as *liᶜān* is an oath that does not waive the *ḥadd* in the case of a stranger, so also in the case of the husband.

The truth, however, is that *liᶜān* is a special oath, which makes it necessary that it have a special *ḥukm*. Further, it is stated in the text about the woman that the oath will avert the torment from her. The question is what is this torment that will be waived because of the oath?

The equivocality that is found in the term torment also led them to differ about the consequences for her if she refused to swear. Al-Shāfiᶜī, Mālik, Aḥmad and the majority said that she is to be subjected to *ḥadd* and her *ḥadd* is stoning to death if he has had intercourse with her and she fulfils the conditions of *iḥṣān*. If he has not had intercourse with her she is to be subjected to stripes. Abū Ḥanīfa said that if she refuses she is liable for confinement till she invokes *liᶜān*. His evidence is the words of the Prophet (God's peace and blessings be upon him), "The shedding of a Muslim's blood does not become permissible, except for three reasons: *zinā* after *iḥṣān*; disbelief after faith; and the taking of a life without cause for retaliation". In addition to this, the spilling of blood because of refusal to swear is an act that is rejected by the principles. If a large number of jurists do not impose a financial liability because of a refusal to swear, it appears appropriate that they should not spill blood because of such refusal. On the whole, the basis in the law for the rule for spilling blood is that it should not be shed except through legally admissible testimony or by confession. It must not be that this rule is restricted by means of an equivocal term. Abū Ḥanīfa in this issue is closer to the truth, God willing. Abū al-Maᶜālī, in his book *al-Burhān*, has acknowledged the strength of Abū Ḥanīfa's reasoning in this issue and he was a Shāfiᶜite.

They agreed that if he declares himself a liar, he is to be subjected to *ḥadd* and the child is to be attributed to him, even if he has denied its paternity. They disagreed whether he has the right to take her back, after their agreement that separation (divorce) becomes obligatory through *liᶜān*, either on its own or by the decree of the judge, which we will discuss later. Mālik, al-Shāfiᶜī, al-Thawrī, Dāwūd, Aḥmad and the majority of the jurists of the provinces said that they cannot be together again, ever, even when he declares himself to be a liar. Abū Ḥanīfa and a group of jurists said that if he declares himself to be a liar and is awarded the *ḥadd*, he may propose to her along with the others. Other jurists said that his wife is to be returned to him.

The argument of the first party is based on the words of the Prophet (God's peace and blessings be upon him), "You have no means of attaining her". The Prophet did not make an exception for this and it was construed as absolute for prohibition. The argument of the second party is that he has called himself a liar, therefore, the *ḥukm* of *liᶜān* stands annulled. Just as the child is associated with him, in the same way his wife is to be returned to him. The reason is that the cause of prohibition is the lack of knowledge about the verification of the veracity of one of them, along with the certainty that one of them is a liar. As soon as this is established, the prohibition stands removed.

22.5. *Section 5:* Aḥkām *Necessary for the Completion of* Liᶜān

The jurists differed about the consequences of *liᶜān* on a number of issues. Among these are whether separation becomes obligatory. If it does, when? Does it become obligatory due to *liᶜān* itself, or through the decree of the judge? If separation does occur, is it divorce or rescission?

The majority held that separation occurs because of *liᶜān*, as has become widely known through the traditions of *liᶜān* that the Messenger of Allāh caused a separation between them. Ibn Shihāb said, as reported from him by Mālik, that this has not ceased to be the *sunna* for the imprecators. Further, because of the words of the Prophet (God's peace and blessings be upon him), "You have no means of attaining her". ᶜUthmān al-Battī and a group of jurists from Baṣra said that *liᶜān* is not followed by separation. They argued that this is a *ḥukm* that is not included in the verse of *liᶜān*, nor is it explicit in the traditions. In the best-known tradition the person divorced her in front of the Prophet and he (the Prophet) did not disapprove it. In addition to this, *liᶜān* has been ordained for waiving the *ḥadd* of *qadhf* and it does not obligate prohibition, as in the case of testimony.

The argument of the majority is that mutual discord, hate and confrontation with similar testimony and a violation of the limits set by Allāh has occurred between them, which makes it necessary that they should never come together again, ever. This is so as marriage is structured upon love and compassion, while these two are devoid of it completely. The least that can be said is that their penalty should be separation. On the whole, the evil that exists between them is of an extreme form.

About the time of separation, Mālik, al-Layth and a group of jurists said that it comes into effect when both are done with imprecation. Al-Shafiʿī said that as the husband finishes his imprecation separation comes into effect. Abū Ḥanīfa said that it does not come into effect, except by the decree of the judge, which was also upheld by al-Thawrī and Aḥmad. Mālik's argument against al-Shafiʿī is based upon the tradition of Ibn ʿUmar, who said that "the Messenger of Allāh ordered separation between imprecators and said, 'Your reckoning is with Allāh, as one of you is a liar. And you (the husband) do not have any means of attaining her' ", and also the report that he did not order separation between them, until the completion of *liʿān* proceedings. Al-Shāfiʿī's argument is that her imprecation causes only the *ḥadd* to be waived from her and it is the man's imprecation that is effective in the denial of descent. It is, therefore, necessary that if the *liʿān* is effective in separation, the man's *liʿān* should be deemed equivalent to a divorce. Their joint argument against Abū Ḥanīfa is that the Prophet (God's peace and blessings be upon him) informed the imprecators about the occurrence of separation between them with their act of imprecation, which indicates that it is *liʿān* that is the cause of separation. Abū Ḥanīfa, on the other hand, is of the view that separation was implemented against them with the decree and the order of the Prophet (God's peace and blessings be upon him), when he said, "You have no means of attaining her". He, therefore, held that his (the judge's) *ḥukm* is a condition for the occurrence of separation, just as his *ḥukm* is essential for the validity of *liʿān*.

The reason for disagreement between those who held that it is because of it (the *ḥukm*) that separation occurs and between those who do not hold it to be so, is that the separation caused by the Prophet (God's peace and blessings be upon him) is not manifest in the well-known tradition as the man took sudden initiative himself and divorced her before he informed him of the separation. The principle is that there is no separation without divorce and that there is no prohibition in the law that can become perpetual, that is, one agreed upon. Those who imposed this principle upon the meaning, because of the likelihood that such meaning negates the obligation of separation, did not hold separation to be obligatory (through *liʿān*). The disagreement between those who stipulate the decree of the judge and those who do not is based upon the vacillation of this *ḥukm* between those *aḥkām* for whose validity the decree of the judge is stipulated and those for which it is not.

The fourth issue, which arises if we say that separation does arise through *liʿān*, relates to the question whether such separation amounts to a rescission or a divorce? Those who uphold separation (through *liʿān*) differed about this. Mālik and al-Shafiʿī said that it is rescission, while Abū Ḥanīfa said that it is an irrevocable divorce. Mālik's argument depends upon the perpetuity of the prohibition and, therefore, the woman comes to resemble those in the prohibited category.

Abū Ḥanīfa, on the other hand, held that it resembled divorce, on the analogy of separation, by a decision of the court, from one who is impotent.

XXIII

THE BOOK OF *IḤDĀD* (MOURNING)

The Muslim jurists, except for al-Ḥasan alone, agreed that mourning is obligatory for free Muslim women during the waiting period following death (of their husbands). They disagreed in the cases of the other wives, and also regarding the kinds of *ʿidda* other than the *ʿidda* following death, and also about what the mourning woman is required to abstain from.

Mālik said that mourning is necessary for the women who are Muslim or from the People of the Book, are minor or major. There is no mourning for a slave-woman whose master has died, irrespective of her being an *umm al-walad*. This opinion was upheld by the jurists of the provinces. Mālik's opinion about the *kitābiyya*, however, was opposed by Ibn Nāfiʿ and Ashhab, who related that too from Mālik. This was also upheld by al-Shāfiʿī, that is, there is no mourning for the *kitābiyya*.

Abū Ḥanīfa said that there is no mourning for a minor or for a *kitābiyya*. A group of jurists said that there is no mourning for a married slave-woman, and this has been related from Abū Ḥanīfa. This, then, is their well-known disagreement about the categories of wives for whom mourning has been prescribed and those for whom it has not been prescribed.

In their disagreement about the categories of *ʿidda* that involve mourning, Mālik said that there is no mourning, except in the waiting period following death. Abū Ḥanīfa and al-Thawrī said that mourning is obligatory in the waiting period of an irrevocable divorce. Al-Shāfiʿī preferred it for a divorced woman, but did not make it obligatory.

The third point relates to what is prohibited to the mourning woman and what is not. She is disallowed, by the *fuqahāʾ* as a whole, all kinds of adornment that is meant to attract men to women, like wearing jewellery or darkening of the eyes, unless this is not meant as an adornment. She is also not allowed to wear colourful clothes, except black, as Mālik did not consider reprehensible her wearing black. All of them made an exemption for using kohl (*kuhl;* antimony sulphide for darkening the eyes) in the case of necessity, though some of them stipulated that it be in a way that does not amount to an adornment, while others did not make such a stipulation, and yet others permitted its use during the night and not during the day. On the whole, the opinions of the jurists in things avoided by the mourning woman are quite similar, and they amount to saying that it is anything that draws the attention of men toward them.

The majority decided in favour of the obligation of mourning generally because of an established *sunna* about it from the Messenger of Allāh. One of the traditions is that of Umm Salama, wife of the Prophet, that "a woman came up to the Messenger of Allāh (God's peace and blessings be upon him) and said, 'O Messenger of Allāh, my daughter's husband has died, and her eyes hurt. May I use kohl for her eyes?' The Messenger of Allāh (God's peace and blessings be upon him) said 'No' two or three times. Each time he said, 'No', and then said, 'It is a period of four months and ten days'. " Abū Muḥammad said that in accordance with this tradition it is, necessary, to construe the obligation of mourning. In the tradition of Umm Ḥabībah—when she called for perfume and applied it on the sides of her face, saying, "By Allāh, I have no need for this, but I heard the Messenger of Allāh saying, 'It is not permitted to a believing woman, who believes in Allāh and the Day of Judgment, to mourn the dead more than three nights, except in the case of the husband, for whom it is four months and ten days' "—there is no evidence, except an exemption in mourning and it denotes permissibility rather than an obligation; similarly, the tradition of Zaynab bint Jahsh.

The Qāḍī (Ibn Rushd) said: In the case where a command is issued after a prohibition, there is dispute among the *Mutakallimīn*, I mean, whether it implies an obligation or permissibility.

The reason for disagreement in making mourning obligatory for a Muslim woman and not a disbeliever is that those who considered mourning to be kind of worship did not make it binding upon the disbeliever, while those who held it to have an underlying rational reason, which is the attraction of men toward her and she being attracted to them, deemed the disbeliever and the Muslim woman to be equal. Those who took into account the attraction of men and not that of women, made a distinction between the minor and the mature woman, as men are not likely to be attracted to minors. The evidence of those who made it obligatory on Muslim women to the exclusion of disbelievers is in the words of the Prophet, "It is not permitted to a believing woman, who believes in Allāh and the Day of Judgment to mourn, except for her husband". They said that the stipulation of faith in mourning indicates that it is a kind of worship.

Those who made a distinction between a slave and a free woman, and also the *kitābiyya*, did so because they thought that the waiting period following death gives rise to two things, by agreement: first is mourning and the second is not to go out (of the house). As the relinquishment of (the prohibition of) going out in the case of the slave-woman became necessary through her employment and the need for her services, the prohibition of adornment also had to be dropped. Their disagreement about the *kitābiyya* relates to her vacillation between a free woman and a slave. With respect to the difference between the slave-woman possessed by the right hand and the *umm al-walad*, the *fuqahā*ʾ decided to forgo mourning in her case, because of the words of the Prophet, "It is not permitted to a believing woman, who believes in Allāh and the Day of Judgment to mourn, except for her husband". The indication of the text reveals that those who are not wives are not obliged to mourn.

Those who made mourning obligatory for the widow, but not a divorced woman, relied upon the literal construction of the case stated (in the text), while those who extend the *ḥukm* to the divorced women did so through reasoning. The reason is that it becomes obvious from the underlying cause of mourning that the purpose is to prevent the attraction of men toward them during the waiting period, nor should they be attracted to them. This is a case of *sadd al-dharīʿa* for the preservation descent, Allāh knows best.

The Book of Divorce is completed, praising Allāh for His favours and thanking Him for His grace. This will be followed by the Book of Sales, God willing.

XXIV

THE BOOK OF *BUYŪ*ʿ (SALES)

The discussion of sales is covered in five parts:[119]

identification of the kinds of sales;
conditions of the validity of each kind;
causes of vitiation (*fasād*);[120]
the *aḥkām* of valid sales; and
the *aḥkām* of vitiated sales.

We will first describe the kinds of absolute sales and then the conditions of validity and vitiation of each (separate) kind, followed by the *aḥkām* of valid and vitiated sales. As the reasons for vitiation and validity are either general for all kinds of sales, or for most of them, or particular to some—so also the *aḥkām* of validity and vitiation are either general or particular—the technical approach requires that we first mention the common elements of these four categories, that is, the general features of the causes of vitiation, the requisites of validity, the *aḥkām* of validity and the *aḥkām* of vitiation. We will then mention the particular features of these four categories within each kind of sale. This book is, then, divided by necessity into six parts:[121]

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[119] The general principles of sales are discussed in five parts. This is followed by a sixth part that deals with individual sales like *ṣarf, salam, bay*ʿ *al-khiyār* and *bay*ʿ *al-*ʿ*ariyya*. Each of these sales, however, is treated as an independent book. This division is explained by the author below. *See infra* note 121 and accompanying text.

[120] The term *fāsid* is sometimes translated as "irregular". Here the term "vitiated" has been preferred. It should be noted that the term *fāsid* does not have the same meaning as "voidable", which is used in English common law. An agreement or contract is voidable at the option of the parties. If the parties choose not to exercise this option, the agreement or contract will take effect. *Fāsid*, on the other hand, is the same as void (*bāṭil*) according to the majority of the Muslim jurists. It has no legal effects. The reason of *fasād* is the stipulation of a condition that has been prohibited by the Lawgiver. The Hanafites maintain that a *fāsid* contract is not void *ab initio* and it can have legal effects. In fact, it will become a valid (*ṣaḥīḥ*) contract if the obnoxious condition is expunged; till such time that this is done, the contract will remain in a state of suspension. The manner in which the term is being used by the author will be determined by the context.

[121] See *supra* note 119

Part 1: Kinds of absolute sales;
Part 2: The general causes of vitiation in absolute sales, that is, in all or most of them, (discussed first) as they are better known than the requisites of validity;
Part 3: The requisites of validity in absolute sales;
Part 4: *aḥkām* of valid sales, that is, the *aḥkām* common to all valid sales or most of them;
Part 5: *aḥkām* common to vitiated sales, that is, when they take effect;
Part 6: Each individual sale with its particular reasons of validity and vitiation and its particular *aḥkām*.

24.1. Part 1: Definition of the Kinds of Absolute Sales

Each transaction between two individuals is an exchange, either of corporeal property[122] for corporeal property, or of corporeal property for a corresponding liability,[123] or of a liability for another liability. Each one of these three is either delayed or immediate. Each one of these again is either immediate for both parties or delayed for both, or is immediate for one party and delayed for the other. The kinds of sales (that emerge) are thus nine in number. Delay from both sides is not permitted by consensus (*ijmā*ᶜ) either in corporeal property or in liabilities as it amounts to a proscribed exchange of a debt for a debt.

The names of these sales are derived from the condition of the goods being exchanged and the form of the contract of sale itself. Thus, when two commodities are exchanged, one may serve as a currency[124] and the other as a priced commodity, or both may be currencies. When a currency is exchanged for a currency the sale is called *ṣarf*; when a currency is exchanged for a priced commodity the transaction is sale proper (*bay*ᶜ). Similar is the sale of a priced commodity for another priced commodity (barter) upon conditions that will be mentioned later. When corporeal property is exchanged for a liability, the sale is called *salam*. If an option is introduced the transaction is called sale with an option (*bay*ᶜ *al-khiyār*). If it is made with a stated profit (mark-up) it is called *murābaha*; when bids are called it is called *muzāyada* (auction).

[122] The term ᶜ*ayn* is applied to mean something determined and present as compared to something that is not determined by (weight or measure in a contract like *currencies*, *dirhams* and *dīnārs*, because these are standardized with respect to weight). The term corporeal property has, therefore, been preferred over the terms "thing" and "subject-matter". The term "subject-matter of the contract" is the equivalent of *maḥall al-*ᶜ*aqd* and is a more comprehensive term than "ᶜ*ayn*". It has been used on occasions for purposes of clarity.

[123] The term "liability" is used here to indicate the Arabic term *dhimma*.

[124] The term currency is being used in place of price (*thaman*) which has been used by the author. In Islamic law when two commodities are exchanged, one of them may be called the "price" while the other is the subject-matter of the sale or *mabī*ᶜ. The situation is different though in the contract of *ṣarf* where both counter-values are currencies or commodities having currency value. The use of the term "price" is likely to prove confusing in *ṣarf* and has, therefore, been avoided throughout to maintain consistency.

24.2. Part 2: Definition of the General Causes of Vitiation in Absolute Sales

When the causes due to which legal proscription has been laid down are considered and these are the general causes of vitiation, they are found to be four: first is the prohibition of the commodity itself; second is usury (*ribā*); third is hazard or uncertainty (*gharar*); fourth are stipulated conditions that lead to one of the last two or both simultaneously. These four causes are in fact the causes of vitiation as the proscription is related to them in sales, with respect to their being sales and not due to some external factor. Among those in which the proscription is linked to an external factor are misrepresentation (*ghishsh*), injury (*ḍarar*), sale in a period of time assigned to a more important activity,[125] and sale prohibited in itself. In this part, then, there are several chapters.

24.2.1. Chapter 1: Corporeal Property Prohibited for Sale

These are of two kinds: filth (*najāsa*) and that which is other than filth. The source for the prohibition of the sale of filth is the tradition of Jābir, recorded in the *Ṣaḥīḥayn*, in which he said, "The Messenger of Allāh (God's peace and blessings be upon him) said, 'Allāh and His Messenger have prohibited the sale of wine (*khamr*), carrion (*mayta*), swine (*khinzīr*) and idols (*aṣnām*)'. It was said, 'What about the fat of corpses with which (the crevices of) boats are filled and it is used for illumination?' He replied, 'Allāh has cursed the Jews. Fat (of corpses) was prohibited for them, but they sold it and consumed its value'". He (the Prophet) said about *khamr*, "He, who has prohibited its drinking, has also prohibited its sale".

Filth is of two kinds. First is that about the prohibition of whose sale the Muslims are all agreed. Of these is wine (*khamr*). It is considered filth except for slight disagreement, regarding its being filth. So is carrion with all its sensitive non-disposable ingredients and similarly swine and those parts of it that accommodate organic life (that is, they are prone to decay).[126] There is disagreement, though, about the utilization of its bristles. Ibn al-Qāsim permitted this. The second kind is filth the utilization of which is required by necessity, like excrement and dung utilized in gardens (as manure); there is a disagreement in the school (of Mālik) about its sale. Some have prohibited this absolutely, some have permitted it without qualification, while others distinguish between manure and excrement, that is, they permit sale of manure and prohibit that of excrement. They disagreed about the tusks of elephants

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[125] Like the Friday congregation prayer.

[126] The parts of the body of a *ḥarām* animal that "do not accept death", like the bristles of swine, may be utilized according to a Mālikī opinion. The use of the term "organic" is, therefore, not very helpful.

(ivory), because of their disagreement whether they are filth. Those who consider them as teeth assign them the *ḥukm* of carrion, while those who consider them inverted horns assign them the *ḥukm* of horns. There is a controversy in Mālik's school about this too.

Among those things whose sale is prohibited but they are not filth, or their being filth is disputed, are dogs and cats. They disagreed about the sale of a dog. Al-Shāfiʿī said the sale of a dog is not permitted at all. Abū Ḥanīfa said that it is. The disciples of Mālik distinguished between a sheep- or farm-dog that can be lawfully owned and that which cannot. They agreed that a dog which cannot be owned cannot be sold for use, or for ownership. There is controversy about the person who needs it for consumption (as food). Those who permit its consumption, permit its sale, while those who do not permit its consumption, on the narration of Ibn Ḥabīb, do not permit its sale. They also disagreed about the (sale of a) dog that can be lawfully owned and it is said that this is prohibited, or that it is disapproved (*makrūh*).

Al-Shāfiʿī relies (for his view) on two things. First, the established proscription from the Prophet (God's peace and blessings be upon him) about charging a price for a dog; second, a dog according to him is filth in itself like swine and we have mentioned his proof about this in the Book of (Ritual) Purification. The basis according to those who have permitted its sale is that a dog is clean (*ṭāhir*) in essence and its consumption is not prohibited, therefore, its sale is allowed like that of other clean things. The proof of those who consider it clean has also preceded in the Book of Purity. In the Book of Foods can be found the proof of those who consider it permissible for consumption. The basis for those who make a distinction is that neither its consumption nor its utilization is permitted except what has been exempted by the tradition about the sale of sheep, farm, or other similar dogs. Less known traditions have been narrated in which the prohibition of charging a price for dogs generally is accompanied by an exemption for charging a price for dogs that can lawfully be maintained.

The proscription of charging a price for a cat is established, but the majority (*jumhūr*) permit it as it is clean in essence and its benefits too are lawful. The reason for their disagreement about dogs is the conflict of evidence.

Related to this is the disagreement about oil extracted from filth and what resembles it, after their agreement about the prohibition of its consumption. Mālik said that the sale of *najis* oil is not permitted. Al-Shāfiʿī had the same opinion. Abū Ḥanīfa, on the other hand, said that it is permitted if the oil is separated not mixed. Ibn Wahb, one of the disciples of Mālik, held the same opinion. The proof of those who prohibit it is the tradition of Jābir, that has preceded, that he heard the Messenger of Allāh, on the day of the conquest of Mecca, saying that, "Allāh and His Messenger prohibited wine, carrion and swine". The reliance of those who permit its sale is (on the basis) that when a thing has more than one benefit, the prohibition of one of its benefits does not prohibit the rest of its benefits, especially if the need for the disputed benefits is equivalent to that of the prohibited benefits. If from this principle wine (*khamr*), carrion (*mayta*) and swine (*khinzīr*) are excluded leaving the rest of the things prohibited for consumption, but useful in other ways, it follows that they can lawfully be sold for those other benefits, that is, if they consist of benefits other than consumption. If they consist of benefits other than consumption and are sold for such benefits, it is permitted.

It is narrated from ᶜAlī, Ibn ᶜAbbas and Ibn ᶜUmar that they permitted the sale of *najis* oil for illumination. In Mālik's school there is found the permission of illumination with it and also the making of soap from it, although its sale is prohibited. Al-Shāfiᶜī also permitted this along with the prohibition of charging a price for it. All this, however, is somewhat weak. It is said that in the school (of Mālik) there is another narration that prohibits illumination with it (the oil) and this is more in conformity with the basic rule, that is, the prohibition of its sale. They also disagreed in the school (of Mālik) about washing and heating the *najis* oil as being effective in removing the filth from it. There are two opinions (on this). The first stands for its permission while the second calls for its prohibition. They are based on the question whether oil, mixed up with the filth, is filthy in its essence or is it filth of contiguity. Those who consider it external, caused only by contiguity, deem it cleaned when washed and heated while those who consider it filthy do not consider it clean, even on heating and washing.

Among the well-known issues related to this topic is their disagreement about the permissibility of the sale of the milk of a woman when extracted. Mālik and al-Shafiᶜī permit this, but Abū Ḥanīfa does not. The reliance of those who permit its sale is on the argument that it is milk the drinking of which is permitted, thus by analogy upon the milk of all cattle, its sale is permitted. Abū Ḥanīfa is of the opinion that its permission is based on the necessity arising from the need of the child for it, but it is actually prohibited just as the flesh of human beings is prohibited and the principle is that milk follows the *ḥukm* of the flesh. The analogy is that human beings are animals whose flesh is not eaten and, therefore, the sale of their milk is not permitted. The basis of this analogy is the milk of swine and asses. The reason for their disagreement then is the conflict of similar analogies. The cases falling under this rule are many and we mention only the well-known issues so that they may be regarded as principles.

24.2.2. Chapter 2: Usurious Sales

The jurists agreed that usury is found in two things: sales and that which is established as a liability through sale, credit, or other transactions. *Ribā* which is incurred as a liability is of two kinds. First is that about which there is an agreement and this is the *ribā* of the period of *jāhiliyya* (the pre-Islamic age) which is prohibited, as they used to stipulate excess in loans and then delay the period (of repayment). They used to say, "Grant me further delay and I will increase it (the amount)". This is what the Prophet (God's peace and blessings be upon him) meant when he said at the farewell pilgrimage, "Take heed, verily the *ribā* of *jāhiliyya* is annulled and the first (claim) of *ribā* I cancel is that of ᶜAbbās ibn ᶜAbd al-Muṭṭalib". The second kind is "loss for hastening (the period)".[127] This is controversial and we will describe it in what follows.

The jurists unanimously agreed about *ribā* in sales that it is of two kinds, delayed (*nasīʾa*)[128] and stipulated excess (*tafāḍul*),[129] except what has been narrated from Ibn ᶜAbbās about his denial of *ribā* in excess because it is narrated from the Prophet (God's peace and blessings be upon him) that he said, "There is no *ribā* except in delay (*nasīʾa*)". The majority of the jurists, however, maintained that *ribā* runs in these two types, as it has been established from the Prophet (God's peace and blessings be upon him).

The discussion of *ribā* is covered in four sections:

Section 1: things in which neither excess nor delay is allowed, along with their corresponding underlying cause (ᶜ*illa*);
Section 2: things in which excess is allowed, but delay is not;
Section 3: those in which both are allowed;
Section 4: things that are considered as one category and those that are not.

24.2.2.1 *Section 1: Identification of Things in which neither Excess nor Delay is Allowed and the Explanation of the Underlying Cause*

We say: The jurists agreed that excess and delay, neither of them is permitted in any category, from among the categories mentioned in the tradition of ᶜUbāda ibn al-Ṣāmit,[130] except what is narrated from Ibn ᶜAbbās. The tradition of ᶜUbāda is that he said, "I heard the Messenger of Allāh (God's peace and blessings be upon him) prohibiting the sale of gold for gold, silver for silver, wheat for wheat, barley for barley, dates for dates, salt for salt, except through equal measure and immediate exchange. Thus, one who increases or causes to be increased has taken *ribā*". This tradition is explicit in the prohibition of excess in (exchange of) the same category of these things. With respect to the prohibition of delay (*nasīʾa*) in these (categories), it is established through more than one tradition and the best known among these is the tradition of ᶜUmar ibn al-Khaṭṭāb who said, "The Messenger of Allāh (God's peace and blessings be upon him) said, 'Gold for gold is *ribā* except from hand to hand (when exchanged immediately), wheat for wheat is *ribā* except from hand to hand, dates for dates is *ribā* except from hand to hand, barley for barley is *ribā* except from hand to hand' ". The tradition of ᶜUbāda includes the prohibition of excess in (exchange within) one category (of a thing) and also includes prohibition of delay in (the exchange of) two (different) categories out of these with the permission of excess (*tafāḍul*) in them. This is laid down in some of the authentic versions (of this *ḥadīth*) where after the prohibition of excess in these six it is stipulated, "Sell gold for silver as you like (but) from hand to hand and sell wheat for barley as you like but from hand to hand". All this is agreed upon by the jurists except (the case of) wheat for barley.

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[127] This is *daᶜ wa taᶜajjal*. The author explains it later as a discount granted for early payment of outstanding debt, before the expiry of the stipulated period. *See infra* note 134 and accompanying text.

[128] The reader must be cautioned about the distinction made by modern writers between *nasīʾa* and *nasāʾ*. They apply the term *nasīʾa* to mean *ribā* of the period of *jāhiliyya* and *nasāʾ* to mean delay in barter. The explanations of Ibn Rushd have influenced modern opinions, but he himself makes no such distinction and uses *nasīʾa* and *nasāʾ* interchangeably to mean "delay". The same application of the terms is found in the works of all earlier jurists.

[129] The two kinds of *ribā* are called *ribā al-faḍl* and *ribā al-nasīʾa* or *al-nasāʾ*.

[130] That is when two commodities of the same prohibited genus are exchanged.

They disagreed about what is besides these expressly mentioned six categories Some, including the Ẓāhirites, said, "Excess is prohibited only in each one of these six species and what is besides these, in it excess is not prohibited within the species". They also said that delay is prohibited in these six species irrespective of the species being similar or different. This is a matter agreed upon, that is, the prohibition of delay (*nasīʾa*) in them together with a difference of species, except what is narrated from Ibn ᶜUlayya who said, "When the species differ, delay and excess are both permitted, except in gold and silver". Thus, they have considered the proscription to be related to the essence of these six categories and as being a particular prohibition not extendable to other things.

The majority of the jurists of the provinces agreed that although it is a particular prohibition, it is extendable to other things generally, but they differed about the underlying general meaning on the basis of which these species were prohibited—that is the meaning of the ᶜ*illa* of prohibition of excess and prohibition of delay. The cause finally agreed upon by the astute among the Mālikites in the prohibition of excess, in four (out of six) species, is the exchange of the same species of food that can be stored. It is further said that it should be in the same storable category even if it is not food. The meaning of being stored is that it should be stored quite often. Some said that *ribā* also applies in rarely stored commodities. The *ʿilla* according to them in gold and silver for the prohibition of excess is the exchange of the same commodity as well as their being the most representative currencies and measure of value for non-durable property. This is the *ʿilla* that according to them is called deficient (*qāṣira*), as it is not applicable to things other than gold and silver. The *ʿilla* of the prohibition of delay (*nasīʾa*) according to the Mālikites in the four expressly mentioned commodities is being tasteful food and the characteristic of being stored, even though they are not of the same category. If, therefore, the categories are different, excess is permitted, but not delay (*nasīʾa*) and excess (*tafāḍul*) is permitted according to them in perishable food—that is, even when the category is the same—but delay is not permitted. The permission of excess is because of the characteristic of not being stored and it is said that storability is a condition for the prohibition of *tafāḍul* within the same species. The prohibition of delay in it (food) exists because it is a food that can be stored and we have said that the characteristic of food is always an *ʿilla* for the prohibition of delay in eatables.

The *ʿilla* of the prohibition of excess in the four species, according to Shāfiʿites, is only the characteristic of food along with being of the same category, while the *ʿilla* of prohibition of delay is the characteristic of food even though the species is different, as in Mālik's opinion. The *ʿilla* according to the Ḥanafites is the same in all six species and it is either measure or weight along with equivalence of species. The *ʿilla* of delay in these species is the difference of species except in brass and gold as there was consensus on the point that delay is permitted in them. Al-Shāfiʿi agreed with Mālik about the *ʿilla* of the prohibition of excess and delay in gold and silver, that is, that they are fundamental currencies and a measure of value for non-durable property which is the *ʿilla* according to them for the prohibition of delay when the species is different. When the species is the same excess is prohibited. The Ḥanafites for purposes of measure consider a quantity which is measured customarily. The *aḥkām* specific to *dīnārs* and *dirhams* will be taken up in the Book of *Ṣarf.* Here, however, the purpose is the elaboration of the various schools of thought of the jurists about the underlying causes of *ribā* proper in these species and the discussion of the evidence relied upon by each group.

We say: Those who restricted *ribā* to these six species belong to either of two groups: those who rejected analogy, that is the derivation of underlying causes from words and these are the Ẓāhirites; and those who rejected *qiyās al-shabah*. Because, in this case whosoever has linked the cases not expressly covered has done so by means of *qiyās al-shabah* not *qiyās al-ʿilla*, except what is related of Ibn al-Mājishūn that he considered here the value and said that the underlying cause of *ribā* is the protection of wealth, meaning thereby corporeal property. Qāḍī Abū Bakr al-Bāqillānī, on the other hand, considered *qiyās al-shabah* as weak and the *qiyās al-maʿna* as strong. He, therefore, used the latter, not finding *qiyās al-ʿilla* as useful. He linked only raisins with these six categories as he found raisins to be similar in meaning to dates. Each one of them, I mean, the users of analogy, has evidence for the derivation of the semblance (*shabah*) that he has taken into account for linking the species not expressly covered by the text with one of the (expressly mentioned) four species

The Shāfiʿites said about establishing the *ʿilla* of semblance (used by them) that when the *ḥukm* rests on a derived word (or noun) it indicates that this root meaning from which the word has been derived is the *ʿilla* of the *ḥukm*, as in the words of the Exalted, "As for the thief (*sāriq*), both male and female, cut off their hands".[131] Since the *ḥukm* rests on a derivative *sāriq*, then the *ḥukm* seems to be related to theft (*sariqa*) itself. Bearing in mind and taking into account the tradition of Saʿīd ibn ʿAbd Allāh in which he said, "I used to hear the Messenger of Allāh (God's peace and blessings be upon him) saying, 'food for food, like for like' "—it becomes evident that it is the characteristic of food upon which the *ḥukm* is based. The Mālikites, however, added to (the characteristic of) food, for the rule of *ribā*, either one more characteristic, the characteristic of being stored, according to *al-Muwaṭṭa*ʾ, or two characteristics, that of being stored and of being an essential nutrient and that is what was preferred by the jurists of Baghdad. Their argument in the derivation of this last *ʿilla* is that had it been the purpose (of the lawgiver) to stipulate food only as the *ʿilla* it would have been sufficient to indicate only one of these four catagories in the text. As a number of them have been mentioned, the intention is to indicate the meaning implicit within each one of them and the meaning found in all is the characteristic of being stored and of being basic essential foods. The lawgiver indicated through wheat and barley all food grains that can be stored and indicated through dates all sweet things that can be stored like sugar, honey and raisins and indicated through salt all condiments that can be stored and used for curing food. They also said that as the underlying meaning of *ribā* is that there should be no misappropriation and that property should be protected, it becomes imperative that this be in the means of sustenance and these are the essential foods.

The reliance of the Ḥanafites in the consideration of measure and weight is that the Prophet (God's peace and blessings be upon him) tied permissibility to a similarity in kind and a similarity in quantity and he tied up prohibition to a similarity in kind and a difference in quantity. This is evidenced in his (God's peace and blessings be upon him) directive to his official to Khaybar, as in the tradition of Abū Saʿīd and others, "except measure for measure, from hand to hand". They were, therefore, of the view that quantity, that is measure and weight, is effective in the *ḥukm* like the effectiveness of kind. Perhaps, they argued on the basis of traditions that were less well known, but in which there was a strong emphasis on the consideration of measure and weight. Among these *ḥadīths* thus narrated, there are some which included the catagories occurring in the *ḥadīth* of ᶜUbāda, but it has an addition stating that these are likewise measured and weighed. In some other traditions they narrated it is stated: 'measuring and weighing are likewise'. This matter, then, is explicit only if the traditions are authentic. However, when the matter is pondered over from the aspect of meaning, it becomes evident, Allāh knows best, that the underlying cause determined by them is the best of causes. This is because the aim of prohibiting *ribā* is (to avoid) the excessive injustice implicit in it and that justice in transactions demands an approximate equivalence. And therefore, when it became difficult to achieve equivalence in things of differing natures, *dīnārs* and *dirhams* were set up for their valuation, that is, assessment of their values. The things differing in nature—that is, those which cannot be (accurately) weighed or measured with fairness—are related to each other proportionately, I mean, the ratio of the price of a thing to its own genus and the ratio of the price of the other to its respective genus should be equal. The example of this fairness is that if a person exchanges a horse with dresses, then, the ratio of the price of this horse to horses should be the ratio of the price of the dress to dresses. Thus if the price of the horse is fifty then the price of the garment should also be fifty. It is so even if the number of a commodity is to be a multiple, like, for example, the number of garments priced as fifty is ten, the difference in number of these goods with respect to each other is then a necessity in a fair transaction, that is a fair equivalence of one horse must be ten dresses.

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[131] Qurʾān 5 : 38.

The case of things measured and weighed is not so, because they are not exactly dissimilar (in characteristics) and their uses are similar and there is no real necessity for one having one species to exchange it for the same species except by way of luxury. Fairness is achieved by equivalence in measure and weight, there being no preferences in utility. Prohibition of excess (*tafāḍul*) in these things prevents transaction in them as their benefits are not different and transaction is necessitated only when benefits differ. Therefore, two *ᶜillahs* prohibited excess in these measured and weighed things: first, to ensure fairness in them; and second, to prevent extravagant transactions. In the prohibition of excess in *dīnārs* and *dirhams* the underlying cause is readily apparent; their purpose is not profit, but the valuation of other things that have necessary benefits. Mālik has related from Saᶜīd ibn al-Musayyib that he used to consider the underlying cause of *ribā* in these (six) species as measure and the characteristic of food and that is an excellent meaning as food is a necessary ingredient of the essential commodities of human beings. It appears that the preservation of property and the prevention of *ṣaraf* (extravagance) is more important in what is an essential commodity than in what is not. It is related from some of the disciples of the Companions that he used to apply the prohibition of *ribā* to those species in which *zakāt* is imposed; and according to others it is utility, that is value (being *māl*) and that is the opinion of Ibn al-Mājishūn.

24.2.2.2. *Section 2: Identification of Things in which Excess is Permitted, but Delay is Not*

It follows from the above that, according to Mālik and al-Shāfiᶜī, the underlying cause of prohibition in usurious commodities is food. In non-usurious commodities, which are not food, the underlying cause for prohibition of *nasīʾa*, according to Mālik, is similarity in kind and identical benefits along with *tafāḍul*. For al-Shāfiᶜī there is no prohibited delay (*nasīʾa*) in non-usurious commodities. For Abū Ḥanīfa, the underlying cause for the prohibition of delay (*nasīʾa* or *nasāʾ*) is measure in usurious commodities and in others sameness of kind irrespective of accompanying excess. Ibn al-Qāsim has preferred an opinion related from Mālik that he prohibited delay in these (exchanges of similar kinds) as it was, according to him, from the category of loans carrying benefits.

24.2.2.3. *Section 3: Identification of Property in which Both (excess and delay) are Permitted Simultaneously*

Those in which both things are permitted simultaneously, I mean, excess and delay, are non-usurious commodities according to al-Shāfiᶜī. According to Mālik it is that which is not usurious, unless it is the same species and an exactly similar kind. According to Abū Ḥanīfa, it is permissible, unless they are of the same species, whether similar or not. Mālik prohibits transactions involving excess in usurious commodities and the *ḥukm* of delay in other commodities for him depends on the similarity of benefits and their disparity. If the benefits differ he considers them (two) separate kinds even though the name is the same, while Abū Ḥanīfa takes into consideration the name and so also al-Shāfiᶜī. For al-Shāfiᶜī, however, sameness of kind is not effective except only in usurious commodities, that is, he prohibits excess in them and it is not for him the essential underlying cause of delay. This, then, is the gist of the opinions of these three jurists in three sections.

The things in which delay is not permitted are of two kinds: those in which excess is not permitted and their explanation has preceded; and those in which excess is permitted. With respect to the things in which excess is not permitted, the underlying cause of the prohibition of delay is food, according to Mālik. According to al-Shāfiʿī it is food alone. According to Abū Ḥanīfa, it is measurable and weighable food. Thus, if similarity in kind is combined with food, excess is prohibited according to al-Shāfiʿī and if a third characteristic is added, that of being stored, excess is prohibited according to Mālik. When the kind is dissimilar, excess is permitted but delay is prohibited.

Things in which excess is not prohibited are of two kinds according to Mālik: edible and non-edible. Delay is not permitted according to him in edible commodities and the underlying cause is food. Delay, according to him, is not permitted in non-edible commodities if the benefits are identical and when (the transaction is) accompanied by excess. Thus, one goat cannot be exchanged with a delay for two goats, except when one is meant for milking (is lactiferous) and the other for eating. This is his well-known opinion. It is said that he considered similarity of benefits and not excess. Accordingly, it would not be permitted to exchange a lactiferous goat for another lactiferous goat with accompanying delay. When the benefits differ then both excess and delay, according to him, are permitted even though the kind is one. It is also said that he considered similarity in names along with a similarity in benefits, but it is better known that he did not, then again it is said that he did.

According to Abū Ḥanīfa, what is taken into account for the prohibition of delay, besides that in which excess is not permitted, is similarity in kind irrespective of the benefits being identical or different. Thus, a goat cannot be exchanged for a goat nor for two along with accompanying delay even though the benefits are different. According to al-Shāfiʿī, on the other hand, all that in which excess is not permitted for the same kind, delay is permitted in it. Thus he permits (the exchange of) a goat for two goats exchanged with a delay or immediately, so also a goat for a goat. The evidence of al-Shāfiʿī is the tradition of ʿAmr ibn al-ʿĀṣ that "the Messenger of Allāh (God's peace and blessings be upon him) ordered him to acquire through the contracts of *ṣadaqa* (*zakāt*) a camel for two toward *ṣadaqa*". He said this is excess in the same genus along with delay. The Ḥanafites argued on the basis of the tradition of al-Ḥasan related from Samura, "that the Messenger of Allāh (God's peace and blessings be upon him) proscribed the sale of an animal for an animal". He said that this indicates the effectiveness of genus for identical categories in the case of delay.

Mālik's reliance in the consideration of the prohibition of delay, when the purposes (benefits) are identical, is the closing of the means (*sadd al-dharīʿa*) (of *ribā*); there is no use in such a transaction except that it is from the category of prohibited loans which carry benefits. It is said that this is an independent principle with him. The Kūfīs, it is said, believed that the sale of an animal for animal is not permitted with delay whether the genus is the same or is different, on the apparent meaning of the tradition of Samura. Thus it appears that al-Shāfiᶜī formed his opinion basing it on the tradition of ᶜAmr ibn al-ᶜĀṣ, while the Ḥanafites followed the tradition of Samura after placing their interpretation on it, as the apparent meaning demands that the exchange of an animal for an animal is not permitted with a delay, irrespective of whether the genus is the same or different. Mālik appears to derive his opinion through reconciliation, limiting the tradition of Samura to a similarity of purposes (benefits) and applying the tradition of ᶜAmr ibn al-ᶜĀṣ to the situation when they are different. The narration of al-Ḥasan from Samura is controversial though al-Tirmidhī has declared it *ṣaḥīḥ*. Mālik seeks support from the tradition related by al-Tirmidhī from Jābir who said, "Two animals for one is not proper with delay (*nasīʾa*) and there is no harm if it is from hand to hand". Ibn al-Mundhir said that it is established that "the Messenger of Allāh (God's peace and blessings be upon him) purchased a slave in exchange for two black slaves and purchased a female slave for seven heads". On the basis of this tradition, the prohibition of a delayed sale of an animal for an animal appears to be a principle independent in itself and not based on the blocking of the means (*sadd al-dharīᶜa*). The jurists disagreed in the case of sale involving usurious commodities, whether actual delivery within the session of sale (*majlis*) before separation is a requisite condition for that the sale of which is not permitted with a delay (*nasāʾ*); although they agreed about the stipulation of this as a condition in the case of currencies. The basis was the saying of the Prophet (God's peace and blessings be upon him), "Do not sell anything not present for that which is present". Those who have stipulated delivery during the session as a condition, considered it similar to *ṣarf*, while those who did not stipulate it said: "possession before parting is not a condition in sales except when there is legal evidence to support this and as there is evidence only in the case of *ṣarf*, the remaining usurious commodities retain the original rule".

24.2.2.4. *Section 4: Identification of Property Considered a Single Species and that which is not*

Under this topic they disagreed on a large number of issues about what can be considered a single species, within which there can be no excess (*tafāḍul*) and what cannot be considered a single species. Of these we will mention the best known. Similarly, they disagreed about the characteristics of a uniform species within which excess is prohibited and whether it matters if it is good or bad quality, or dried or fresh.

Among the things disputed, whether they are a single species or two different commodities, are wheat and barley. Some said they are one species of food; while others said they are two species The first opinion is that of Mālik and al-Awzāᶜī and it is related by Mālik in *al-Muwaṭṭa*ʾ on the authority of Saʿīd ibn al-Musayyib. The second is that of al-Shāfiʿī and Abū Ḥanīfa and their reliance is on transmission and analogy. The transmission is the saying of the Prophet (God's peace and blessings be upon him), "Do not sell wheat for wheat, barley for barley, except like for like (in similar quantities)". Thus he considered them two categories. Similarly, in some of the narrations of the tradition of ʿUbāda ibn al-Ṣāmit, it is said, "Sell gold for silver as you like, wheat for barley as you like and salt for dates as you like, but from hand to hand". It is related by ʿAbd al-Razzāq and Waqīʿ from al-Thawrī and considered *ṣaḥīḥ* by al-Tirmidhī. According to analogy they are two different things with different names and benefits and thus it is necessary that they be two separate species. The basis (of the analogy) is gold and silver and all other things with different names and benefits. The reliance of Mālik is on the practice of his ancestry (*Shaykhs*) in Medina. His disciples also relied on transmission and analogy. The transmitted text is that the Prophet (God's peace and blessings be upon him) said, "Food for food, like for like". They maintained that the term "food" includes wheat and barley, but this is a weak argument. It is a general term elaborated by *ṣaḥīḥ* traditions. By way of analogy, they reckoned a large number of things to have identical benefits and excess (*tafāḍul*) by agreement is not permitted in those having identical benefits. *Sult* (barley without shell) and barley according to Mālik are one species. Lentils are all one category according to him for purposes of *zakāt*, but about sales there are two narrations from him: first, they are one category; second, they are different categories. The reason for the difference is the conflict of the similarities and benefits and their disparity. Those who were inclined toward similarity said they are one species, while those who were inclined toward disparity said they are two kinds or more. Thus rice, millet and *jawār* are one category for him (Mālik).

24.2.2.4.1. Issue 1: Disagreement about the single category of meat in which excess is not permitted

They disagreed regarding the single category of meat in which excess is not permitted. Mālik said meats are of three kinds. The meat of all four-footed animals is of one species; the meat of those in the sea is one species; and the meat of birds is one species too. Among these three different species excess is permitted. Abū Ḥanīfa said each one of these represents many different species and excess is permitted in them, but not within a specific single species. Al-Shāfiʿī had two opinions, one of which was like that of Abū Ḥanīfa and the other that they are all one species. Abū Ḥanīfa permitted the exchange of mutton with beef with excess, but Mālik did not permit it. Al-Shāfiʿī did not permit the exchange of bird meat with mutton with an excess, but Mālik did. The reliance of al-Shāfiʿī is on the saying of the Prophet (God's peace and blessings be upon him), "Food for food, like for like" and on the argument that with the departure of life the qualities of distinction are done away with and then the term "meat" applies equally to all these species. The reliance of the Mālikites is on the fact that these are separate genera which necessitates that they be separate kinds of meat. The Ḥanafites considered the difference within one genus out of these and said that: "(ignoring) the difference between different kinds (of meat and) animals, that is within one genus, is as if you would say that the difference in birds is commensurate with the difference that exists between fruit, wheat and barley". On the whole each group claims that the relative difference that exists between the things expressly covered (by the text) is the same difference it establishes for meat. The Ḥanafites are on stronger ground about meaning, as the prohibition of excess exists because of the similarity of benefits.

24.2.2.4.2. Issue 2: Disagreement about the sale of a living animal with a slaughtered animal

Within this discussion they also disagreed about the sale of an animal (living) with a carcass (slaughtered), into three opinions. First, it is not permitted at all; this is the opinion of al-Shāfiᶜī and al-Layth. Second, it is permitted in different genera in which excess is permitted, but it is not permitted in similar genera, that is in usurious commodities, because of the uncertainty by way of *excess and this is in those the purpose of which is consumption.* This is the opinion of Mālik. Thus, it is not permitted to exchange a slaughtered goat with a living animal meant for consumption. This is so according to him in consumable animals, so much so that he does not permit the exchange of a living animal with another if the intention is to consume one of them. This falls under this head, that is, its prohibition is in view of *ribā* and *muzābana*. The third opinion is that it is permitted absolutely. This is the opinion of Abū Ḥanīfa.

The reason for their disagreement is the conflict between principles underlying this topic and a *mursal* tradition traced to Saᶜīd ibn al-Musayyib. Mālik related from Zayd ibn Aslam from Saᶜīd ibn al-Musayyib that "the Messenger of Allāh (God's peace and blessings be upon him) proscribed the sale of an animal for meat". Those for whom the tradition does not clash with any of the principles of sale that impose prohibition adopted the tradition's view, while those who view that the principles oppose it are obliged to follow one of two courses: to prefer the tradition and make it an additional principle independent in itself; or to reject it because of its conflict with the principles. Al-Shāfiᶜī preferred the tradition, while Abū Ḥanīfa preferred the principles. Mālik reconciled it with the sale principles and considered sale in it under the category of *ribā*, that is, the sale of usurious commodities with their sources, like sale of oil for olives. The discussion of this principle will come later. This is what the jurists define as *muzābana* and it touches *ribā* from one aspect and *gharar* (hazard, uncertainty) from another. It is prohibited in usurious commodities from the aspect of *ribā* and *gharar* and in other commodities from the aspect of *gharar* alone, the cause of which is uncertainty external to the original commodity.

24.2.2.4.3. Issue 3: Sale of flour for wheat

Within this discussion is the sale of flour for wheat, like for like. The preferred opinion of Mālik grants its permission and it is found in his *al-Muwaṭṭa*ʾ. It is also narrated from him that it is not permitted and that is the opinion of al-Shāfiʿī, Abū Ḥanīfa and Ibn al-Mājishūn from among the disciples of Mālik. Some of the disciples of Mālik said that this does not depict a real conflict in his opinions. The narration of prohibition applies when the consideration of likeness is by measure and the narration of permissibility applies when the consideration is by weight. Mālik considers measure and weight in those that are customarily measured and weighed and count in what is not customarily measured and weighed.

They disagreed under this discussion about that which involves workmanship and is originally usurious, like bread for bread. Abū Ḥanīfa said there is no harm in the sale of this with excess and like for like as it is no longer usurious. Al-Shāfiʿī said it is not permitted even like for like, not to say excess, as workmanship has converted it in a manner that renders uncertain its measures through which likeness can be assured. The preferred opinion of Mālik about bread is that it is permitted like for like and it is said that it is permitted with excess and equality. However, dough for dough is permitted, according to him, like for like. The reason for disagreement is whether workmanship transfers (a thing) from the genus of usurious commodities and if it does not transfer it, does it enable (the measurement of) exact likeness. Abū Ḥanīfa said it does transfer it while Mālik and al-Shāfiʿī said it does not. The latter two disagreed about the possibility of likeness in it. Mālik used to permit the consideration of likeness in bread and wheat through estimation in addition to weight. However, when workmanship did not affect one of the usurious commodities, but did the other, Mālik was of the view in most of them that workmanship transfers them from the genus, that is, from the same genus, thus permitting excess.

In others he does not hold this view and the details of his opinion in it are difficult to distinguish. Thus roasted and cooked meat are from the same genus, according to him and baked and unbaked wheat are two separate genera. His disciples have sought to make distinctions in this, but apparently there is no underlying rule in it, in his school, under which his opinions can be gathered. Al-Bājī has tried to gather them in *al-Muntaqā*. Similarly, it is difficult to gather all benefits that, according to him, obligate a similarity between individual things within a genus that is traded and to distinguish them from those benefits that do not (obligate such similarity), that is between animals, goods and plants (vegetables). The reason for the difficulty is that when a person is questioned about similar things at different times and there is no rule that he is applying for distinction except what a preliminary examination yields to him immediately, he comes up with different answers. When someone coming after him desires that these answers be reconciled under one rule and principle it becomes difficult for him. You can ascertain this from their books. These, then, are the most important (examples) in this topic.

24.2.2.5. *Section 5: Sale of a Usurious Moist (fresh) Commodity for a Dry One of its own Genus*

In their disagreement about the sale of a usurious (fresh) moist commodity for a dry one within its own genus with similarity of quantity and immediate exchange, the cause is what has been narrated by Mālik from Saᶜd ibn Abī Waqqāṣ that he said, "I heard the Messenger of Allāh (God's peace and blessings be upon him) being asked about the purchase of dried dates with fresh dates. The Messenger of Allāh (God's peace and blessings be upon him) said, 'Do the fresh diminish (in weight or volume) when they dry up?' They said, 'Yes'. He then prohibited this (sale)". Most of the jurists, including Mālik, al-Shāfiᶜī and others, followed this and said the sale of dry dates with fresh dates is not permitted at all. Abū Ḥanīfa said it is. His two disciples Muḥammad ibn al-Ḥasan and Abū Yūsuf disagreed with him. Al-Ṭaḥāwī had the same opinion as Abū Ḥanīfa.

The reason for their disagreement is the conflict of the apparent meaning of the tradition of ᶜUbāda and others with this tradition, as well as their disagreement about authenticating it. The tradition of ᶜUbāda stipulates, for permissibility, only the existence of similarity and equality and this apparently deals with the immediate mode of the contract, not with the ultimate condition. Those who have preferred the tradition of *ribā* and paid more attention to this apparent meaning, reject this tradition, while those who have considered this tradition as a principle independent in itself said that it is an additional rule explanatory of the traditions of *ribā*. The tradition is also disputed by scholars about its authenticity and it has not been recorded by the two *Shaykhs* (al-Bukhārī and Muslim). Al-Ṭaḥāwī said ᶜAbd Allāh was contradicted as Yaḥyā ibn Kathīr has related it from him, saying "that the Messenger of Allāh (God's peace and blessings be upon him) proscribed the sale of fresh dates for dried, with a delay". He (al-Taḥāwī) said that the person who has related this tradition from Saʾd ibn Abī Waqqāṣ is unknown (*majhūl*). The majority of the jurists, however, inclined toward acting according to it. Mālik has said in his *al-Muwaṭṭaʾ*, on the basis of analogy and the underlying cause of this tradition, that trading every fresh thing with a dried one of its genus is prohibited; that is, the prohibition of similarity as in dough for flour or dried meat with fresh. This according to Mālik is one of the kinds of prohibited *muzābana*, while the contract of *ʿariyya* is an exception from this principle. The same is said by al-Shāfiʿī. Prohibited *muzābana*, according to Abū Ḥanīfa, is the sale of dried dates on the ground with those on tree tops because of the uncertainty about the equality of the quantity of each, that is about their equivalence. Al-Shafiʿī extended this *ʿilla* to the case of sale of two fresh things, thus he does not allow the sale of fresh dates for other fresh dates in equal quantities, nor dough for dough with equivalence. He believed that excess (in one) would be found when they dried up. He was opposed in this by most of those who favoured this tradition.

Their disagreement about the sale of a thing of good quality for another of bad quality within the usurious species is conceived as the sale of a thing of medium quality with two others, one of a higher and the other of an inferior quality. For example, two measures (*mudd*) of dry dates of medium quality are exchanged for two measures of other dates, one of which is better than the medium and the other of a lesser quality. Mālik rejects this as there is a suspicion that two measures of medium quality are being exchanged for a measure of good quality only, while the measure of bad quality is being added to make permissible what is not. Al-Shafiʿī agrees with him in this, but the prohibition according to him is not because of suspicion as he does not attach importance to it. It appears that he considers excess (*tafāḍul*) in quality. There is no equivalence in quality as the excess of the good quality over the medium is not the same as the deficiency in the bad compared to the medium. Related to this subject is their disagreement about the permissibility of the sale of a usurious commodity with a commodity like it plus goods or *dīnārs* or *dirhams*, as the commodity to which goods are added is of a lesser quality than the other individual commodity, or there are with each one of them goods and two kinds of commodities in different quantities. The example of the first is the sale of two measures of dates with one measure (of dates) and *dirhams* while that of the second is the sale of two measures of dates and a dress with three measures of dates and *dirhams*. Mālik, al-Shāfiʿī and al-Layth said that this is not permitted while Abū Hanīfa and the Kūfīs said it is. The reason for disagreement is whether the usurious commodity and the opposing goods must be equivalent in value or whether the consent of the parties is sufficient. Those who considered equivalence in value said it is not permitted due to uncertainty, as if the goods are not equal in value to the difference of one usurious commodity over the other, excess (*tafāḍul*) would be the necessary consequence. The example of this is the exchange of two measures of dates with one measure of dates and a dress in which it is necessary that the value of the dress be equal to one measure, otherwise excess is the necessary outcome. Abū Ḥanīfa deems sufficient the consent of the parties. Mālik considers prevention of the means in these, as one of the parties has made this a means of selling one commodity with an excess. These are their well-known discussions in this category.

24.2.3. Sub-chapter: Sales through Usurious Means

Here is a situation which the parties confront when one of them stipulates excess or loss, through a negotiated rescission. The parties may enter unintentionally into an injurious sale, if one of them purchases from his companion something that he is selling with an excess, or with a loss. For example, a person sells to another goods for ten *dīnārs* in cash and then purchases the same goods from him for twenty *dīnārs* on credit. When the the second sale is related to the first, it becomes apparent that one of them has paid ten *dīnārs* in exchange for twenty with a delay. Such transactions are called deferred sales (*buyū*ᶜ *al-ājāl*). We shall mention, out of these, only the issue of the negotiated rescission (*iqāla*) as related to the issue of delayed sales for the purpose of this book is the extraction of principles not detailed opinions.

24.2.3.1. Issue: Negotiated rescission between buyer and seller

The jurists did not disagree about the case of a person who sells, for example, his slave for a hundred *dīnārs* on credit and then regrets the sale and asks the buyer to return the sold property in lieu of which he gives the buyer ten *dīnārs* cash or credit. All the jurists said that this is permitted and that there is no harm in it. The reason is that *iqāla* involving increase or decrease, according to them, is an independent transaction and there is no harm if a person sells a thing for a certain sum and then buys it back for a greater value. In this transaction the original seller purchased the slave for one hundred (units), that were due and ten units extra,[132] cash or credit. On the other hand, if the buyer, in this example, regrets the sale and demands *iqāla* so that he gives to the seller ten units cash or credit for a period greater than that in which a hundred (*dīnārs*) are due, then in this the jurists disagreed. Mālik said that it is not permitted, while al-Shafiʿī said that it is. The reason why Mālik disapproved it is that it is a means to an end in which the intention is the exchange of gold for gold with a delay and the sale of gold plus property for gold—the buyer having paid ten units and the slave for the hundred for which he was liable. An element of a loan also enters this transaction; it is as if the buyer has sold the slave to him for ninety and considered as a loan the extra ten *dirhams*, possession of which had to be taken by him from himself, on his own behalf. *Al-Shafiʿi considered all this as permitted*, *as it is an independent* sale. There is no difference, according to him, between this issue and the issue in which an individual is a creditor to another for a hundred *dīnārs* and he buys from the debtor a slave worth ninety *dīnārs* taking immediate payment of ten *dīnārs* that are due. He said that suspicion is not to be cast on the acts of people.

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[132] The term being used by the Author here is *mithqāl*—a unit of measure for gold.

If the first sale was for cash, then, there is no dispute that it is permitted as it does not amount to a sale of gold for gold with a delay. Malik, however, disapproved it for those who practice *ʿīna* (dual sale)—that is granting of loans to people—as it becomes a means for money lending in most of the cases and the parties reach it through what is beyond sale and is not genuine. The sales that are defined as delayed sales are those in which one individual sells goods for a price with a delay and then purchases them back for a different price either for cash or for credit.

24.2.3.2. Nine issues, two of which are disputed

The person who sells a thing with a delay and then purchases it, will purchase it with delay of a period ending at the same time (as the sale), or prior to it, or later. In each of these three cases, he will purchase the thing for the same price for which he has sold it, or for a lesser price, or higher. Two out of these (nine) cases are disputed and these are when he purchases during the period, for cash, at a price that is less than the price taken, or that he purchases it for a higher price with a period of delay lengthier than that of the sale. According to Mālik and the majority at Medina, this is not permitted. Al-Shafiʿī, Dawūd and Abū Thawr said it is permitted. The reasoning of those who disallowed it is based upon the consideration of the relation between the two sales. They suspected that the intention is to pay a greater amount for the sake of a delay and this is prohibited *ribā*. A false form (of the transaction) was, therefore, concocted so that the parties could obtain *harām* and it is the same as a person saying to another, "Lend me ten *dīnārs* for one month and I will repay you twenty", to which he replies, "This is not permitted, but I will sell you this donkey for twenty *dīnārs* on credit for one month and then buy it back from you for ten *dīnārs* cash". In the rest of the cases of the problem there is no suspicion (of an underlying intention). There is no allegation if he pays more than the sale price for a period shorter than the first, or if he pays less than the sale price for a lengthier period. The proof of those who hold this opinion is the *hadīth* of Abū al-ᶜĀliya from ᶜĀ᾿isha that "I heard her, when a slave-woman—who bore a child of Zayd ibn al-Arqam—said to her 'O *Umm al-Mu᾿minīn,* I purchased from Zayd a slave of his at the time of *'aṭā'* (the periodic governmental payment) for eight hundred. He then needed his money so I bought the debt back from him before the termination of the period for six hundred [cash]". ᶜĀ᾿*isha said*, "*Evil is what you sold and evil is what you* bought. Convey this (my words) to Zayd that his (participation in) *jihād* with the Messenger of Allāh (God's peace and blessings be upon him) is nullified unless he repents". She (the woman) said, "Do you think it will be proper if I relinquish the second sale and just take back the six hundred?" ᶜĀ᾿isha then replied, "Yes—He unto whom an admonition from his Lord cometh and (he) refraineth (in obedience thereto), he shall keep (the profits of) that which is past'."[133] Al-Shafiᶜi and his disciples said that the *ḥadīth* of ᶜĀ᾿isha is not established and Zayd himself contradicted her and when the Companions differ among themselves, our method is to resort to analogy (*qiyās*). An opinion similar to that of al-Shāfiᶜī is also attributed to Ibn ᶜUmar.

If a defect develops in the subject-matter of sale in the possession of the first buyer, then al-Thawrī and a group from among the Kūfīs permitted its seller to have a period of delay for buying it with cash at a lesser price. There are two narrations from Mālik on this. The form that Mālik considers in these sales is that they may be misused to take the shape of "postpone it for me and I will increase (the amount) for you", or sale that is not allowed with an excess, or sale not permitted with a delay (*nasī᾿a*), or sale with a loan, or gold in exchange for gold, or loss (discount) for hastening (the period), or sale of food before possession, or sale and *ṣarf.* All these are the bases of *ribā*.

In relation to this is also discussed their disagreement about the person who sells food before he has taken possession of it. This was prohibited by Mālik, Abū Ḥanīfa and a group of jurists. It was permitted by al-Shāfiᶜī, al-Thawrī, al-Awzāᶜī and a group. The proof of those who disapproved of it is that it resembles the sale of food for food with a delay (*nasī᾿a*). Those who permitted it did not view it as such in view of the absence of an intention to do so. Within this is also the disagreement about one who purchases food for cash to be delivered after a fixed period. When the period expires the seller does not have the food that he was to deliver, so he buys food from the purchaser for a price that he pays him in place of the food that he was under an obligation to deliver. Al-Shāfiᶜī permitted this saying, "There is no difference in buying food, that he was under an obligation to deliver, from someone other than the buyer, or from the the buyer himself". Mālik disallowed this, viewing it as a means to the sale of food before its possession is taken. As he (the seller) delivered food to him (the buyer), for which he was liable, it amounts to sale before possession is taken.

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[133] Qur᾿ān 2 : 275

The form of *dharīʿa* (means) in this is that a person purchases food from another for a fixed period (of delivery) and when the period expires the seller says, "I do not have food, but I will purchase from you the food I owe you". The other says, "This is not proper as it is the sale of food before possession, but buy food from me (as a separate sale) and I will deliver it to you". This, then, develops into what we have mentioned, that is, he delivers the food that he acquires from him and the price he pays is the price of the food that he owed. Al-Shāfiʿī, as we have said, does not give weight to allegations (of using sales as a means), but looks at what is prohibited and what is permitted out of sales according to the stipulations of the parties and what they express through their own words and acts. This is based on the consensus (*ijmaʿ*) of the jurists, that is, if he says, "I will sell to you these *dirhams* for similar *dirhams* postponed for a period of a month or a year", it is not permitted. If he says, "lend me *dirhams* and allow me a certain period", say a month, it is permitted. Thus there is no disagreement among them except the form (*sīgha*) of words of sale and accompanying intention and the form of the words of *qarḍ* (loan) with the accompanying intention.

As the bases of *ribā*, mentioned earlier, are five—grant me postponement and I will increase the amount; excess (*tafaḍul*); delay (*nasīʾa*); loss for hastening (the period); sale of food before possession—it is thought that this sale falls under these categories, as the person entering it pays some *dīnārs* and takes back more, without any formality or a liability for compensating (loss). It is, therefore, necessary that we mention these two (remaining) bases here.

Daʿ wa taʿajjal (or loss for hastening the period of payment) was permitted by Ibn ʿAbbās out of the Companions and Zufar out of the *fuqahāʾ*. It was prohibited by a group, among them are Ibn ʿUmar from the Companions and Mālik, Abū Ḥanīfa, Al-Thawrī and a group from among the *fuqahāʾ*. Al-Shāfiʿī has different opinions in this. Mālik and most of those who reject *daʿ wa taʿajjal* consider its form[134] to be that a person who has a debt outstanding for a certain period, hastens the period by taking payment even though the amount paid is less than what was due to him. The reliance of those who did not permit hastening for loss is that it resembles excess with a period which is prohibited, by agreement. The basis of this resemblance is that he has rendered a part of the price equivalent to and in exchange for the period on two counts, that is, when he increased the period he increased the price proportionately and when he reduced the period he reduced the price proportionately. The reliance of those who permit it is what is related from Ibn ᶜAbbās "that some people came to the Prophet (God's peace and blessings be upon him) from Banū Naḍīr, when he ordered their expulsion and said, 'O Prophet of Allāh, you have ordered our expulsion, but we have debts outstanding against people with remaining periods'. The Messenger of Allāh (God's peace and blessings be upon him) said, 'Decrease and hasten' ". The reason for disagreement is the conflict of *qiyās al-shabah* with this tradition.

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[134] *See supra* note 127 and accompanying text. It may be noted that this transaction resembles the all too familiar discounts given by traders to their debtors these days for making early payments. Another example may be the concessions given by banks for the recovery of bad debts, both in interest and capital.

24.2.4. Proposition: Sale of Food before Possession

The jurists are in agreement over the disapproval of the sale of food before possession,[135] except what is related from ᶜUthmān al-Battī. The jurists agreed on this because of the establishment of its proscription from the Messenger of Allāh (God's peace and blessings be upon him) through the narration of Mālik, from Nāfiᶜ from ᶜAbd Allāh ibn ᶜUmar, that the Messenger of Allāh (God's peace and blessings be upon him) said, "He who purchases food must not sell it till he takes possession of it". They disagreed over this issue on three points. First is property about which possession is stipulated; second are benefits for the sale of which possession is stipulated; third is the difference between what is sold from food in heaps (by estimate) and that sold by measure. In this, then, there are three sections.

24.2.4.1. *Section 1: Subject-Matter of Sale for which Possession is Stipulated*

There is no dispute in Mālik's school about the permission of selling things, other than food, before possession and there is also no dispute in his school about usurious food that possession is a condition for its sale. Mālik has two opinions about non-usurious food. First, that it is disallowed (without prior possession). This is better known and is also the opinion of Aḥmad and Abū Thawr, though these two authorities stipulated that food should be measured and weighed. Second, that it is permitted. For Abū Ḥanīfa possession is a condition for all kinds of sold property, except immovable property like houses and real estate. For al-Shāfiᶜī, possession is a condition for all kinds of property. This is also an opinion of al-Thawrī and is related from Jābir ibn ᶜAbd Allāh and Ibn ᶜAbbās. Abū ᶜUbayd and Isḥāq said that every thing that is not measured or weighed may be sold without harm before possession and they stipulated possession for weighable and measurable commodities. This was also the view of Ibn Ḥabīb, ᶜAbd al-ᶜAzīz ibn Abū Salama and Rabīᶜa, however, they added counting to measure and weight. Thus, for the stipulation of possession, seven opinions are available. First, in usurious food only; second, in all food without qualification; third, in measurable and weighable food; fourth, in each movable thing; fifth, in every thing; sixth, in all measurable and weighable things; and seventh, in measurable, weighable and countable things.

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[135] The implications of this discussion have a direct bearing on the transactions of the commodity exchanges, especially "futures" transactions.

The reliance of Mālik in disapproval, besides those commodities expressly covered by the text, is upon the indirect indication of the text (*dalīl al-khiṭāb*) in the foregoing tradition. The reliance of al-Shāfiᶜī, for generalizing possession for all sales, is the generality of the saying of the Prophet (God's peace and blessings be upon him), "It is not permitted: to sell with a loan; to profit without a corresponding liability (for loss); or to sell what you do not possess". This relates to the topic of sale without liability for loss and is based on his opinion that possession is a condition for the subject-matter of sale to enter into the liability of the buyer. He also argued on the basis of the tradition of Ḥakīm ibn Ḥizām, who said, "I said, O Messenger of Allāh, 'I am involved in sale transactions, what is permitted to me in them and what is prohibited?' He said, 'O son of my brother, when you buy something, do not sell it till you take possession of it' ". Abū ᶜUmar said that "the tradition of Ḥakīm ibn Ḥizām has been related from Yaḥyā ibn Abū Kathīr from Yūsuf ibn Mahak and ᶜAbd Allāh ibn ᶜAsmaᵓ and he said that 'I do not know of a fault in Yūsuf ibn Mahak and ᶜAbd Allāh ibn ᶜAsmaᵓ, except that only a single person relates from them' ". This, in fact, is not a fault even though it has been looked down upon by a group of traditionists. From the aspect of analysis, sale without possession raises a doubt of *ribā*. Abū Ḥanīfa exempted what is movable and transferable, in his view, from what is immovable and non-transferable, for transfer of possession, according to him, is possible by making the property available. Those who considered measure and weight did so because of their agreement that measurable and weighable things do not move out of the liability of the seller to that of the buyer except by actual measuring and weighing and the sale of that for which he (the seller) is not liable is not permitted.[136]

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[136] This is based on the well-known principle of Islamic law: *al-kharāj biᵓl-ḍamān,* which means that entitlement to profit or gain depends upon the corresponding liability for loss. If a person has no liability for bearing a loss in a transaction, he cannot have the profits arising from such a transaction. He becomes liable for loss only when the subject-matter moves into his possession. Thus, he is not allowed to sell the commodity before it moves into his possession. This principle plays a major role in the Islamic law of contract.

24.2.4.2. *Section 2: Benefits for the Sale of which Possession is Stipulated and those for which it is not*

For the consideration of this distinction contracts are divided first into two kinds. First are the contracts of *muʿāwaḍa* or the commutative contracts and second are those that do not have an *ʿiwaḍ* (counter value), like gifts and charity. The commutative contracts are divided into three kinds. First are those that have as their object the determination and measurement (of the subject-matter) and these are sales, hire, dower, settlements and compensation of property because of *taʿaddī* (tort; delict; wrongful act). The second kind does not involve the intention of mutual exchange, but is undertaken by way of compassion and this is *qarḍ* (charitable loan). The third kind involves both aspects, that is, the intention of mutual exchange as well as compassion and includes partnership (*sharika*), negotiated rescission (*iqāla*) and resale at cost price (*tawliya*). The result of the opinions of the jurists on this topic is as follows.

There is no dispute about the stipulation of possession in commutative sales and these are of those things for which each individual jurist has stipulated possession. Those that are purely by way of compassion, I mean *qarḍ*, there is no dispute about them also that possession is not a condition, as it is permitted to an individual to sell a *qarḍ* before possessing it. Abū Ḥanīfa has also exempted those that are due to the compensation of dower or due to *khulʿ*. He said, "Their sale before possession is permitted". I do not know of any dispute in this (Mālik's) school about contracts that are ambivalent between the intent of compassion and mutual exchange and these are *tawliya, sharika* and *iqāla,* that they are permitted before possession as well as after it.

Abū Ḥanīfa and al-Shāfiʿī said *sharika* and *tawliya* are not permitted before possession. *Iqāla* is permitted, according to them, as it is a rescission of sale before possession and not a sale. The proof of those who stipulated possession in all commutative contracts is that it amounts to a prohibited sale. Mālik, however, exempted *tawliya, iqāla* and *sharika* on the basis of *āthār* and legal analysis. The *athar* is what is related as a *mursal* from Saʿīd ibn al-Musayyib, that the Messenger of Allāh (God's peace and blessings be upon him) said, "He who purchases food must not sell it, till he takes possession of it", except what is by way of *sharika, tawliya,* or *iqāla.* Legal analysis indicates that it is compassion that is the intention in these and not mutual exchange, as excess or loss is not involved. Abū Ḥanīfa exempted from these dower, *khulʿ* and *jiʿāla*, as compensation in these is not evident, being undetermined.

24.2.4.3. *Section 3: Distinction between Food Sold by Measure and that Sold in Heaps (by estimate)*

Mālik made an exception about the stipulation of possession in the sale of food in heaps allowing it (to be sold without the condition of possession); that was also the opinion of al-Awzāʿī. Abū Ḥanīfa and al-Shāfiʿī did not permit it. One of their proofs is what is related from Ibn ʿUmar, that he said, "In the time of the Prophet (God's peace and blessings be upon him), we used to buy food in heaps, so he sent someone to us who ordered us to transfer it from the spot where we had purchased it, to a spot besides it, before we sold it". Abū ʿUmar said: "Though Mālik does not narrate from Nāfiʿ the occurrence of heaps in this recension, it has been narrated by a group; ʿUbayd Allāh ibn ʿUmar, along with others, has recited it and he has precedence in the retention of traditions from Nāfiʿ ". The reliance of the Mālikites is that there is no right to be discharged in heaps, as they are transferred to the liability of the buyer by the contract itself. This pertains to the category of the restriction of the generality by analogy, whose underlying cause is deduced. The consensus of the jurists, on the prohibition of sale by a person of that which he does not own, is also subsumed under this category and it is called *ʿīna*, according to those who consider it as a progression from the category of the means (*dharīʿa*) toward *ribā*. Those who view it from the aspect that its transfer is unlikely, maintain that it belongs to the category of uncertain sales (*buyūʿ al-gharar*). The form it acquires as a means toward prohibited usury is that a person says to another, "Give me ten *dirhams* and I will return its double to you after a period' ". The other replies, "This is not proper, but I will buy from you goods (in return) for other goods". These goods he designates, but they are not equivalent in value (to the goods bought). He then undertakes this sale and purchases the goods, delivering possession of the goods sold (in return), after the conclusion of the contract. The value of the goods (delivered) is equivalent to the amount in *dirhams* that he (the first person) had asked for as a loan, to be doubled on return. The detail exists in the school (of Mālik), but this is not the occasion for narrating it. There is, however, no disagreement in the school about the form we have mentioned that it is not permitted, I mean, their agreement about the price by which (undetermined) goods are to be purchased before the sale is actually transacted.

The Muslim jurists agreed upon the prohibition of (the sale of) a debt for a debt. They disagreed on (various) issues, though, irrespective of whether they formed part of it. As, for example, Ibn al-Qāsim did not permit a creditor to acquire from his debtor, against the debt, ripe dates, or residence in a house, or a slave-girl for service. Ashhab used to permit this, saying that this is not an exchange of a debt for a debt, but it amounts to that when he (the creditor) has not stipulated taking anything from him. This amounts to *qiyās* according to the Mālikites and is also the opinion of al-Shāfiʿī and Abū Ḥanīfa. Among the things related to this, which Mālik permitted and in which he was opposed by the majority of the jurists, is what he said (in *al-Mudawwana*) that "People used to sell meat at a fixed price delaying payment till the date of governmental *'aṭā'* and the buyer used to take a known quantity every day". He said, "The People saw no harm in this or in the other things sold in the market". Ibn al-Qāsim relates that this is not permitted except when there is fear of decay, if the entire quantity is taken at once. There is no permission for wheat and other commodities like it.

These are the fundamentals of this category. The category has been prohibited in law because of the existence of misappropriation which is voluntary and intentional.

24.2.5. Chapter 3: Sales Proscribed on Account of Misappropriation the Cause of which is *Gharar*

These are sales that are proscribed on account of misappropriation the cause of which is uncertainty (*gharar*). *Gharar* is found in sales from the aspect of *jahl* (lack of knowledge) in various forms: (1) from the aspect of *jahl* caused by the failure to identify the subject-matter of the contract, or failure to determine the contract; (2) from the aspect of *jahl* about the attributes of the price, or the priced commodity, or about the quantity, or the deferred period (of delivery), if there is one; (3) from the aspect of *jahl* about its existence or the impossibility of its acquisition; and this relates to the obstacles to delivery; (4) from the aspect of its sound existence, that is its continued existence. And then there are sales that combine in themselves most or some of these attributes.

Among the sales in which these categories of *gharar* are to be found, there are those that are expressly prohibited in the *shar*ᶜ and those about which there is silence. Most of those expressly prohibited are agreed upon, it is only the meanings of their names that are disputed. Those about which there is silence are disputed. We shall first discuss those sales that are expressly prohibited in the law and in *fiqh* and those which relate to them. After that, we will discuss, from amongst those not mentioned in the law, sales about which the disagreement of the *fuqahā*ʾ of different regions became well-known, so as to render it a rule of *fiqh*: that is, guidelines to help in referring things to their origins.

Among those that are expressly mentioned are: proscription by the Prophet (God's peace and blessings be upon him) of the sale of the foetus in the stomach of a conceiving animal (*ḥabl al-ḥabla*); his proscribing the sale of that not yet created; prohibition of sale of fruits before they are ripe; of the sales of *mulāmasa* and *munābadha*; and of sales by throwing stones (*bay*ᶜ *al-ḥaṣāt*). Among them are also his proscription about: *mu*ᶜ*āwama*; two sales in one; conditional sale; sale linked to a loan; sale of grain ears before they whiten; the sale of grapes before they blacken; and the sales of foetuses and sperm of animals (*maḍāmīn* and *malāqīḥ*).

The sale of *mulāmasa* in *jāhiliyya* took the form that the buyer could only feel a dress and not spread it out (for examination), or he would buy something on a dark night not knowing what was within. This is unanimously agreed upon for prohibition and the reason is *jahl* about attributes. In the sale of *munābadha*, each party to the sale used to fling a dress at the other, without determining the reciprocity of either, deferring the matter to their subsequent agreement. With respect to sale by throwing a stone, its form with them was that the buyer would throw a stone and say, "Any dress on which the stone falls belongs to me". It is said that they also used to say, "If the stone falls from my hand, the sale would be binding". This amounts to gambling. There are two interpretations of the sale of *ḥabl al-ḥabla*. First, that these were sales they postponed till the she-camel, for example, would deliver its offspring and then the offspring would yield an offspring. Uncertainty of period in this is evident. It is also said that it was the sale of the foetus of the she-camel. This, in fact, relates to the category of the proscription of the sale of *maḍāmīn* and *malāqīḥ*. *Maḍāmīn* are the foetuses and *malāqīḥ* are what exists in the spines of stallions (sperm). These are all sales of *jāhiliyya* that are prohibited by agreement. They are prohibited because of the reasons we have mentioned.

The sale of fruit (or crops) is established from the Prophet (God's peace and blessings be upon him) that "he proscribed its sale till it began to ripen and was in full bloom". To this are related well-known issues, out of which we shall discuss the core.

The sale of fruit can take place either before or after it sprouts. Once it comes into existence, the sale can take place either after it is picked, or before that. If it occurs before picking, it can either be before it ripens or subsequently; and each one of these (two) can be an unqualified sale, or sale with the condition of letting the fruit stay on the trees, or sale with the condition of participation in picking. All the jurists agree on the prohibition of the first kind, which is the sale of fruit before it comes into existence, for it belongs to the proscribed category of sale before creation and to that of the sale of *sinīn* and *muᶜāwama* (yearly sales). It is related from the Prophet (God's peace and blessings be upon him) that "He proscribed the sale of *sinīn* and the sale of *muᶜāwama* and these are the sales of trees for (several) years", except what has been related from ᶜUmar ibn al-Khaṭṭāb and Ibn al-Zubayr that they used to permit the sale of fruit on the basis of *sinīn*. There is no dispute about the permissibility of its sale after picking. With respect to its sale after creation, most of the jurists favour permission, with details that we shall mention; except what is related from Abū Salama ibn ᶜAbd al-Raḥmān and from ᶜIkrima, that it is not permitted except after picking.

If we accept the view of the majority that it is permitted before picking, then, it will be either before ripening, or after it. We have said that this would be either an unqualified sale, or a sale with the condition of picking, or sale with the condition of leaving (the fruit) on the trees. There is no dispute about the permissibility of sale before ripening with the condition of picking, except what is related from al-Thawrī and Ibn Abī Laylā, who disallowed it and this is a weak recension. There is no dispute, however, that sale before ripening, with the condition of leaving it on the trees, is not allowed, except what is related from al-Lakhmī about its permission, based on deduction from the principles of the school. About an unqualified sale before ripening, the jurists of different regions, disagreed. The majority—Mālik, al-Shāfiᶜī, Aḥmad, Isḥāq, al-Layth, al-Thawrī and others—said it is not permitted. Abū Ḥanīfa said it is permitted on the condition that the buyer pick the fruit (immediately), not because it is a sale of what has not yet been created, but because it is an essential condition, according to him, for the sale of fruit—as will follow later.

The evidence of the majority for disallowing an unqualified sale of fruit before ripening is the established tradition of Ibn ᶜUmar that "The Messenger of Allāh (God's peace and blessings be upon him) proscribed, for both the buyer and seller, the sale of fruit till it begins to ripen". The distinction, between what is before ripening and what is after it, was thus known. The proscription includes the unqualified sale with the condition of leaving the fruit on the trees. When it became obvious to the majority that the underlying reason in this prohibition—which is based on the saying of the Prophet (God's peace and blessings be upon him) coming after the proscription of sale before ripening, from the tradition of Anas ibn Mālik "What if Allāh were to deny the fruit; for what, then, would you be taking your brother's wealth?"—is the apprehension of diseases that will usually infect the fruit before it ripens, they did not assign an absolute meaning to the proscription, that is, the proscription of sale before ripening. They were, on the other hand, of the view that it applies to sale with the condition of leaving it (the fruit) on the trees till it ripens. Thus, they allowed its sale, before ripening, with the condition of picking. They disagreed about an unqualified sale, in this context, whether it should be interpreted to mean (immediate) picking, which is permitted, or being left on the trees, which is prohibited. Those who interpreted the unqualified sale as implying the leaving of fruit (on the trees), or considered the unqualified sale to be included in the generality of the proscription, said it is not allowed. Those who interpreted it to indicate picking said that it is allowed. Mālik's renowned opinion is that unqualified sales imply leaving the fruit on trees, yet another opinion is that they imply picking.

The proof of the Kūfīs, in permitting the sale of fruit generally before ripening, is the tradition of Ibn ᶜUmar that the Messenger of Allāh (God's peace and blessings be upon him) said "He who sells date-palms that have fertilized (must know that) the fruit is for the seller, unless the buyer has stipulated a condition (to include the fruit)". They said, "Since it is permitted to the buyer to stipulate (this condition), it is likewise permitted to sell the fruit separately". They interpreted the tradition imposing the proscription, about sale of fruit before ripening, to mean a recommendation. They argued about this using a tradition related from Zayd ibn Thābit, who said, "In the time of the Messenger of Allāh (God's peace and blessings be upon him), the people used to trade in fruit before it had ripened. When the time of payment drew near and demands were made, the buyer would say, 'the fruit has been affected by the vicissitudes of time and damaged by diseases'. As their disputes, reaching the Prophet, increased, he said, as an advice extended to them, 'Do not sell fruit till it begins to ripen' ". Perhaps they understood the meaning indicated by the tradition through the words, "till it begins to ripen", as the blossoming of the fruit—on the evidence of the saying of the Prophet, "What if Allāh were to deny the fruit; for what, then, would you be taking your brother's wealth?" It was analytically consistent for those among the Kūfīs who held this opinion and who did not share the opinion of Abū Ḥanīfa about the requirement of immediate picking in the sale of fruit, to permit its sale before the commencement of ripening with the condition of leaving it on trees. The majority, then, apply the permissibility of the sale of fruit, with a condition before ripening to a particular case—that is, when the fruit is sold with its *aṣl* (the trees).

There is no dispute about the permissibility of the purchase of fruit after ripening. The general meaning of the tradition, according to the majority of the jurists, implies that the fruit is left on trees, on the evidence of the saying of the Prophet (God's peace and blessings be upon him), "What if Allāh were to deny the fruit; for what, then, would you be taking your brother's wealth". The wisdom behind the evidence is that disease normally infects fruit before it begins to ripen; and after ripening it is rare. If the condition of leaving it on trees is not stipulated in the sale, there would be no expectation of disease. The condition is therefore invalid. According to the Ḥanafites, the stipulation of leaving fruit on trees is not permitted and the generality occurring in the tradition implies picking. This is against the implication of the tradition. Their argument is that sale of a thing itself requires (immediate) delivery, otherwise it involves uncertainty (*gharar*). It is, therefore, not permitted to sell things with (delayed) periods. The majority maintain that the sale of fruit is exempted from the rule of delayed sales, as it is not possible for fruit to become ripe all at once. The Kūfīs, then, went against the majority on two counts: first, in the permission of sale of fruit before ripening; and second, in the denial of leaving ripe fruit on trees—by stipulating it as a condition, or by making an unqualified contract. Their disagreement in the first case is more sound than it is in the second, that is, in stipulating picking even when the fruit is ripe. Their disagreement in the first case is sound as it belongs to the category of reconciliation of the two preceding traditions of Ibn ᶜUmar and because this is also related from ᶜUmar ibn al-Khaṭṭāb and Ibn al-Zubayr.

The commencement of ripening, beyond which the Messenger of Allāh (God's peace and blessings be upon him) permitted sale, takes place when the unripe dates turn yellow and the grapes turn black, if they are the type that turn black. On the whole, the attributes of ripening should appear in the fruit. This is the opinion of a group of jurists, of different regions, because of what is related by Mālik from Ḥumayd from Anas, "He (the Prophet) was asked about his words—'till it ripens'—and he said, 'till it turns red' ". It is also narrated from the Prophet (God's peace and blessings be upon him) that "He proscribed the sale of grapes till they turn black and grain till it hardens". Zayd ibn Thābit in a narration of Mālik from him, did not sell his fruit till the rise of the *Thurayya* (Pleiades) and this was when twelve nights of *ayyār*, that is May, had passed. It is also the saying of Ibn ᶜUmar, "He was asked about the saying of the Messenger of Allāh (God's peace and blessings be upon him) that proscribed the sale of fruits till they were safe from disease and ᶜAbd Allāh Ibn ᶜUmar said, 'That is the time of the ascension of Pleiades' ". It is related from Abū Hurayra from the Prophet (God's peace and blessings be upon him) that he said, "When the star ascends in the morning the diseases are removed from the residents of the land". Ibn al-Qāsim related from Mālik that there is no harm in selling an orchard even though it is not yet ripe, if the orchards around it have ripened and when it is time of safety from disease, intending thereby, Allāh knows best, the ascension of the *Thurayya*. His well-known opinion, however, is that the orchard is not to be sold till it begins to ripen. It is also said that he did not take into account, along with ripening, (the condition of) the ascension of the *Thurayya*. The resulting opinions from the jurists about the commencement of suitability (for sale) are three: one, that it is ripening; second, that it is the ascension of the *Thurayya*, even if at the time of sale there is no ripening; third, that it is both things taken together. Mālik said, in his well-known opinion, about ripening that when there are in a single orchard itself fruits of different species with different stages of ripening, no species is to be sold unless ripening commences in the species itself. He was opposed in this by al-Layth. Sale of some species in similar stages of ripening is permitted, according to him, by ripening in others.

Commencement of ripening acceptable to Mālik in one species of fruit is the start of ripening in parts of it, not necessarily in the whole of it, when such ripening occurs in it, it occurs prematurely long before the ripening of the rest, a successive process, because the time when fruits are generally secure from diseases is the commencement of ripening in succession without interruption. According to Mālik, if ripening begins in a date-palm of a grove it is permitted to sell it and to sell the groves adjacent to it, provided the date-palms of the groves are of the same species. Alshafi said, it is not permitted to sell except the grove in which ripening has commenced. Mālik considered the time of security from disease as being the same for similar species. Al-Shāfiʿī based his view on the deficiency in the coming into (proper) existence of the fruit, that is, if it did not ripen it would be the sale of that which is not created, because the criterion of ripening in it at the time of purchase is not created yet; but what he al-Shāfiʿī says is not stipulated for all fruits, only for some fruits in the same garden—it is an opinion not held by anyone else. The above is the gist of what is well known of their disagreement about the sale of fruit.

Among the transmitted traditions relevant to this heading, which they also disputed, is that which is related from the Prophet (God's peace and blessings be upon him) about the proscription of the sale of ears (of grain) till they become white and of grapes till they become black. This is because the jurists agreed that it is not permitted to sell wheat in the ear without the ear itself, as it is the sale of a thing whose characteristics are not known, nor is its quantity. They disagreed about the sale of the ear itself along with the grain. The majority permitted this, including Mālik, Abū Ḥanīfa, the jurists of Medina and the jurists of Kūfa. Al-Shāfiʿī said: it is not permitted to sell the ear itself even if it is fully mature, as first, it involves *gharar* (hazard) and, secondly, (it is prohibited) on the analogy of (the prohibition of) its sale mixed with straw after threshing. The proof of the majority is in two things: transmission and analogy. The transmission is what is related from Nāfiʿ from Ibn ʿUmar "that the Messenger of Allāh (God's peace and blessings be upon him) proscribed the sale of a date-palm till it is ripe and of an ear till it whitens and is safe from disease—prohibiting both the seller and the buyer". This tradition (contains) a significant addition over what has been related by Mālik of the same tradition; and an addition reported by a trustworthy transmitter is acceptable. It is reported that al-Shāfiʿī withdrew his opinion when he heard of this addition, because (the use of) analogy according to him is not correct with the existence of a *ḥadīth*.

The sale of an ear, when it is green and has not grown, is not permitted according to Mālik except with the condition of cutting. About the sale of ears, which have not been harvested, it is said that it is permitted according to Mālik, while it is also said that it is not permitted unless they are in a sheaf. Its sale in threshed straw is not permitted, without any disagreement. This is so when it is (sold) in heaps (by estimate), but when it is sold by weight it is permitted according to Mālik, while I am not aware of the opinions of others in this.

Those who permitted the sale of ears, when fully mature, disagreed as to who is to be responsible for harvesting and threshing. The Kūfīs said, it is up to the seller who is to undertake it and deliver clean grain. The others said that it is the responsibility of the buyer. A theme relevant to the subject of this chapter is in the tradition affirming "that the Messenger of Allāh (God's peace and blessings be upon him) proscribed two sales in one", according to the *ḥadīth* of Ibn ʿUmar and those of Ibn Maṣʿūd and Abū Hurayra. Abū ʿUmar said that all these have been transmitted by the trustworthy authorities. The jurists, therefore, agreed generally on the implication of this *ḥadīth*, but differed over the details—I mean the form to which the term is applied and that to which it is not. They also agreed on some of its forms. This sale may take one of three ways: one is exchange of two priced commodities for two prices, another is exchange of a priced commodity for two prices and a third is exchange of two priced commodities for one price, in which case one of the two sales becomes binding. The (sale of) two priced commodities for two prices is visualized in two ways: first, that one says to the other, "I will sell you this commodity for such a price on the condition that you sell me that house for such price"; and second, that he says to him, "I will sell you this thing for a *dīnār* or this other commodity for two *dīnārs*". The sale of a single commodity for two prices is also visualized in two ways: first, that one of the prices is in cash while the other on credit, like one saying to the other, "I will sell you this dress in cash at such price on the condition that I buy it from you (on credit) with such period and at such price". The (sale of) two commodities for a single price is like one saying to the other, "I will sell you one of these two for such and such price".

In the first case, when one says to the other, "I will sell you this house for so much on the condition that you sell me this slave-boy for so much", al-Shāfiʿī stipulates that it is not permitted, because the price in both cases is unknown for the two things (being sold), if they are separated the parties would not agree to the price to which they are agreeing in a single contract. The basis of al-Shāfiʿī, in rejecting two sales in one, is the ignorance of the price or the priced commodity. As to the second case, which is when he says, "I will sell you this thing for a *dīnār*, or this other commodity for two *dīnārs* on the condition that the sale is binding in one of them", it is not permitted according to all, irrespective of the currency being the same or different. ʿAbd al-ʿAzīz ibn Abī Salama differed in this. He permitted it whether the currencies were the same or different. The underlying cause (*ʿilla*) according to all is *jahl* (lack of knowledge), while according to Mālik it relates to the category of blocking of the means (*sadd al-dharāʾiʿ*) for it is possible that he would select for himself one of the dresses and, therefore, would have sold a dress plus a *dīnār* for another dress plus a *dīnār* and this is not permitted on Mālik's principles. In the third case, which occurs when he says, "I sell you this dress for so much on cash or for so much on credit", if the sale in it is binding then there is no dispute that it is not permitted, however, if the sale is not binding in one of them then Mālik permitted it, while Abū Ḥanīfa and al-Shāfiʿī prohibited it for they (the parties) separated with an unknown price. Mālik regarded it as a case of option (*khiyār*). When he has an option the possibility of regretting the conversion of one currency into the other is not visualized, which is the (real) obstacle according to Mālik. The underlying cause of prohibition of this third case, then, according to al-Shāfiʿī and Abū Ḥanīfa, is from the point of view of ignorance about the price, which according to them is one of the sales of hazard (*gharar*). The underlying cause of its prohibition according to Mālik, is the plugging of the channels (*sadd al-dharāʾiʿ*) that may lead to usury (*ribā*). This is because of the possibility that the one who has an option may choose initially the performance of the contract, in his mind without disclosing it, with one price, immediate or deferred and then change his mind when the other appears better to him. He then gives up one price for the other; it is as if he sold one of the prices for the other, admitting the sale of a price for a price with a delay, or with delay and excess. This is the case when the price is a currency. When the price is not a currency but food, it becomes another (forbidden) situation, which is the sale of food for food with excess.

If, however, he says, "I will buy from you this dress on cash for so much on the condition that you buy it from me (on credit) with a period", it is not permitted unanimously (by *ijmāʿ*), according to them (the jurists), as it is one category of *ʿīna*, which is the sale by a person of what he does not have and it also involves the prohibiting cause of *jahl* about the price. If he says to him, "I will sell to you one of these two dresses for a *dīnār*" and one becomes binding on him, whichever he chooses and they part before the (exercise of) option, then if the two dresses are of different kinds that can be exchanged for each other, there is no dispute between Mālik and al-Shāfiʿī that it (the sale) is not permitted. ʿAbd al-ʿAzīz ibn Abī Salāma said it is permitted. The underlying cause of prohibition is uncertainty and *jahl*. If the dresses are of the same kind it is permitted according to Mālik, but not according to Abū Ḥanīfah and al-Shāfiʿī. Malik permitted it, however, as he permits an option in sales of similar kinds after the contract, because there is minimal *gharar* in this according to him. Those who did not permit it did so because they do not permit *gharar* at all, as they (the parties) separated with an uncertain sale.

On the whole, the jurists agreed that excessive *gharar* is not permitted, while minimal *gharar* is. They disagreed about things as to the kinds of *gharar* (in them). Some link them to excessive *gharar*, while others link them to permissible minimal *gharar* due to its vacillation between slight and excessive. If we adopt the opinion of Mālik's school for permissibility with the buyer having to choose between taking possession of (one out of) the two dresses and one of them is destroyed or becomes defective, then who is to suffer the loss? It is said that the loss is (shared) between them and it is said that the buyer is entirely liable unless evidence of (the agent of) its destruction is established. It is (also) said that a distinction is to be made in the dresses as to what is obvious to him (about the agent of destruction) and what is not obvious to him, as in the case of the slave and he is liable for what he was oblivious to while he is not liable for that to which he was not oblivious. Is it, then, binding on him to accept the residue? It is said that it is binding and it is said it is not binding. This belongs to the rules of sales.

We should bear in mind that the issues included in this topic are all related to the problems of *gharar* for the jurists of the provinces; but for Mālik there are among them some that he forbids as they might lead to usury (*ribā*) and there are others that he relates to the problem of *gharar*.

These, then, are the issues that relate to the expressly mentioned *aḥkām* in this topic. It is proper if we discuss, when dealing with the topic of sales (declared) void on the basis of (spurious) conditions, his (Mālik's) prohibition of sale with a double condition and sale with a condition, even though their cause is *gharar*.

24.2.5.1. *Section 1: Issues not Expressly Covered (by the texts)*

The issues under this topic, not expressly covered (by the texts) and which are disputed among the jurists of different regions, are many, but we shall choose for discussion the best known hoping that their analysis may provide inspiring guidelines for the *mujtahid*.

24.2.5.1.1. Issue 1: The subject-matter of sales is of two kinds

The things sold are of two kinds: things present and visible, there being no dispute about (the validity of) their sales; and things absent or impossible to see (or examine), in these there is disagreement among the *fuqahā*ʾ.

Some said, the sale of an absent thing (*mabī*ᶜ) is not permitted in any circumstances, whether described or not described. This is the better-known opinion of al-Shāfiᶜī and is recorded by his disciples, I mean that the sale of an absent *mabī*ᶜ is not permitted by description. Mālik and most of the jurists of Medina said that it is permitted to sell an absent commodity (*mabī*ᶜ) by description as long as it is of a kind in which the description is not likely to change prior to the taking of possession. Abū Ḥanīfa said that it is permitted to sell an absent commodity without description, but the buyer has an option, when he actually sees it, whether to maintain the sale contract or to rescind it. Similarly, they permitted sale by description, on the condition of the option of examination (*khiyār al-ru*ʾ*ya*), even when the thing conforms with the description. According to Mālik, if the thing conforms with the description the sale becomes binding. According to al-Shāfiʿī the sale does not take effect *ab initio*, in both cases. It is said in the school (of Mālik) that the sale of an absent commodity without description is valid on the condition of an option, the option of examination. This has been stated in the *Mudawwana*, but is rejected by ʿAbd al-Wahhāb, who said, "It is against our principles".

The basis of disagreement is whether the fact that the degree of knowledge gained through description being less than the degree of knowledge attained though sensory perception constitutes *jahl* (lack of knowledge) adversely affecting the sale of a commodity, as it amounts to excessive uncertainty (*gharar*), or that it is not effective being uncertainty of a minimal degree that is tolerable. Al-Shāfiʿī viewed it as excessive *gharar*, Mālik as minimal. Abū Ḥanīfa was of the view that if the buyer has the option of (later) examination then there is no *gharar* even though he did not see it at the time of the contract. Mālik held that *jahl* consequent upon the absence of a description is adversely effective in the validity of the contract. It is not a matter of contention with Mālik that description stands as a substitute for an examination of the *mābīʿ*, because of its absence or because of hardship involved in its display or the risk it is likely to be exposed to through repeated display. He, therefore, permitted sale through the listing of the description. He did not permit the sale of a weapon in the scabbard, or a folded dress in a cover, unless displayed or examined in the sheath. Abū Ḥanīfa argued on the basis of what is related from Ibn al-Musayyib, who said "that the Companions of the Prophet (God's peace and blessings be upon him) said, 'We wished that ʿUthmān ibn ʿAffān and ʿAbd al-Raḥmān ibn ʿAwf would contract a sale so as to know who had greater acumen for business and then ʿAbd al-Raḥmān bought from ʿUthmān ibn ʿAffān a mare that he had on a different (distant) land of his for forty thousand or four thousand' ", and he (Ibn al-Musayyib) related the entire report from which it is evident that the sale of an absent thing is valid. The stipulation of species, however, is a necessary condition according to Abū Ḥanīfa. Sale by description or through the option of examination of an absent *mabīʿ* admits of another kind of *gharar*, whether the thing exists at the time of the contract or is non-existent. They, therefore, stipulated that the absence of the commodity should be recent except when it is safe from destruction like immovable property. On the basis of this, Mālik allowed sale through prior examination, I mean, if it is so recent that he is assured the commodity is unlikely to change with the passage of a short time. Let it be noted.

24.2.5.1.2. Issue 2: Agreement that it is not permitted to sell things with a (delayed) period

They agreed that the sale of things is not permitted with a delayed period and one of its conditions is the delivery of the *mabīʿ* to the buyer, immediately, following the conclusion of the contract. Mālik, Rabīʿa and a group of the jurists of Medina, however, permitted the sale of a high-priced slave-girl at a mutually agreed discounted price (with the seller retaining the delivery of the girl till the termination of the period and payment of the reduced price), but they did not permit a cash sale in this just as Mālik did not permit it in the sale of an absent *mabīʿ*. The majority prohibited this in so far as it looks like the sale of a debt for a debt and because of the inability to deliver. It appears that the prohibition of sale of a debt for a debt here belongs to the prohibition based upon *gharar*, owing to the lack of delivery from both parties, not to a case of *ribā* and we have already discussed the underlying cause of the prohibition of (the exchange of) a debt for a debt. In this topic is also the taking by a person from his debtor, in exchange of the debt he owes him, dates that have begun to ripen, which Ibn al-Qāsim viewed as not permitted as he held it to be (an exchange of) a debt for a debt. Ashhab used to permit this on the ground that (the exchange of) debt for debt occurs only when he has not begun to take possession of any part of the commodity, I mean, he used to hold the view that the possession of the first instalments stands in the place of the possession of the last instalments. This is analogy according to many of the Mālikites and is also the opinion of al-Shāfiʿī and Abū Ḥanīfa.

24.2.5.1.3. Issue 3: Crops growing in a single phase and those growing more than once

The jurists of the provinces regions agreed on the permissibility of the sale of fruit, which grow only once when a part has ripened, even though the rest have not ripened as yet. They disagreed about those, which produce different crops, even when the first crop has begun to ripen. The summary of the (opinions in the) school of Mālik in this is that the yields are either consecutive with no interruption or they are not so. If they are not consecutive the sale of those (crops) that are not created as yet is not to be included in those that are, like the fig tree which has the first yield and the later prime pick. Again, if they are consecutive, without interruption, it is possible either to distinguish the crops or it is not. An example of the distinction is the husk of winter barley which is yielded time after time. An example of those which cannot be distinguished is melons, egg plants, cucumbers and pumpkins. About those which can be distinguished and separated there are two narrations: one of permissibility and the second of prohibition. About those which are consecutive and cannot be distinguished there is (just) one opinion of permissibility.

He (Mālik) was opposed in all this by the Kūfīs, Aḥmad, Isḥāq and al-Shāfiʿī, who said that one crop cannot be sold on the basis of (the ripening of) another. Mālik's proof of the permissibility of the sale of indistinguishable things is that the containment (delay in selling the ripe part) is not possible (especially if perishable), so it is permitted to sell that which is not created from among them along with what is created and has begun to ripen. Its basis is the sale of that which is not ripe, from among crops, along with that which is ripe, as Mālik considered *gharar* in description similar to *gharar* in the thing itself. It is as if he held that the exemption here must be considered analogous to the sale of crops, I mean, sale of that which is ripe with that which is not ripe for the occasion of necessity. The principle, according to him, is that within (the categories of) *gharar* is that which is permitted at the time of necessity; and he, therefore, prohibited according to one of his reports the sale of more than one yield of winter barley because there was no necessity here if they were distinguishable. The aspect of permissibility of winter barley on its similarity with that which is not distinguishable is weak. According to the majority, all this belongs to the forbidden sale of that which has not been created and to the prohibited category of annual sale of fruit.

The sale of turnips, carrots and cabbage is allowed, according to Mālik, when they have begun to ripen and that being their suitability for consumption. Al-Shāfiʿī did not allow this except when (they are) harvested, otherwise it is from the category of the sale of that which is absent. In the same category is the sale of walnuts, almonds and legumes in their shells, which Mālik permitted and al-Shāfiʿī disallowed. The basis for their disagreement is their different views whether it belongs to (the category of) *gharar* which affects sales. This is so as they agreed that *gharar* is divided into these two kinds and that which does not affect sale is either minimal, or the sale is based upon necessity, or is a combination of these two factors. Another similar question relates to the sale of fish in a stream or a pond, over which they differed too. Abū Ḥanīfa said it is permitted, but Mālik and al-Shāfiʿī prohibited it, so far as I know. Prohibition is what his (Mālik's) principles lead to. Within this is also the sale of a runaway slave, which is permitted absolutely by some, prohibited by others including al-Shāfiʿī. Mālik said that if his description and location are known both to the buyer and the seller, it is permitted, but I believe, he then stipulated that his running away should also be known, in which case there should be mutual delay, that is, the seller does not take possession of the price till the delivery of the slave to the buyer, because it is a case of vacillation, at the time of the contract, between a sale and a loan. This is one of Mālik's principles through which he prohibits cash (payment) in the postponed sale, in the sale of the unreliable delivery and in all that is of the same genus. Among those who permitted the sale of the runaway slave and the stray camel is ʿUthmān al-Battī. The proof of al-Shāfiʿī is the *ḥadīth* of Shahr ibn Hawshab from Abū Saʿīd al-Khudrī "that the Messenger of Allāh (God's peace and blessings be upon him) proscribed the sale of a runaway slave, (the sale) of what is in the bellies of cattle till delivered, the sale of what is in their udders and the sale of booty till it is apportioned".

Mālik permitted the sale of milk of cattle for a limited number of days, if the amount milked from them was generally known in practice, but he did not permit this in a single (particular) goat. The rest of the jurists said this is not permitted except by a known measure after milking. In this topic is also the prohibition by Mālik of the sale of meat in its skin. Similarly prohibited is the sale of the diseased, but Mālik permitted it, unless the disease was incurable. It was prohibited by al-Shāfiʿī and Abū Ḥanīfa, which is also another narration from him (Mālik). Within this topic is also mineral dust and the dust from goldsmiths. Mālik permitted the sale of mineral dust for cash from another metal or for a commodity, but he did not permit the sale of dust from a goldsmithery. Al-Shāfiʿī prohibited the sale in both cases, while others allowed it in both, which was the opinion of al-Ḥasan al-Baṣrī. These, then, are the sales that are disputed from the aspect of lack of knowledge of their quality.

About the consideration of quantity, they agreed that it is not permitted to sell a thing that is (usually) measured by size or by weight or by count or by length, except when its quantity is known to the buyer and the seller. They agreed that the knowledge of these things by way of known measure or known scales is effective in the validity of sale and in things whose measure and weight is not known to the buyer or seller, out of all things measured, weighed, counted or measured by area. They also considered whether knowledge is insufficient if quantification is arrived at by way of appraisal and assessment; it is permitted in some and prohibited in others. The principle in Mālik's school in this is that it is permitted in all things the utilization of which is in bulk and not in single units. These are of different kinds, according to him: among them are those that are primarily measured but are permitted as *juzāf* and these are those measurable in size as in weight; among them are those that are primarily *juzāf* but may be measured, these are like land and dresses that are measured by area through length; among them are those in which measure and weight are basically not allowed but counting is allowed in them and their sale is not allowed as *juzāf*. It is these (last) that have utility in their separate units, as we said. According to Mālik the *juzāf* sale of gold nuggets and silver, not minted, is permitted, but it is not permitted in *dirhams* and *dīnārs*. Abū Ḥanīfa and al-Shāfiʿī said it is permitted with disapproval (*makrūh*). It is permitted, according to Mālik, to sell a heap, the total quantity of which is unknown, by means of measure at an agreed rate, that is, each measure of it for a certain (price). When its total measure has been found, its total value at the agreed rate is to be settled. Abū Ḥanīfa said that it (the *juzāf* sale) is valid only in a single measure that we have named (probably that which is in bulk). Mālik permitted this kind of sale (i.e., by estimate) in slaves, dresses and food. Abū Ḥanīfa prohibited it in slaves and dresses, while others, I think, prohibited it in everything because of the uncertainty of the price.

It is permitted, according to Mālik, that the buyer accept as true the seller's claimed measurement when the sale is not on credit, as such a sale on credit might be a way to induce the buyer to accept the seller's claim. According to the others, this is not permitted unless the buyer ascertains its measure, owing to proscription of the Prophet (God's peace and blessings be upon him) of the sale of food till it has been duly measured. Others permitted it unconditionally. Among those who prohibited it are Abū Ḥanīfa, al-Shāfiʿī and Aḥmad, while among those who permitted it without reservation are ʿAṭāʾ ibn Abī Rabāḥ and Ibn Abī Malīka. It is not permitted, according to Mālik, that the seller, who knows exactly the quantity of the commodity but does not inform the buyer of it and (then) sells this measurable commodity by estimate (*juzāf*) to a buyer who does not know the exact measure, because of uncertainty as far as the buyer is concerned. It is not permitted by al-Shāfiʿī and Abū Ḥanīfa (also). According to Mālik, the proscribed (sale of) *muzābana*, which is the sale of an uncertain quantity for an uncertain quantity, belongs to this principle. In the case of usurious commodities, this prohibition is due to excess (*tafāḍul*) and in non-usurious commodities it is due to the lack of quantitative determination.

24.2.6. Chapter 4: Sales with Conditions and Provisos

The irregularity found in these sales is from the aspect of *gharar*, however, because the traditions have dealt with them, it is necessary to render them separately as an independent category of sales. The basis for the disagreement of jurists in this issue consists of three traditions. The first of these is the tradition of Jābir, who said, "The Messenger of Allāh (God's peace and blessings be upon him) bought a she-camel from me and stipulated, as a condition, riding it to Medina". This tradition is found in the *ṣaḥīḥ* compilations. The second tradition is that of Barīra that the Messenger of Allāh (God's peace and blessings be upon him) said, "Any condition that is not in (accordance with) the Book of Allāh is void, though it be a hundred conditions". The tradition is agreed upon (by Muslim and al-Bukhārī) for its soundness. The third is the *ḥadīth* of Jābir, who said, "The Messenger of Allāh proscribed *muḥāqala, muzābana, mukhābara, muʿāwama and thaniyyā* (proviso) and exempted the *arāya*". This too is found in Muslim's *Ṣaḥīḥ*. Related to this issue is what is reported by Abū Ḥanīfa that it is related "that the Messenger of Allāh (God's peace and blessings be upon him) proscribed sale with a condition" (that is, sale dependent upon a condition). In view of this apparent contradiction in these traditions regarding conditional sales, the jurists disputed sale with a condition. Some said, the sale is void and the condition (too) is void. Among those who held this opinion are Abū Ḥanīfa and al-Shāfiᶜī. Some said that both the sale and the condition are valid. Among those who held this opinion is Ibn Abī Shubrama. Some other (jurists) said that the sale is valid, but the condition is void. Among those who held this opinion is Ibn Abī Laylā. Aḥmad said that the sale is valid with one condition, but not with two (or more).

Those who nullify sale with a condition adopt the generality of his (the Prophet's) proscription of sale with a condition and his proscription of provisos (*thaniyyā*). Those who permitted the sale while nullifying the condition adopted the generality of the *ḥadīth* of Barīra. Those who did not permit two conditions, but permitted one, argued on the basis of the tradition of ᶜAmr ibn al-ᶜĀṣ, recorded by Abū Dāwūd, who said, "The Messenger of Allāh (God's peace and blessings be upon him) said, 'Loan with a sale is not permitted, nor are two conditions with a sale and there is no (entitlement to) profit without a (corresponding) liability for loss, nor should there be a sale in what you do not have' ".

In Mālik's view, the conditions are divided into three kinds: conditions that are nullified along with the sale; conditions that are permitted along with the sale; and conditions that are nullified, but the sale is valid. It is believed that there is, for him, a fourth category of such conditions, which if insisted upon by the stipulator nullifies the sale, but when it is given up by him the sale is valid. The expounding of clear distinctions within his school, among these four categories, is difficult, though many of the jurists have desired to do so. In fact, the distinction should be based upon the degree of *ribā* and *gharar* implicit in the conditions—the two categories of *fasād* that disturb the validity of a sale—or to what leads to a deficiency of ownership. If the degree of implied *gharar* or *ribā* is excessive, he (Mālik) nullifies the sale and nullifies the condition; when it is insignificant, he permits the sale and permits the condition with it, but when it is midway, he nullifies the condition and permits the sale. Mālik's followers are of the view that his opinion is the best, as it accommodates all the traditions and such accommodation, according to them, is better than making preference (*tarjīḥ*). The later Mālikite generations have made some similar distinctions in these; among them are Jiddī, al-Māzirī and al-Bājī. To explain the details, it may be said that a condition pertaining to the subject-matter of sale falls into one of the two primary categories. First, that which is stipulated as effective after the termination of ownership, like one who sells an *ama* or a slave boy and stipulates that when freed he (the seller) will be the *mawlā* and not the buyer. In this kind (of transaction) it is said that the contract is valid, but the condition is void due to the *ḥadīth* of Barīra. Second, to stipulate a condition that is effective within the duration of ownership. This they said is divided into three kinds: either to stipulate a benefit of the subject-matter (*mabīᶜ*) for himself; or to restrict the buyer's general or particular (power of) disposal; or to assign a particular meaning to the subject-matter and this too is divided into three kinds with one of the meanings being that of magnanimity while the other is not.

When he stipulates for himself a minor benefit that does not amount to a prevention of disposal in the subject-matter itself, like selling the house stipulating residence in it for a short period, like one month—and it is said of a year—this is permitted on the basis of the tradition of Jābir. If, however, he stipulates prevention of disposal, particular or general, then this is not permitted as it involves *thaniyyā* (proviso), like selling an *ama* with the condition that he (the buyer) will not cohabit with her or will not sell her. When he stipulates some kind of magnanimity like manumission, then the stipulation of prompt (compliance) is permitted according to him, but when it is delayed it is not permitted due to the immensity of *gharar* in it. Mālik permits the sale with the condition of prompt manumission. Al-Shāfiᶜī considers it to be prohibited as it is from the category of sale with a condition and the tradition of Jābir is ambiguous according to him as in some narrations he (the Prophet) sold it and stipulated riding it to Medina while in others he sold it and asked for the ride by way of *ᶜāriya* (loan). Mālik viewed all this as a kind of minimal *gharar* and permitted it for short period, but not for a lengthy duration. In terms of Abū Ḥanīfa's principles, however, it is prohibited.

His (the seller's) stipulation of conditions that do not involve magnanimity, like the condition of not selling it, is not permitted according to Mālik; it is said that he held the sale to be rescinded and it is also said that only the condition was cancelled. For the person to whom the seller says, "When I bring the price (back) to you, return the *mabīᶜ* to me", it is not permitted according to Mālik as it is ambivalent between being a sale and a loan. If he brings back the price it amounts to a loan, if he does not it is a sale. They disagreed about this in the school (of Mālik), whether it is permitted in a negotiated rescission (*iqāla*). Those who view *iqāla* as a sale, nullify it by the factors that nullify sales, while those who consider it as rescinding of a sale, distinguish it from sales. They also disagreed about one who sells a thing with the condition that it is not to be sold until the price is paid. Mālik is reported to have permitted this, as its *ḥukm* is like the *ḥukm* of a pledge (*rahn*) there being no distinction in a pledge whether the thing is a property sold or something else. Ibn al-Qāsim is reported to have said that this is not permitted, as it is a condition that prevents the buyer from the benefit of the sale for a long period in which the seller cannot stipulate a benefit (for himself), therefore, it is necessary to invalidate the sale. It is for this reason that Ibn al-Mawwāz said that it is permitted if it is for a very short period.

One of the narrations in this topic is his (the Prophet's) proscription of sale with a loan, about which the jurists agreed that it is a void sale. They disagreed about the validity of a sale when he (the seller) relinquishes the condition before taking possession. Abū Ḥanīfa, al-Shāfiᶜī and all the jurists prohibited it, but Mālik and his disciples permitted it, except for Muḥammad ibn al-Ḥakam. An opinion like that of the majority is also related from Mālik. The proof of the majority is that the proscription implies the *fasād* of the prohibited action and, further, the price of the *mabī*ᶜ here is uncertain due to its association with a loan. It is related that Muḥammad ibn Aḥmad ibn Sahl al-Barmakī (who held the view of the majority) enquired about this issue from Ismāʾīl ibn Isḥāq al-Mālikī, saying to him, "What is the difference between a loan with a sale and between a person who sells a slave for a hundred *dīnārs* and a skin of wine, who when he contracts the sale says, 'I forgo the skin?' He then said, "This (latter) sale is annulled by agreement of the jurists". Ismāᶜīl answered this question with a reply that is not legally persuasive, saying, "The difference between them is that the stipulator of a loan has a choice between relinquishment an non-relinquishment, while the problem of the skin of wine does not involve this". This reply is, in fact, the same as the question, which is: "How can he have a choice here and did not have one there so that he may forego the skin and validate the sale?" It is better to say that the prohibition here is not due to a thing inherently prohibited, that is a loan, as a loan in itself is permissible, but it has been imposed due to its association, I mean, the association of sale with it. Likewise, sale in itself is permitted, but is prohibited here because of the association of the condition with it. In the other case, the sale has been prohibited due to its association with a thing inherently prohibited and not for the of stipulation (of a condition). The point at issue is whether *fasād* arising in a sale, because of a condition, is removed when the condition is revoked, or is not removed—just like the *fasād* arising from an otherwise permissible sale owing to its association with a thing inherently prohibited. This too is based upon another principle and that is whether this *fasād* is revelational or is rational. If we say it is legal, it is not removed by the revocation of the condition. If we say it is rational, it is removed by the revocation of the condition. Mālik views it as rational, while the majority view it as non-rational. The *fasād* that is found in usurious sales and in those with *gharar* is based primarily upon revelation and, therefore, these sales are not valid, according to them, even if *ribā* is relinquished after the sale, or *gharar* is removed. They disagreed about its *ḥukm* if transacted, as will be explained in the *aḥkām* of the vitiated sales.

Within this topic is the sale of the ᶜ*urbān* (sale with earnest money). The majority of the jurists of different regions hold that it is not permitted, but it is related from a group of the *Tābi*ᶜ*ūn* that they permitted it, among them are Mujāhid, Ibn Sīrīn, Nāfiᶜ ibn al-Ḥarth and Zayd ibn Aslam. The form it takes is that a person purchases a thing and delivers to the seller part of the price on the condition that if the sale is executed between them this earnest money will form part of the price of the goods, if it is not executed the buyer will forgo it. The majority inclined toward its prohibition, as it is from the category of *gharar*, *mukhāṭara* and the devouring of wealth of others without compensation. Zayd used to say, "The Messenger of Allāh (God's peace and blessings be upon him) permitted it". The *Ahl al-Ḥadīth* said that this is not known from the Messenger of Allāh (God's peace and blessings be upon him).

Under the *istithnā*ʾ (provisos) are well-known issues about which the jurists have differed, I mean, whether they are included within the proscription of provisos. Among these is the case of the person who sells a pregnant (female) and exempts what is in the foetus. The majority of the jurists of the provinces, including Mālik, Abū Ḥanīfa, al-Shāfiʿī and al-Thawrī, are of the view that it is not permitted. Aḥmad, Abū Thawr and Dāwūd said that it is permitted and it is also related from Ibn ʿUmar. The reason for disagreement is their difference whether the exempted (thing) is part of the *mabīʿ*, from which it has been exempted, or it is not a part of the *mabīʿ*, but still remains in the seller's ownership. Those who considered it as part of the *mabīʿ* said, (exempting) it is not permitted and it is among the proscribed exemptions on the ground that they contain uncertainty of description as well as uncertainty of safe delivery. Those who said that it still remains in the ownership of the seller permitted it. The summary of opinions in Mālik's school about one who sells an animal and exempts part of it, depends on whether this part is defined proportionately, or specifically or by measure. If it is stated proportionately, there is no dispute about the permissibility of its sale, like his selling a slave except (say) one-fourth share in him. If it is specifically denoted, it can either be internal (invisible), like a foetus, or visible. If it is invisible, it is not permitted. If it is visible, like the head, arms, or legs, it can either be part of an animal whose slaughter is permitted or one whose slaughter is not. If it is one whose slaughter is not permitted, the sale is not permitted, as it is not permitted to sell a salve and exempt his legs, for that which is exempted is indistinct (thus entailing *gharar*) and cannot be divided. There is no dispute about this. If it is an animal whose slaughter is permitted and he sells it and exempts part of it, that has a value, with the condition of slaughtering, then in the school there are two opinions. First, that it is not permitted and this is better known. Second, that it is permitted and that is the opinion of Ibn Ḥabīb who permitted the sale of a goat exempting the feet and the head. If, however, the exempted part has no value, there is no dispute in the school about its permission. The basis for Mālik's opinion is that if he exempts it with the skin then what is under the skin is unknown and if he does not exempt it with the skin, he does not know how it will come out having been skinned. The basis for Ibn Ḥabīb's opinion is that he is exempting a determined and known limb and the existence of skin over it does not harm it, just like the purchase of grain in its ear and of walnut in its shell. For the exemption from an animal on the condition of slaughter, either by custom or expressed, a part determined by measure, like some *arṭāl* (pounds) from a slaughtered camel, there are two narrations from Mālik. First is prohibition and this is the narration of Ibn Wahb. Second is permission in a few *arṭāl* only and this is the narration of Ibn al-Qāsim.

They agreed, under this topic, about the permissibility of a person selling the fruit of his palm-grove exempting from it certain determined date-palms on the analogy of the permissibility of their fruit purchased separately. They also agreed that it is not permitted to him to exempt from his palm-grove an unspecified number of date-palms to be determined by the buyer after the sale, as it would amount to the sale of a thing not seen by the parties. They disagreed about the man who sells a palm-grove and exempts from it a number of date-palms after the sale. The majority disallow this because the quality and the description of date-palms vary, while its permissibility is related from Mālik. Ibn al-Qāsim rejects his (Mālik's) verdict in the case of date-palms, but allows it in the case of sheep. Similarly, they disagreed when the buyer exempts a measure from the sale of the palm-grove. Abū ᶜUmar ibn ᶜAbd al-Barr said, "The jurists of different regions, whose verdict is accepted and according to whose opinions books have been recorded, disallowed this because of his (the Prophet's) proscription of provisos in sales and because it is exemption of a measure in a sale by estimate (*juzāf*)". Mālik and his predecessors from among the jurists of Medina permitted this, if exemption was less than a third and disallowed it in more than that, interpreting the proscription of exemption to apply to what was more than a third. They compared the sale of what is besides the exempted part to the sale of a heap, the exact amount of whose measures is not known, being sold by estimate exempting a defined measure from it. This principle is also disputed, I mean, sale by estimate, exempting a certain measure from it.

The jurists disagreed within the same topic about sale and hire in the same individual contract. Mālik and his disciples permitted this, but the Kūfīs and al-Shāfiᶜī did not permit it, as they held that the price would then be unknown. Mālik said if the rent or wage is specified, it would not remain unknown. Perhaps those who disallowed it saw it as two sales in one. They agreed that loan and a sale are not allowed, as we have said, but the opinion of Mālik differed about the permission of a loan and partnership (*sharika*), he permitted it once and disallowed it another time.

Disagreement among the jurists over all the above questions arises from their differences on the degree of the prohibiting causes stated textually. Those for whom a prohibiting cause appeared to be strongly involved in a particular transaction prohibited it, while those to whom it appeared to carry only a little weight allowed it. This actually depends on the discretion of the *mujtahid*, who in reflecting over such issues is pulled equally by the opposing probabilities. In such cases of dispute it is fairer to hold each of the disputing jurists to be correct. It is for this reason that some say that in issues like these we may choose any of the conflicting opinions.

24.2.7. Chapter 5: Sales Proscribed because of Harm or Fraud

The transmitted (injunctions) in this chapter are those that are established through the (Prophet's) prohibition: that an individual sell countering the sale of his brother; that he make an offer countering the offer of his brother; that trade caravans be received (outside the city limits); that a settler sell on behalf of an inhabitant of the desert; and that bids be raised (*najsh*). The jurists differed about the details of the meanings of these traditions, a disagreement that is not wide apart.

Mālik said that the meaning of his (God's peace and blessings be upon him) words, "Do not sell counter to the sale of others" and of the proscription about one making an offer countering his brother's offer, is the same. It is a situation when the buyer is inclined toward the offeror when there was nothing left between them (the buyer and the seller before concluding the sale), except minor formalities like the choice of gold, or the stipulation of defects or absolution from them. Abū Ḥanīfa interpreted the tradition in the same way as Mālik. Al-Thawrī said that the meaning of his (the Prophet's) words, "Let not some of you sell over the sale of others", is that a person should not come upon the parties to the sale and say that I have goods better than these. He did not determine the time of inclination or any other matter. Al-Shāfiʿī said that the meaning is that when the oral agreement is concluded, but they have not parted, a person comes presenting him (the buyer) with goods that are better than those being sold. This is based upon his view that a sale becomes binding through parting. He and Mālik, then, are in agreement that the proscription implies the state when the sale is close to becoming binding, but they are in disagreement as to what this state is; because of their disagreement as to what it is that makes a sale binding, as we shall explain later. The jurists of the provinces hold that this sale is despicable (*makrūh*), but if it takes place it is valid, as it constitutes an offer upon an inconclusive sale. Dāwūd and his disciples said that if it takes place it is to be rescinded, whatever the manner in which it takes place, abiding by the generality (of the tradition). Its rescission is (also) related from Mālik and some of his disciples unless they part, but Ibn al-Mājishūn denied this in a sale and said that this is what Mālik said about marriage (*nikaḥ*), which has already preceded.

They disagreed about the inclusion of a *dhimmī* (non-Muslim subject of the Islamic state) in the proscription of one's offer countering the offer of another. The majority said that there is no difference between a *dhimmī* and another in this. Al-Awzāᶜī said that there is no harm in an offer against the offer of a *dhimmī*, as he is not a Muslim's brother and the Prophet (God's peace and blessings be upon him) has said, "None should offer counter to the offer of his brother". It is on this basis that some prohibited auction (*muzāyada*), although the majority favoured its permissibility. The basis for the disagreement among them was whether the proscription here is to be interpreted as disapproval or as prohibition and if it is to be interpreted as prohibition, is this so in all situations or in some cases to the exclusion of others?

24.2.7.1. *Section 1: Going Out to Meet (trade) Caravans*

They disagreed over the meaning of the proscription of going out to receive the caravans (*rukbān*) for sale. Mālik was of the view that it is aimed at the people of the market (shopkeepers), so that the one who meets them should not benefit alone from the inexpensiveness of goods, to the exclusion of other shopkeepers. He held that it was not permitted for one to buy goods till the goods have reached the market. This prohibition applies when the meeting is at a point near the market; otherwise it is all right. The limit of nearness according to the school (of Mālik) is within six miles. He held that if the sale went through it is permitted, but then the shopkeepers should share (participate in) the goods, which are saleable in the market. Al-Shāfiᶜī said that the factor behind the proscription is the protection of the interests of the seller so that the advance buyer does not deceive him, as he does not know the market price in the city. Al-Shāfiᶜī said: "If the sale goes through, the seller will have the option of rescinding the sale or keeping it". The opinion of al-Shāfiᶜī is manifest in the tradition related by Abū Hurayra, in which the Prophet (God's peace and blessings be upon him) said, "Do not intercept the goods on the way to the market; if one obtains something from these, at an unjust price and buys it, the seller has an option on reaching the market". It is recorded by Muslim and others.

24.2.7.2. *Section 2: Sale by a Settler on behalf of the Inhabitant of the Desert*

The jurists disagreed about the meaning of the Prophet's proscription of sale by a settler for a nomadic desert-dweller. Some said, in absolute terms, that the settler is not to sell for the inhabitant of the desert. He (Mālik) differed about the purchase of the settler for the Bedouin. He permitted it once—and that was the opinion of Ibn Ḥabīb—and prohibited it on another occasion. The settlers according to him (Mālik) are the residents of the cities. It is said of him that he disallowed the sale of residents of villages for the pilgrims in transit. Similar to the opinion of Mālik here are those of al-Shāfiʿī and al-Awzāʿī. Abū Ḥanīfa and his disciples said that there is no harm if a settler sells for an inhabitant of the desert and informs him of the rate. Mālik held it to be disapproved, that is, informing the Bedouin of the rates, but al-Awzāʿī permitted it.

Those who prohibited this sale agreed that the aim of this proscription is the affluence of the urbanites, as things with the ruralists are cheaper than they are with urbanites; they are inexpensive, in fact most of them are *gratis*, without a price. It was as if they held that (the act of) an urbanite advising a ruralist (on rates) was despicable, but this is in conflict with the saying of the Prophet (God's peace and blessings be upon him), "*Dīn* is advice" and on which Abū Ḥanīfa relied for support. The proof of the majority is the tradition of Jābir, recorded by Muslim and Abū Dāwūd, who said, "The Messenger of Allāh (God's peace and blessings be upon him) said, 'The urbanite is not to sell for the ruralist, leave the people alone so that Allāh may provide for some of them through others' ". This addition is unique with Abū Dāwūd, so far as I know. It belongs, more likely, to the category of protection of the Bedouin from deception, for he arrives not knowing the market price, unless this addition is established, in which case the meaning of the tradition would be the same as the proscription of going out to meet the caravans, as interpreted by al-Shāfiʿī and as it appears in an established tradition.

They disagreed when it took place. Al-Shāfiʿī said if it goes through then it is concluded and permitted on the basis of the words of the Prophet (God's peace and blessings be upon him), "Leave the people alone so that Allāh may provide for some of them through others". The disciples of Mālik disagreed about this. Some of them said that it should be rescinded, while others said that it is valid.

24.2.7.3. *Section 3: Prohibition of Raising Bids*

The jurists agreed on the prohibition of the Prophet's proscription of *najsh* (raising bids). *Najsh* occurs that when one raises (the price of) a commodity having no intention to buy it, but to benefit the seller and harm the buyer. They disagreed when such a sale takes place. The Ẓāhirites said that it is void, while Mālik said that it is like selling a defective commodity, in which case the buyer has a choice to rescind it if he likes or to maintain it if he so desires. Abū Ḥanīfa and al-Shāfiʿī said that if it takes place he (who raises the bid) has sinned, but the sale is valid. The reason for disagreement is whether the proscription implies voidability of the proscribed sale itself or of something external to the contract. Those who said that it implies rescission of the sale itself did not permit it, while those who said that it does not, permitted it.

The majority are of the opinion that if the proscription is because of one aspect of the proscribed act, it leads to its voidability, like the proscription of *ribā* and *gharar*, but if it is because of something external, it does not lead to voidability.

It appears that included in this category is the proscription by the Prophet (God's peace and blessings be upon him) of the sale of water, because of his words, some of which indicate that "he proscribed the sale of surplus water to prevent thereby (thirsty) cattle from approaching the pasture area (close to the water)". Abū Bakr ibn al-Mundhir said that it is established "that the Messenger of Allāh (God's peace and blessings be upon him) proscribed the sale of water to protect through it the pasture area". He said that the remaining water in a well should not be denied, nor should the water be sold. The jurists disagreed about the meaning of this proscription. A group of jurists interpreted it in its generality and said that the sale of water is not permitted in any circumstances, whether it is a well or pond or a spring in the ground, owned or not owned, except that when it is owned he (the owner) has a prior right to use the amount he needs. Yaḥyā ibn Yaḥyā had the same opinion and said that access (for free use) cannot be denied to four things: water, fire, firewood and pasture.

Some restricted these traditions because of their conflict with the recognized principles; namely, that one's wealth is not permissible, as has been affirmed by the Prophet (God's peace and blessings be upon him), without the good will of that person and there is consensus (*ijmā*ᶜ) on this point. Those who restricted its meaning put forward different interpretations of restriction. Some said that this is so when a well is shared between co-owners, one of them watering on one day and the other on the next. If the field of one is irrigated in part of his day, but that of his co-sharer is not irrigated in his allotted one day, then the former should not prevent him from using the water in the remainder of his day. Some said that the interpretation is: that one irrigates with his own water, but if his well suffers damage, while his neighbour has surplus water, then his neighbour is not to deny him water till his well is restored (or repaired). Both interpretations are similar and the point of the interpretations is that they qualified the indeterminate meaning in these two traditions, as the proscription of the sale of water is absolute and then there is prohibition of denying the surplus water. They qualified the absolute meaning in this tradition and said it is the surplus water, (the sale of) which is prohibited in the two traditions, that is, at first he (the Prophet) prohibited the sale of water generally and then prohibited denial of surplus water. Thus, they (the jurists) applied the general term in the tradition to the restricted one. The basis of Mālik's opinion is that when the source of water is in privately owned land, it is for the owner to sell it or deny it, unless he is approached by destitute people who are likely to die (of thirst). Further, he (Mālik) interpreted the *ḥadīth* (prohibiting the sale of water) to apply to the wells of the desert, which are dug in unowned land. He was, therefore, of the view that the owner—that is, one who dug it—has the prior right and when his animals have been watered he leaves the rest for other people. It is as if he held that a well cannot be owned by digging (revival of land).

Within this category is the rule governing the separation between the mother and her child (by the sale of the mother alone), which is unanimously prohibited on the basis of the words of the Prophet (God's peace and blessings be upon him), "As to one who causes separation between a mother and her child, Allāh will cause separation between him and his loved ones on the Day of Judgment". They disagreed, however, in this on two points: on the time of the permissibility of separation; and on the legal effect of the sale when it takes place. About the effects of the sale, Mālik said that the sale is to be rescinded, while al-Shāfiʿī and Abū Ḥanīfa said it is not to be rescinded, but the buyer and seller (are considered to) have sinned. The cause of disagreement is whether the proscription requires the invalidity of the proscribed act, when it is caused by (an) external (factor). About the time at which prohibition converts into permissibility, Mālik said its (minimum) limit is the time of teething. Al-Shāfiʿī said it is the age of seven or eight years, while al-Awzāʿī said it is over ten years, as then he (the child) recognizes his benefit and can be independent of his mother.

Related to this category is the conclusion of a sale carrying fraud (*ghabn*), but a sort of *ghabn* that is normally practised. Is the sale to be rescinded? The well-known opinion in the school (of Mālik) is that it is not rescinded. ʿAbd al-Wahhāb said that if *ghabn* involves over one-third of the value it is to be returned and he attributes it (his opinion) to some of the disciples of Mālik, basing it also on the rendering of an option by the Prophet (God's peace and blessings be upon him) for the bearer of goods when met outside the city, on the basis of *ghabn*. In addition, he finds a basis in the granting of an option to Munqidh ibn Ḥayyān for three days when it was mentioned to him that he was defrauded in sales. Some among the early predecessors were of the view that the *ḥukm* of the father is the same as that of the mother, while a group of jurists maintained this for all brothers (that is, they should not be sold separately while still young).

24.2.8. Chapter 6: Proscription (of Sale) because of the Time of Prayer

This is laid down in law only for the time of the obligation of proceeding for *jumuʿa* prayer because of the words of the Exalted, "When the call is heard for the prayer of the day of congregation, hasten unto remembrance of Allāh and leave your trading".[137] This is a matter unanimously agreed upon as far as I know, I mean, the prohibition of sale at the commencement of *adhān* (call for prayer), which takes place after the declining (of the sun) when the *imām* is at the pulpit. They disagreed about its legal effects after it takes place, whether it is to be rescinded. If it is rescinded, then for whom and also whether all other contracts are linked to sale. It is well-known from Mālik that it is rescinded and it is said (in another opinion) that it is not rescinded, which also is the opinion of al-Shāfiᶜī and Abū Ḥanīfa. The reason for disagreement, as we have said more than once, is whether the proscription laid down because of an external factor leads to the invalidity of the thing proscribed. And for whom is it rendered void? According to Mālik, voidability is for one on whom *jumuᶜa* is obligatory, not for one on whom it is not. The principles of the Ẓāhirites require its rescission for both parties to the sale.

It is possible that all other contracts be linked to sale, as in them there is the same meaning of occupation found in indulgence in sale instead of walking toward the *jumuᶜa*. It is also possible that they should not be linked with it, as their conclusion at such a time is rare as against sale. It is possible to link all other prayers, on the whole, with *jumuᶜa* by way of recommendation, in the anticipated prayer time. If it is missed then it is by way of prohibition, though no one has said this in the entirety of my knowledge. It is for this reason that Allāh has praised those relinquishing sale for the sake of prayer and the Exalted says, "Men whom neither merchandise nor sale beguileth from remembrance of Allāh and constancy in prayer and paying to the poor their due".[138]

As the general causes of vitiation of sale have been established, we move to study the reasons and conditions of its validity and that is the second division in the general examination of sales.

24.3. Part 3: Reasons and Conditions Validating Sales

The causes and conditions validating sales are, on the whole, the opposite of causes vitiating them and are confined to three areas (of study): first, the study of the contract (*ᶜaqd*); second, the study of the subject-matter (*maᶜqūd ᶜalayh*); and third, the study of the parties to the contract. In this part, then, there are three chapters.

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[137] Qurʾān 42 : 9

[138] Qurʾān 24 : 37

24.3.1. Chapter 1: The Contract (ᶜ*Aqd*)

24.3.1.1. Element 1: The Form of the Contract

The contract (of sale) is not valid except by the use of the words "sale" and "purchase", used in the past tense. The seller says, "I have sold to you" and the buyer (thus) says, "I have bought from you". If he says, "Sell me your commodity for such and such price" and the seller says, "I have sold it (to you)", then according to Mālik, the sale is valid and binding on one who can comprehend, unless he comes up with a (valid) excuse. According to al-Shāfiᶜī, sale is not concluded until the buyer says, "I have bought". Similarly, when the buyer says to the seller, "For how much will you sell your goods?" and the seller says, "For so much", to which he replies, "I have bought it from you".

It is disputed whether sale becomes binding until he (the buyer) says, "I have bought them from you". According to al-Shāfiᶜī, sale is concluded both by unequivocal words and an alluding expression and I do not remember an opinion from Mālik about this. Gestures are not sufficient for this, according to al-Shāfiᶜī, to the exclusion of words. There is no dispute, as far as I know, that offer and acceptance effective for a binding sale are not to be delayed till after the parting from the session—I mean, when the seller says, "I have sold my goods to you for so much" and the buyer remains silent not accepting the offer till they part. If he later comes back and says, "I have accepted", it would not be binding on the seller.

They disagreed about the (exact) moment when it becomes binding. Mālik, Abū Ḥanīfa, their disciples and some of the jurists of Medina said that it becomes binding through acceptance during the session even though they have not parted. Al-Shāfiᶜī, Aḥmad, Isḥāq, Abū Thawr, Dāwūd and from among the Companions (God be pleased with them all) Ibn ᶜUmar, said that sale is binding through parting after the session and that as long as they have not parted, sale is neither binding nor is it concluded. This is the opinion of Abū Dhiʾb among a group of jurists of Medina, of Ibn Mubārak, Qāḍī Sawār, Qāḍī Shurayḥ and of a group the successors to the Companions (*Tābiᶜūn*) among others. This is also related from Abū Barza al-Aslamī from among the Companions and there is no opposition to it from the Companions.

The reliance of those who stipulate the option of the session (*khiyār al-majlis*) is the tradition of Mālik from Nāfiᶜ from Ibn ᶜUmar that the Messenger of Allāh (God's peace and blessings be upon him) said, "The (two) parties to the sale, each one of them has an option (*khiyār*) against his counterpart, as long as they have not parted, except in the sale with an option". In some of the narrations of this tradition, it is recorded, "Except when one of them says to the other—'choose' ". The *isnād* of this tradition is most reliable and authentic, according to all *ḥadīth* authorities, so much so that Abū Muḥammad thought that *isnād* like this should lead to *yaqīn* (certainty), even if related by way of *āḥād* (individual narration). The meaning of the tradition became confusing for the contenders, because of their method of denying to act according to it. The reliance of Mālik in the denial to act according to it is that it does not correspond to the practice of the people of Medina, although he was confronted with the implication of the tradition of Ibn Masᶜūd, which he related as *munqaṭi*ᶜ (with an interrupted *isnād*), where he said, "Whoever the two parties to a sale, the final word is that of the seller, or they should retract". It is as if he assigned to it its general meaning, which implies that it (the option) can be during the session and after it. If the (duration of the) session itself is stipulated as a condition for the conclusion of the contract, there would be no need in it for the explanation of the ruling about disagreement during the session, as the sale would not as yet have been concluded or become binding, which it will through parting after the session. This tradition is (in any case) *munqaṭi*ᶜ and cannot contradict the first one. It especially does not contradict the former except by stressing its general implication. It is better, however, that the meaning of the latter should be fixed in the light of the former. This latter tradition has not been related by a *ḥadīth* authority with a complete *isnād*, in so far as I know. This, then, is what Mālik (God bless him) relied upon in relinquishing to act on the other tradition.

Mālik's disciples relied on the narrated sources and on analogy. The most significant source related to this issue exists in the words of the Exalted, "O ye who believe, fulfil your undertakings (ᶜ*uqūd*)".[139] ᶜ*Aqd* consists of offer and acceptance and the command here implies the obligation (to fulfil). The option of the session (*khiyār al-majlis*), however, gives rise to the relinquishment of fulfilment because it grants, according to them, a party (to sale) the right to retract prior to parting after having consented. On the basis of analogy, they said, "It is a commutative contract, therefore, the option of the session is not effective in it, the basis being all other contracts like *nikāḥ*, *kitāba*, *khul*ᶜ, pledge and settlement (*ṣulḥ*) on the bloodwit of intentional bodily injury (including murder)". When it is said to them that the textual sources relied upon by you were restricted by the cited tradition and you are only left with analogy in the face of the tradition, it consequently becomes binding on them to be one of those who give precedence to analogy over tradition. That is a practice abhorred by the Mālikites—though the preference of analogy over transmission has been related from Mālik, similar to the practice of Abū Ḥanīfa. They respond to this by saying that this is neither rejection of a tradition in favour of analogy nor is it preference. It belongs to a category of interpretation differing from the obvious meaning and interpretation through analogy is unanimously acceptable to the *uṣūliyyūn*. They say that they have two interpretations for this tradition. First, that the two parties to the sale are still haggling and the sale is not concluded between them. It is said to them, in such a case the tradition has no use as it is well-known that they can retract the contract not being made by mere discussion. In the second interpretation, they said that the parting is indirectly meant to be parting through words and not physical parting, as the Exalted has said, "But if they (the disputing husband and wife) separate, Allāh will compensate each out of His abundance".[140] The objection, however, to this is that it is a figurative not the original use (of the word). In its original application the word means physical separation. The basis of preference here is to compare the apparent meaning of the word with analogy and to prefer whichever is stronger. The wisdom behind this right of option is to give the parties opportunity to mitigate the chances of remorse. These, then, are the principles of the first element, which is contract (*ᶜaqd*).

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[139] Qur'ān 5 : 1

24.3.1.2. Element 2: The Subject-Matter of the Contract

This is the *maᶜqūd ᶜalayh* (the subject-matter). In it is stipulated absence of *gharar* (uncertainty) and *ribā* and the discussion of their different kinds, both agreed upon and disputed and the causes of dispute have already preceded; there is no point in repeating them here. *Gharar* is removed from a thing by its becoming known with respect to: existence; description; quantity; readiness for delivery, of both commodity and price; and period (of delivery), if it is a credit sale.

24.3.1.3. Element 3: Parties to the Contract

It is stipulated for them that they be full owners or lawful agents, both of age and, along with this, neither of them should be subject to interdiction, whether on the basis of idiocy—according to those who subject the idiot to interdiction—or because of the right of another like a slave, unless the slave is authorized (*maᵓdhūn*) to trade.

They disagreed in this about the unauthorized agent (*fuḍūlī*), whether his sale is effective. The form it takes is that a person undertakes a sale, of someone else's property, on the condition that if the (assumed) principal ratifies the sale it will become effective, otherwise it will be rescinded. Similarly, in the purchase for a principal without his permission on the condition that if he agrees the purchase will be valid, otherwise it will be void. Al-Shāfiᶜī prohibited it in both its forms while Mālik permitted it in both. Abū

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[140] Qurᵓān 4 : 130

Ḥanīfa made a distinction between sale and purchase. He said it is permitted in sale, but not in purchase.

The reliance of the Mālikites is on the narration that "the Messenger of Allāh gave a *dīnār* to ᶜUrwa al-Bāriqī and said, 'Buy for us out of this incoming flock, a goat'. He said, 'I bought two goats with a *dīnār* then sold one of them for a *dīnār* and came back with a goat and a *dīnār*'. I said, 'O, Messenger of Allāh, here is your goat and your *dīnār*'. He said, 'O Lord, bless him in his lawful transactions' ". The point of the argument in this is that the Prophet (God's peace and blessings be upon him) did not authorize him to deal in the second goat, either for its sale or its purchase. This forms the proof against Abū Ḥanīfa in purchase for another person and against al-Shāfiᶜī on both counts. The reliance of al-Shāfiᶜī is on the proscription laid down in the sale by a person of what he does not have. The Mālikites interpret that to mean sale for himself and not that for another (who has the commodity). They said that the evidence for this is that the proscription was laid down in the case of Ḥakīm ibn Hizām and his famous case, as he used to sell what he did not possess. The basis for disagreement is the famous issue, whether the proscription related to a cause is to be confined to it or is to be generalized.

These then are the fundamentals of this part. On the whole the examination in this part is to be potentially included in the first part; however, the technical legal approach requires that it be dealt with separately. Now that we have discussed this part, in accordance with our purpose, let us traverse the third part, which is the discussion of the *aḥkām* of valid sales.

24.4. Part 4: Discussion of the General *Aḥkām* of Valid Sales

The principles of this part, which have a direct relationship to the transmitted bases, are confined to four units. The first unit is about the *aḥkām* concerning the existence of defects in the subject-matter of sales. The second unit is about the liability for compensation (*ḍamān*) (in case of destruction) of the subject-matter, when it shifts from the ownership of the seller to the ownership of the buyer. Third is the distinction of things that follow the subject-matter, within which they exist at the time of sale, from those which do not follow it. Fourth are the disputes between the parties to the contract, though their discussion would have been more suitable in the Book of Judgments. Similar is the case of the categories of the *aḥkām* of sales like restitution (*istiḥqāq*) and so is pre-emption (*shuf*ᶜ*a*) a category of *aḥkām* contingent upon sales; however, it is customary to devote individual books to them.

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[141] Qurʾān 4 : 29

24.4.1. Unit 1

In this unit there are two chapters. The first chapter is on the *aḥkām* concerning the existence of defects in absolute sales. The second chapter is on the *aḥkām* of defects in sales with the condition of absolution (*barāʾa*).

24.4.1.1. Chapter 1: The *Aḥkām* of Defects in Absolute Sales

The basis for rescission due to defects are the words of the Exalted, "[E]xcept it be a trade by mutual consent",[141] and the well-known tradition of the goat not milked for some time before sale (*musarrāt*) (so as to enhance its value). The subject-matter bearing the defect, forms the basis of the contract either with the likelihood of rejection or without such likelihood. Again, when it forms the basis of the contract and is liable to rejection, it may give rise to a *ḥukm* or it may not give rise to a *ḥukm*. When it does give rise to a *ḥukm*, it is also possible that the subject-matter of sale has changed after the sale or it has not. What is its *ḥukm* when it does not change? If it does change, then, how many kinds of changes take place and what is their *ḥukm*?

The sections covering the fundamentals of this chapter are, therefore, five. Section one is about the identification of contracts in which a *ḥukm* is invoked due to defects, as distinguished from those in which it is not. The second section is about the identification of defects, which give rise to a *ḥukm* and about the conditions generating such a *ḥukm*. The third (section) concerns the identification of the *ḥukm* of the causative defect when the subject-matter of the sale is not altered. Fourth is the section for the identification of the categories of alterations taking place in the possession of the buyer and their *ḥukm*. The fifth section is about the adjudication of the *ḥukm* in case of dispute between the parties to the sale, though this was more suitable for the Book of Judgments.

24.4.1.1.1. *Section 1: Distinction of Contracts that Give Rise to a* Ḥukm, *by Virtue of Defects, from those that do not*

The contracts in which a *ḥukm* becomes obligatory without dispute, because of defects, are the contracts whose purpose is the exchange of counter-values. Similarly, in contracts whose primary aim is not mutual compensation there is no dispute that defects have no effect in them whatsoever. These are like gifts (*hiba*) for purposes other than charity and spiritual reward. About those contracts that fall between these two categories, I mean, those that combine magnanimity with compensation like a gift for a (spiritual) reward, the apparent ruling of the school is that there is no *ḥukm* for them because of defects. It is also said, however, that a *ḥukm* can be invoked if the defect renders the transaction void.

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[141] Qurʾān 4 : 29

24.4.1.1.2. *Section 2: Identification of Defects that Give Rise to a* Ḥukm *and the Conditions Necessitating the* Ḥukm

This section has two aspects: first, defects that give rise to a *ḥukm*; and second, conditions necessitating the *ḥukm*.

24.4.1.1.2.1. Aspect 1

Among these are defects in character (of the sold commodity, like a slave) and those present in the body. Of these there are those whose opposites are stipulated in the subject-matter of sale and are called defects by virtue of conditions, as well as those that invoke a *ḥukm* even if the existence of their opposites is not stipulated in the subject-matter. These are qualities whose absence constitutes an inherent deficiency. The opposites of other defects are merely perfections whose absence does not amount to a real defect, such as a professional skill (like a slave knowing carpentry or tailoring etc.). Such inherent defects are mostly found in character, but can also exist in the body. Among physical defects are those that exist in the body of a commodity as well as of an inanimate commodity.

The defects that have an effect on the contract are, according to all authorities, natural deformities or legal deficiencies, which have an adverse effect on the price of the subject-matter. These differ in accordance with the times, customs and individuals. Perhaps a deficiency in the created body is an advantage in law, like meekness in female slaves and circumcision in male slaves. Due to the interdependence of these meanings and gradually through the practice of people, disagreements arose between the jurists in these matters. Out of these issues, we shall discuss those in which controversies among the *fuqahā*ʾ became prominent, so that what is derived from them by the mind of the jurist serves as a rule and a guideline for that in which no text can be found or where the text cannot be extended to another case.

Among these is the existence of (the habit of) indulging in unlawful sexual intercourse (*zinā*) in slaves. The jurists differed about this. Mālik and al-Shāfiʿī said that it is a defect. Abū Ḥanīfa said that it is not, rather it is a deficiency in the legal requirement, which is chastity. Marriage (in a slave-girl), according to Mālik, is a defect as it is an impediment against utilization. Similarly, in the case of a debt. This is so, as a defect on the whole is that which hinders a mental or physical act and such a defect is sometimes inherent in the thing or is external. Al-Shāfiʿī said, as far as I know, that neither a debt nor marriage is a defect. Pregnancy in an attractive (slave-girl) is a defect according to Mālik and about its being a defect in an ugly slave-girl there is a disagreement among the jurists.

Taṣriya is a defect according to Mālik and al-Shāfiʿī and that is the blocking of milk in the udder for a few days so that it may give the impression that the animal yields a substantial quantity of milk. Their proof is the well-known tradition of *muṣarrāt*. It is the saying of the Messenger of Allāh, "Do not block the milk of camels and cows (to cheat in sale). If one does this, then, the buyer has two options, either to keep it or to return it along with a *ṣāʿ* of dates". They said that the option of returning was established for him (the buyer) in the case of *taṣriya* and this indicates that it is an effective defect. Further, they maintained that he is a swindler and they held fraud similar to all other effective defects. Abū Ḥanīfa and his disciples said that *taṣriya* is not a defect because of the common knowledge that whoever buys a goat and discovers later that its milk is not much, cannot designate it as a defect. They also said that the tradition of *muṣarrāt* does not obligate practice due to its deviation from general principles. This deviation from principles is (seen) from different aspects. Among them is its conflict with the saying of the Prophet (God's peace and blessings be upon him), "(Right to) profit is through a corresponding liability for loss". This is a principle agreed upon. Among them is also its conflict with the prohibition of selling food for food with a delay, which is not permitted by agreement (of the jurists). Further, (compensation in) perishable property is undertaken through payment of its value or its like and granting a *ṣāʿ* of dates as compensation of milk is neither of these. Moreover, there is an exchange of an uncertain quantity of food, that is estimated (*juzāf*), with one of known measure as the milk with which the seller caused a deception is of an unknown quantity and, further, it can sometimes be more and sometimes less while the compensation here is fixed. It is, however, necessary (according to Ibn Rushd) to exempt this case (of *muṣarrāt*) from all these principles because of the authority of the tradition. It may be said that it does not fall in this category at all, but is a specific *ḥukm* and this has been a digression, so we now return to what we were discussing and say:

There is no disagreement, among them, that being one-eyed, blind, or amputated in hand or foot are effective defects. Similarly, a disease in a limb or the entire body. Grey hair in a beautiful (slave-girl) is a defect within the school and it is said that there is no harm if it is slight. Similarly, unhealthy blood-discharge (non-menstruating) is a defect in a slave-girl, beautiful or ugly and so is menopause according to the well-known opinion of the school. Being thin-haired is a defect as are, by agreement, all diseases of the senses and limbs.

On the whole, then, the principle in the school is that all that has an effect on the value, I mean, in lowering it, is a defect. Bed-wetting is a defect, which is also the opinion of al-Shāfiʿī. Abū Ḥanīfa said that the (slave) girl is to be returned because of it, but not a (male) slave. Femininity in (slaves sold as) males and masculinity in females is a defect. All this is held by the school except that in which we have narrated disagreement.

24.4.1.1.2.2. Aspect 2

The condition of a defect invoking a *ḥukm* is that it (the defect) should have existed prior to the time of sale or it should occur during the period of contractual obligation (*ʿuhda*), according to those who uphold such a period. Mālik was unique in the maintenance of the *ʿuhda* to the exclusion of the rest of the jurists. He was preceded in this by the seven jurists and others from among the jurists of Medina. The meaning of *ʿuhda* is taken to be a post-sale period, during which defects occurring are held to be the responsibility of the seller. It is actually, according to those who uphold it, two periods: a period of three days, for all defects arising in it in the possession of the buyer; and a period of a year concerning the three defects of *judhām* (leprosy), *baraṣ* (disease similar to leprosy) and insanity. Anything of the latter which strikes the subject-matter within a year is the responsibility of the seller, but anything other than these three is the liability of the buyer, according to the principle.

The period of three days, according to the Mālikites, is on the whole like the (three) days of *khiyār* (option) and like the days of a slave-girl's waiting period; maintenance in these days and the liability for compensation belong to the seller. As to the period of a year, maintenance and liability for compensation are on the buyer except for the three diseases. This period (related to diseases), according to Mālik, applies to slaves, but also occurs in all those categories of sale the purpose of which is mutual market contention and would be treated as (immediate) sale without being deferred. There is no dispute in this (within Mālik's school), however, there is disagreement in other things. The period of a year, according to him, is calculated in months after the end of the three-day period. The period of *muwādaʿa* (place of stay of a slave mutually agreed to by the parties) runs concurrently with the three-day period, if that period is longer than three days. The period of a year does not run concurrently with the period of waiting by a slave-girl. This is the best-known opinion of the school over which there is a disagreement. The seven jurists said that none of the periods coincides with another; the period of *istibrā*ʾ runs first, then the three-day period and then the period of a year. Narrations differ from Mālik whether the period is binding in every land even when the people have not been accustomed to it or made to accept it. Two points of view are narrated from him in this. If it is said that it is not binding on the people of a certain land except when made to accept the condition, then is it necessary that the people of all lands be made to accept it? There are two opinions on this also.

Cash payment is not required in the three-day period, even if stipulated in the contract, but it is necessary in the one-year period. The underlying cause in this is that the delivery of the price, if deferred, will be incomplete and it will look like (the transaction of) a loan and a sale. These, then, are the well-known *aḥkām* of the *ʿuhda* in the school of Mālik and they are all derived opinions based on the validity of the *ʿuhda*, so we must refer to the statement of the proofs establishing it and those nullifying it.

The reliance of Mālik (God bless him), in the case of *ʿuhda* and the proof on which he depended, is on the practice of the people of Medina. His later followers argued on the basis of what is related by al-Ḥasan from ʿUqba ibn ʿĀmir from the Prophet (God's peace and blessings be upon him), that he said, "The *ʿuhda* of the slave is three days". It is also related (that he said), "There is no *ʿuhda* after four (days)". The latter tradition is also related from Samura ibn Jundub al-Fazārī (God be pleased with him). Both traditions are defective (*maʾlūl*) according to the *ḥadīth* scholars, as they differed about the transmission to al-Ḥasan from Samura even though al-Tirmidhī has declared it as *ṣaḥīḥ*. The rest of the jurists of the provinces did not consider the traditions on *ʿuhda* as *ṣaḥīḥ* and were of the view that even if they were proved authentic they conflicted with general principles. This is so as the Muslim jurists are in agreement that any damage striking the subject-matter of sale prior to its possession by the buyer is on (account of) the seller. A restriction of this settled principle is only possible through an established text. It is for this reason that one of the two narrations from Mālik, demanding the application of *ʿuhda* in each land unless it is already a usage in that land or is stipulated (as a condition), particularly the period of one year, is regarded as weak, for there is no tradition in it. Al-Shāfiʿī has related from Ibn Jurayj, who said, "I asked Ibn Shihāb about the *ʿuhda* of one year and that of three (days) to which he said, 'I do not know of a precedent in this' ".

As the discussion of the distinction of defects, which give rise to a *ḥukm* and those which do not, has been completed and the condition in this—namely, that the defect must arise before the sale or within the *ʿuhda* (according to those who uphold it)—is established, let us now proceed to the remaining (discussions).

24.4.1.1.3. *Section 3:* Ḥukm *of the Causative Defect when the Subject-Matter of Sale is not Altered*

When defects are found, even though the subject-matter of sale has not altered at all in the possession of the buyer, they can either be in immovables, in goods, or in animals. In case they are in animals, there is no dispute that the buyer has an option either to return the subject-matter of sale and redeem the price, or to keep the *mabīʿ* without compensation (for the defects). When such defects are found in immovables, then, Mālik distinguishes between slight and major defects. He says, if the defect is slight, return (of the property) is not necessitated, but the value of the defect, called *arsh*, is to be paid. If the defect is major, return is obligatory. This is what is found in the well-known books of his disciples, while the jurists of Baghdad (his disciples) have not gone into details. About goods, the well-known opinion in his school is that there is no *ḥukm* in this like that for landed property. On the other hand, it is said that it is of the same nature as landed property according to the school (Mālik). Here is what was preferred by the jurist Abū Bakr ibn Rizq, Shaykh of my grandfather, may Allāh have mercy on both of them. He used to say, "There is no difference, in this issue, between landed property and goods". His opinion has to be upheld by those who distinguish between slight and major defects in landed property, that is, they have to make the same distinction in the case of goods too. The principle is that anything which lowers value necessitates a return. That is the opinion of the jurists of different regions. It is for this reason that the jurists of Baghdad did not make the distinction I have referred to concerning landed property. Their opinion was not different even in the case of animals and they did not distinguish between slight and major defects.

24.4.1.1.3.1. Subsection: Agreement between the buyer and seller that the buyer will retain the *mabī*ᶜ and the seller will pay him the value of the defect

We said that the buyer has an option either to return the *mabī*ᶜ and redeem the price or to retain it without any compensation (for defects). If, however, they agree that the buyer will retain the goods and the seller will pay him the value of the defect then the majority of the jurists of the provinces permit this, except for Ibn Surayj from among the followers of al-Shāfiᶜī. He said that they cannot do this for it is an option in wealth (*māl*) and he has no right to annul its return for compensation, as is the case of the option in pre-emption (*shufᶜa*). Qāḍī ᶜAbd al-Wahhāb said that this is not correct as it is a right of the buyer and it is up to him to discharge it—that is to return it and have a recourse to the price or to relinquish it for compensation—and what he has said, about the option in pre-emption, is evidence favouring us as we permit its relinquishment exchange for compensation. There is no dispute in this. In this discussion there are two well-known issues for purposes of distinction.

24.4.1.1.3.1.1. Issue 1: Several items in a single contract, one of which is defective

If the buyer purchases different kinds of things in a single contract and finds one of them to be defective, should he return all of them or just the one which he found to be defective? Some said that he only has the right to return all or retain them. This was the opinion of Abū Thawr and al-Awzāʿī; unless a separate value had been specified for each of the different things in which case there is no dispute that the particular defective subject-matter (*mabīʿ*) will be returned. The dispute arises when the price of each unit has not been specified. Some said that the defective commodity is to be returned in exchange for its proportion of the price, which is to be estimated. Among those who held this opinion were Sufyān al-Thawrī and others besides him. Both opinions are related from al-Shāfiʿī. Mālik made a distinction and said that the defective thing is to be examined. If it was the prominent part of the contract and its major object, all the things are to be returned. If it was not the major part of the contract then it is to be returned in exchange for its value. Abū Ḥanīfa made another distinction and said that if the defect occurred before possession then everything is to be returned, but if it occurred after possession the defective part is to be returned for a proportionate part of the price. In this issue, then, there are four opinions. The argument of those who prohibited division for return is that the commodity returned had no value agreed upon by the buyer and the seller. Similarly, what is retained has a value that was not agreed upon by both of them. It is possible that had it been divided it would not have sold for the value now determined for it. The argument of those who viewed the return of the defective part through division is that it was a must as it was an occasion of necessity. The valuation and estimate is substituted for consent on the analogy that the part of the *mabīʿ* which is lost has no other solution except valuation.

The distinction drawn by Mālik, whether it is the object of the contract, is *istiḥsān* on his part as he held that this defective part, if it was not the object of the sale, will not cause too much harm in so far as its valuation does not conform with the price intended by the buyer and the seller. When it is the object, however, or overwhelms the *mabīʿ* the harm in it is immense. There are different narrations from him whether the effect of the defect is to be considered only on the price of the whole or for the defective part only. With respect to the distinction drawn by Abū Ḥanīfa between possessing and not possessing, the taking of possession is a condition for the completion of the sale according to him. As long as it is not possessed, the liability for loss, in his view, is on the seller. The *ḥukm* of restitution in this issue is return on the basis of a defect.

24.4.1.1.3.1.2. Issue 2: Two men buying the same thing in a single contract

They disagreed about two men buying a single thing in the same contract and finding a defect in it, one of them desiring a return (of the property) while the other refuses. Al-Shāfiʿī said, he who wishes to return (his share of the property) may do so. This is also the narration of Ibn al-Qāsim from Mālik. It is also said that he is not allowed to return it. Those who made return obligatory, deemed it to be two separate contracts as two parties joined in it. Those who did not obligate it, deemed it to be a single contract, in which the buyer wishes to return a portion of the subject-matter on the basis of a defect (he has to return it all or keep it).

24.4.1.1.4. *Section 4: Identification of the Kinds of Alterations taking place in the Possession of the Buyer*

In case of alteration of the *mabī*ᶜ in the possession of the buyer, who does not discover the defect till after the occurrence of the alteration, the *ḥukm* changes in the opinion of the jurists of different regions according to the nature of the alteration. In case of change (in a slave) by death, disease, or manumission, the jurists of different regions maintain that it is a total loss and the buyer will have recourse to the seller for the value of the defect. 'Aṭā' ibn Abī Rabāḥ said that he cannot have recourse in the case of death or manumission. Similar is the case, according to them, of one buying a slave-girl and discovering that she had conceived from her seller. So is the case of *tadbīr*, which is based upon the analogy of *kitāba*.

There is a disagreement among the jurists about changes taking place because of (further) sale. Abū Ḥanīfa and al-Shāfiᶜī said that if he sells the subject-matter, he cannot have recourse to the buyer for anything. Al-Layth had the same opinion. Mālik had a detailed opinion in case of sale. He can either sell it to the person who had sold it to him or to someone else and he can either sell it to him for the same price, or for less, or for more. If he sells it to the person who had sold it to him, for the same price for which he had bought it then he cannot have recourse on the basis of defect. If he sells it to him at a lesser price, he can have recourse for the recovery of the value of the defect. If he sells it to him at a higher price, he will examine the issue. If the first buyer had made a misrepresentation, that is he was aware of the defect, then the first will not have recourse to the second for anything. If he had not made a misrepresentation, the first will have recourse to the second for the price and the second will have recourse against the first also. The two sales will be rescinded and the *mabī*ᶜ will revert to the ownership of the first. If he sells it to the person he bought it from, then Ibn al-Qāsim says that he has no recourse for the value of the defect, like the opinion of Abū Ḥanīfa and al-Shāfiᶜī. Ibn al-Ḥakam says that he has a recourse for the defect. Ashhab said that he will have recourse for the lesser of the value of the defect or for the value of the price, this is so when he has sold for less than he bought it for. On this basis, he does not have a recourse if he sold it for the same price or more. This was also the opinion of ᶜUthmān al-Battī.

The reason for Ibn al-Qāsim's, al-Shāfiᶜī's and Abū Ḥanīfa's opinions is that if he has alienated (the property) through sale, then he has taken the compensation in it without considering the effectiveness of defect in this compensation, which is the price. Therefore, when the buyer demands from him the compensation of the defect he has recourse to the first seller without dispute. The reason for the second opinion is seen through the similarity of the sale with manumission. The reason for the opinion of Ashhab and ᶜUthmān (al-Battī) is that if the *mabīᶜ* was in his possession, he could do nothing but retain it or return the whole of it; however, if he has sold it he has taken compensation through the price, so he has a right only to what is deficient unless it is more than the value of the defect. Mālik said that if he gifts it or donates it alienating ownership without compensation, he has recourse for the value of the defect. Abū Ḥanīfa said he has no recourse, as his *hiba* or *ṣadaqa* is alienation of ownership to which he has consented seeking a reward. His consent to relinquishing the right to (compensation) for the defect is more appropriate and suitable in this case. Mālik, however, made an analogy in case of gift upon manumission. Analogy reveals that he should have no recourse for any part of it if he alienates it with no possibility of return, as they are in agreement that if it is in his possession he has no other option but to return it or retain it, which is evidence that a defect has no influence in discharging any part of the price, the only effect it has is in the rescission of the sale.

About contracts in which the return (of property) is consequential, as in pledges and hire, the disciples of Mālik differed. Ibn al-Qāsim said this does not prevent return because of a defect when he returns the subject-matter to him. Ashhab said if the time when it will pass out of his hands is not distant, he has a right to return it because of a defect. The opinion of Ibn al-Qāsim is better. *Hiba* for a (spiritual) reward, according to Mālik, is like sale in so far as there is alienation in it. These then are the *aḥkām* of the situations that befall a *mabīᶜ* in contracts undertaken in it.

24.4.1.1.4.1. Subsection: The occurrence of a loss in the subject-matter

If a deficiency occurs in the subject-matter, it can either be in value, in the *corpus*, or in character. A deficiency in value, because of the fluctuation of the market, is not effective, by consensus, in causing return on the basis of defect. If the deficiency occurring in the *corpus* is slight, not affecting the value, it does not cause return on the basis of defect; its *ḥukm* is as if it had not occurred. This is the stipulation of Mālik's school and of others beside it. About the deficiency occurring in the *corpus*, which affects the value, the jurists are divided into three opinions. First, that he (the buyer) has no option except for the value of the defect and he cannot do anything besides this if the seller refuses the return (of the *mabīᶜ*). This was the latest opinion of al-Shāfiᶜī and it was also the opinion of Abū Ḥanīfa. Al-Thawrī said that he has no option but to return the subject-matter and compensate the defect which occurred in his possession. This was also the prior opinion of al-Shāfiᶜī.

The third opinion is that of Mālik, who said that the buyer has the option to hold on to the subject-matter with the seller reducing the price in proportion to the defect, or he returns it to the seller and pays him the price of the defect that occurred in his possession. If the seller and the buyer disagree, however, the seller saying to the buyer, "I will take possession of the *mabī*ᶜ and you pay me the value of the defect that occurred in your possession", while the buyer says, "No, in fact, I will hold on to the *mabī*ᶜ and you pay me the value of the defect, which occurred in your possession". Here the buyer's opinion will prevail and it is he who has the choice. It is, however, maintained in the school that the opinion of the seller will prevail and this appears correct according to the view of one who maintains that he has no choice but to retain the *mabī*ᶜ or to return it compensating the defect occurring in his possession. Abū Muḥammad ibn Ḥazm had an entirely different opinion. He said, "He has to return it and there is no liability on him".

The proof of those who said that the buyer has no choice but to return it and to repay the value of the defect, or to retain it, is their consensus that if no defect occurs in the possession of the buyer he has no option but to return it. This necessitates the maintenance of the (latter) *ḥukm* (*istiṣḥāb ḥāl*) even though the defect has occurred in the buyer's possession and he has paid the compensation for the defect occurring during his possession. The proof of those who are of the view that he does not return the *mabī*ᶜ, but has the right to the value of the defect occurring in the seller's possession, is analogy on manumission (ᶜ*itq*) and death, because the principle is not agreed upon, ᶜAṭā having opposed it.

Whenever the seller's and the buyer's rights clash, Mālik deems the right of the buyer as predominant and grants him an option. This is so, as the seller may be doing one of the two (following) things: he has been negligent in so far as he did not seek out the defect and inform the buyer about it; or he knew about it, but has swindled the buyer. According to Mālik, if it is found that he has misrepresented a defect, the return (of the *mabī*ᶜ) becomes obligatory without the buyer paying him the value of the defect, which occurred in his possession. If the *mabī*ᶜ is lost by death or otherwise, the liability (for the loss) is on the seller, unlike the case in which it is not established that he has misrepresented. Abū Muḥammad (ibn Ḥazm)'s proof is based on the reason that it was an act of Allāh and it could even have occurred in the possession of the seller. The return of the *mabī*ᶜ on the basis of defect indicates that the sale has not taken place in reality, but only in apparent form. Further, there is no evidence in the Book or in the *sunna* that holds the *mukallaf* (subject) liable for a loss in which he was not instrumental, except when it is by way of an exemplary penalty for the usurper (*ghāṣib*), according to those who hold him liable for what is lost in his possession through an act of God. This is the *ḥukm* of defects occurring in the *corpus* of the *mabī*ᶜ.

About the defects of character, like running away and theft (in slaves), it is said in the school that they elude return as in the case of defects of *corpus*. On the other hand, it is said they do not. There is no dispute that the defect arising in the possession of the buyer, if it is cured after its occurrence, is not instrumental in restoration, unless its adverse effect is feared. They disagreed within this issue about the buyer having had intercourse with the (bought) slave-girl. Some said that if he has intercourse with her he cannot return her, but has recourse for the value of the defect, whether she was a virgin or a non-virgin. This was the opinion of Abū Ḥanīfa. Al-Shāfiᶜī said that he has to pay the value of the decrease in her price through the intercourse in the case of the virgin, but not in the case of the non-virgin. Others said that he has to pay even this and also dower according to her status (*mahr al-mithl*). This was the opinion of Ibn Abī Shubrama and Ibn Abī Laylā. Sufyān al-Thawrī said that if she is a non-virgin he pays one-twentieth of her price (*niṣf al-ᶜushr*), while he pays one-tenth of it if she is a virgin. Mālik said there is no claim on him for intercourse with a non-virgin as it was a gain (*ghalla*) that accrued to him by virtue of bearing the liability for loss. In case of the virgin, it amounts to a defect that establishes, according to him, for the buyer an option as in his opinion that has preceded. A similar opinion is related from al-Shāfiᶜī. ᶜUthmān al-Battī said that intercourse is considered in this case of the slaves according to custom, if it is effective in (causing a decrease in) value the seller compensates the deficiency; if it is not effective he (the buyer) has no right to any compensation. This, then, is the deficiency that can occur in things sold.

The jurists disagreed about increase occurring in the *mabī*ᶜ, I mean, that which is reproduced and is separable from it. Al-Shāfiᶜī was of the opinion that it is not effective in causing return and belongs to the buyer, because of the generality of the Prophet's saying, "(Right to) revenue is by a corresponding liability (for bearing loss)". Mālik exempted offspring from this and said that it belongs to the seller and the buyer has no choice except to restore the increase with its source or to retain (both). Abū Ḥanīfa said that all increases prevent restoration and necessitate valuation of the defect except for revenue and service. His proof is that what has been given birth to by the *mabī*ᶜ is already included in the contract, as its return and the return of its offspring is not possible, it amounts to an alienation (of property) that requires a valuation of the defect, except for what has been stipulated by the law about revenue and service. As to the increase resulting within the *mabī*ᶜ and which is not separable from it, if it is like the (change in the) colour of a dress, or a fraying of the dress, then it generates an option according to the school; either for retention with a recourse for defect or the return (of the *mabī*ᶜ) and his becoming a co-sharer with the seller in the value of the increase. About the development in the body, like corpulence, it is maintained in the school that it establishes an option for the buyer and it is also said that it does not. Similarly, in the case of reduction, like emaciation. This, then, is the discussion of the alterations (in the *mabī*ᶜ).

24.4.1.1.5. *Section 5: Judgment on the* Ḥukm *Varying with the Disagreement of the Parties.*

In relation to the nature of the judicial decision rendered in accordance with these *aḥkām*, (it is said that) if the seller and the buyer settle upon one of the situations out of those mentioned above, the *ḥukm* specific to that situation becomes applicable. If the seller refutes the denies the claim of the plaintiff, he will either be denying the defect or he will deny its occurrence in his possession. If he denies the existence of a defect in the *mabī*ᶜ, when the defect is such that all (prudent) men are equal in its discernment, then two ᶜ*adl* (morally upright) witnesses who are selected from among the people are sufficient. If the defect is of a nature whose knowledge is particular to people of some trade, then witnesses having this trade render testimony; who it is maintained by the school should be two and morally upright and it is also held that neither ᶜ*adāla* (moral probity) nor number, nor Islam is stipulated as a condition for such witnesses. The same is the case when they disagree about its being instrumental in (causing change in) value and also about its occurring prior to the time of the sale or after it. If the buyer has no evidence, the seller will take an oath that it did not take place in his possession. If he has evidence about the existence of the defect itself in the *mabī*ᶜ, no oath is to be administered to the seller.

When the existence of the defect is to be estimated no oath from the seller is required, rather the demand of the *ḥukm* in this is that the valuation be made in its defect-free form and also in its defective form, the buyer then takes back the difference of these two values. If there is an option, three types of valuation are to be undertaken: valuation in defect-free form, valuation with defect occurring in the possession of the seller and valuation with defect occurring in the possession of the buyer. The seller then refunds the price reducing from it an amount equivalent to the difference between the valuation in defect-free form and valuation in defective form. If the buyer refuses to return (the property) and prefers to retain it, the seller refunds out of the price the difference between the original value and the value with the defect occurring in his possession.

24.4.1.2. Chapter 2: The Sale of *Barāʾa* (Absolution)

The jurists differed about the permissibility of this sale. The form it takes is that the seller imposes a condition on the buyer for bearing the liability of all defects occurring in general in the *mabīʿ*. Abū Ḥanīfa said that the sale of absolution from all defects is permissible irrespective of the seller having a knowledge of the defects, of having conveyed (their existence) to the buyer, of having mentioned them to the buyer and of having pointed them out. Abū Thawr had the same opinion. Al-Shāfiʿī in his better-known opinion, which is supported by his disciples, said, "The seller is not absolved (of liability) of a defect unless he points it out to the buyer". Al-Thawrī had the same opinion. According to the well-known narration from Mālik, *barāʿa* is permitted in the defects known to the seller. This is particularly so in the case of slaves, except for absolution from pregnancy in the sale of an attractive slave-girl, which is not permitted according to him due to the immensity of *gharar* in it, but is permitted in the case of an ugly slave-girl. There is a second narration from him that it is permitted in slaves and animals. In the third narration from Mālik, he holds the same opinion as that of al-Shāfiʿī. It is related from him that the sale of absolution is permitted only in sale by the *sulṭān* and it is said in the sale of inherited property, without even stipulating absolution.

The proof of those who permitted *barāʿa* absolutely is that freedom from defects is the right of the buyer in sales; if he chooses to relinquish it, it is his privilege to forgo what is due. The proof of those who did not permit it absolutely is that it belongs to a category of *gharar* pertaining to defects the seller is not aware of and to the category of fraud and cheating in the case of defects he knows. It is for this reason that Mālik stipulated the lack of knowledge of the buyer. On the whole, the reliance of Mālik is on what he has related in the *Muwaṭṭaʿ* that " ʿAbd Allāh ibn ʿUmar sold a slave that he had for eight hundred *dirhams* and sold it on the condition of absolution. The buyer later came back to ʿAbd Allāh ibn ʿUmar and told him, 'The slave has a disease that you did not indicate to me'. They then took their claims to ʿUthmān and the man said, 'He sold to me a slave who has a disease which he did not indicate to me'. ʿAbd Allāh (ibn ʿUmar) said, 'I sold to him with absolution'. ʿUthmān ruled that ʿAbd Allāh ibn ʿUmar take an oath that he knew he was selling the slave with no disease known to him'. ʿAbd Allāh ibn ʿUmar refused to do so and took back the slave". It is also related that Zayd ibn Thābit used to permit the sale of *barāʾa*. Mālik singled out the slaves for this as their defects are mostly hidden.

On the whole, the option of returning (the sold commodity) on the basis of defects is a right established for the buyer. As this (identification of the defect) varies greatly, like the variance in the description of the things sold, it inevitably follows that if the two parties agree on the lack of knowledge of it that it should not be permitted; the basis of which is their agreement on the lack of knowledge about the characteristics of the *mabī*ʿ, which influence the price. It is for this reason that Ibn al-Qāsim has related from Mālik in the *Mudawwana* that his last opinion was the rejection of the sale of *barāʾa*, except what is exempted by the *sulṭān* and particularly in the discharge of debts (foreclosures). Al-Mughīra out of the disciples of Mālik held that *barāʾa* is permitted in that in which the (value of the) defect does not exceed a third of (the value of) the *mabī*ʿ.

The sale of *barāʾa* is on the whole binding with a condition, according to one who permits it, except for the sale by the *sulṭān* and of the sale of the estate of the deceased (inheritance) in the opinion of Mālik alone. The discussion of *barāʾa*, generally, is about its permissibility and about the condition of its permissibility. It is also about the kinds of contracts, kinds of *mabī*ʿ, varieties of defects and its absolute and conditional permissibility, all of which has been implicitly present in our discussion, so keep it in mind.

24.4.2. Unit 2: Time of Liability of Compensation of the Subject-Matter

They disagreed about the time at which the buyer is liable for the *mabī*ʿ so that it will be his loss if it is destroyed. Abū Ḥanīfa and al-Shāfiʿī said that the buyer is not liable until after taking possession. Mālik has details in this, as the things sold in relation to this topic are of three kinds: sales in which the seller is obliged to satisfy the buyer about weight, measure, or counting; sales in which these do not arise and these are *juzāf*; or those that are not weighed, measured or counted. Those in which there is the right to such satisfaction, the buyer is not liable except after taking possession. About those in which there is no right of satisfaction, the goods being present, there is no disagreement in the school that they are within the liability of the buyer even though he has not taken possession. There are three narrations from Mālik about the absent *mabī*ʿ. The best known is that the liability is that of the seller unless he imposes it as a condition on the buyer. Second, that it is the liability of the buyer, unless he stipulates it to be that of the seller. The third makes a distinction between things that are not secure from perishing till the time of demand, like animals and eatables and those that are likely to survive. The disagreement in this issue is based upon the question whether possession is a condition of the contract or is a *ḥukm* among the *aḥkām* of the contract, the contract being binding without possession. Those who said that possession is a condition of the validity of the contract or of its being binding, or in whichever way you wish to convey this meaning, the liability is, according to them, that of the seller till such time that the buyer takes possession. Those who maintained that it is a binding *ḥukm* among the *aḥkām* of the *mabīᶜ* and sale has been concluded and become binding said, "The contract is now within the liability of the buyer".

The distinction of Mālik between the absent and present (*mabīᶜ*), between that in which there is a right of satisfaction (about weighing etc.) and that in which there is not, is *istiḥsān*. The meaning of *istiḥsān* in the majority of the cases is recourse to *maslaḥa* and equity.

The Ẓāhirites were of the opinion that the property is within the liability of the buyer by virtue of the contract and as far as I know the reliance of those who hold this view is that revenue belongs to the buyer even before possession. The Prophet (God's peace and blessings be upon him) has said, "(Right to) revenue is dependent upon a (corresponding) liability for loss". The reliance of the contenders is the tradition of ᶜAttāb ibn Usyad "that the Messenger of Allāh (God's peace and blessings be upon him) when he sent him to Mecca said, 'Prohibit them the sale of that which they have not possessed and the profit of that for which they are not liable' ". We have already discussed the condition of possessing the *mabīᶜ* in what has preceded. There is no disagreement among the Muslim jurists that it is within the liability of the buyer after the taking of possession, except in the case of *ᶜuhda* (period) and diseases. As we have already discussed the *ᶜuhda*, it is necessary that we now discuss the diseases.

24.4.2.1. Chapter 1: Discussion of Diseases

The jurists disagreed about the foregoing claims in the case of diseases in fruit. Mālik and his disciples gave a positive ruling in this, while Abū Ḥanīfa, al-Thawrī, al-Shāfiᶜī in his latest opinion and al-Layth denied it. The reliance of those who forgo damages is the tradition of Jābir that the Messenger of Allāh (God's peace and blessings be upon him) said, "One who sells fruit that is (later) affected by disease should not charge anything from his brother, for what reason will anyone of you take his brothers wealth?"—recorded by Muslim as the narration of Jābir. It is also related from him that he said, "The Messenger of Allāh (God's peace and blessings be upon him) commanded that the (charges for) diseased fruit be forgone".

The reliance of those who permitted (relinquishment of payment) for diseases are these two traditions of Jābir, along with *qiyās al-shabah* as they said, "It is a *mabīᶜ* in which the right of satisfaction (about weighing etc.) against the seller still remains, on the evidence of his watering it till ripening. It is, therefore, necessary that the liability should be his, the basis being all the other *mabīᶜ*s in which the right of satisfaction remains". The difference, according to them, between this sale and all the other sales is that this sale has been explicitly mentioned in the law and the *mabī*ᶜ has not ripened yet. It is as if he (the lawgiver) exempted it from the sale of what has not been created yet. It thus follows that its liability should be his, unlike all other sales.

The reliance of those who did not favour it is on the comparison of this sale to all other sales and (on the fact) that vacation (by the seller) in this sale amounts to possession (by the buyer); and they agreed that liability of the buyer is after taking of possession. There is also, by way of transmission (of tradition), the tradition of Abū Saᶜīd al-Khudrī, who said, "Fruit bought by a man was struck by disease and his debt mounted. The Messenger of Allāh (God's peace and blessings be upon him) then said, 'Grant him out of the *ṣadaqa*'. He was granted *ṣadaqa*, but it was not sufficient to meet his debt, so the Messenger of Allāh (God's peace and blessings be upon him) said, 'Take (out of his wealth) what you find and you will have nothing more than that' ". They said that he (the Prophet) did not render judgment about disease here. The reason for disagreement here is the conflict of traditions in it and the clash of the different analogies of resemblance. Each one of the parties desired to turn away the conflicting tradition with the tradition which formed the basis for him and said about the prohibition (relinquishing payment) in case of disease: "It appears that the command about diseases was laid down in connection with the proscription about the sale of fruit before it begins to ripen". They also said: "This is supported by the fact that when the complaints about diseases became numerous, they were ordered that they should not sell fruit until it began to ripen". This was in the well-known tradition of Zayd ibn Thābit. Those who permitted it in the face of the tradition of Abū Saᶜīd, said, "Perhaps the seller in that case was destitute, so he (the Prophet) did not rule for the relinquishment on the basis of disease, or the quantity affected by disease was such that it was not binding to invoke the ruling of disease, or that the time in which this happened was not the time of infection by disease, like infection after cutting or after ripening".

Al-Shāfiᶜī related the tradition of Jābir, from Sulaymān ibn ᶜAtīq from Jābir and used to consider it weak (*ḍa*ᶜ*īf*) saying, "The mentioning of relinquishment in it is ambiguous". He said, however, that "If the tradition is established, relinquishment (of payment) is a must, both in small and large quantities".

There is no dispute among them about the ruling for diseases when it occurs because of lack of water and those who uphold it generally deemed this agreement a proof for its (general) acceptance. The discussion about the fundamentals of disease, in the school of Mālik, is covered in four sections. First is the identification of the causes leading to diseases. Second, the location of the disease in the subject-matter. Third is the quantity of it that is to be forgone. Fourth is the time of relinquishment.

24.4.2.1.1. *Section 1: Identification of the Causes Effective in Calamities*

About events that strike fruit as an act of God like cold, drought, flood and decay, there is no dispute in the school that these are calamities. Shortage of water (thirst) is, as we have said, a calamity. Some of Mālik's disciples viewed that which strikes it as an act of man as a calamity, while others did not. Those who viewed it as a calamity are divided into two types. Some of them viewed as a calamity that which is irresistible like (the descending of) an army, though they did not consider (as a calamity) that which can be guarded against, like theft. Others deemed all that struck fruit through the act of man as a calamity, whatever its nature.

Those who considered it only in the acts of God relied on the apparent meaning of the saying of the Prophet (God's peace and blessings be upon him), "What do you think, if Allāh were to prevent the fruit (from maturing)". Those who considered it to be in the acts of man, compared it to the acts of God. Those who exempted the thief from it said that it is possible to protect it from him.

24.4.2.1.2. *Section 2: The Objects of Calamities*

The objects of calamities are fruits and vegetables. There is no dispute about fruits in the school and for vegetables the better-known opinion is the application of (the rulings of) calamities to them. They differed about vegetables in their comparison to the basis, which is fruit.

24.4.2.1.3. *Section 3: The Quantity Necessary for Relinquishment*

The quantity in which calamities apply is one-third for fruit. In the case of vegetables, it is said that it applies to all quantities, while it is also said that it applies to a third. Ibn al-Qāsim considers a third of fruit through measure, while Ashhab considers it a third of the value. According to Ashhab, if fruit amounting to a third of the value through measure is lost, he will forgo one-third of the price, irrespective of the third (in value) amounting to a third in measure. When a third measure of the fruit is lost Ibn al-Qāsim, however, would lower the price by a third if the fruit is of the same kind and the price of its differing stock is the same. If the fruit is of several different kinds, also with differing values, or of different stocks of different values, he would compare the value of the lost third with the total value and reduce it accordingly. So, at times he would consider measure only when the value of the different parts and stock of the fruit was the same, at other times he would consider both things (that is measure and value) when the value was different.

The Mālikites in their derivation about relinquishment for calamities argue on the basis of quantification, although the tradition is absolute. This is so as a small quantity, being well-known through practice, is lost from every yield of fruit. The buyer, then, agreed to this condition on the basis of practice though not expressly. So also the calamities on which the *ḥukm* is based demand a distinction between small and large quantities. They said, "When this distinction becomes obligatory, it is a necessary to consider a third, as the law has given it consideration on many occasions". The school, however, is not clear about this principle, sometimes rendering a third from the realm of larger, as in the case here and at other times considering it from the realm of lesser (quantity). About the distinction between less and more they were not confused at all. Quantities are difficult to establish, according to the majority of the jurists, on the basis of analogy. It is for this reason that al-Shāfiᶜī said, "If I had upheld an opinion about calamities, I would have distinguished between less and more and the consideration of a third as a criterion for less and more is laid down as a text in *waṣiyya* (bequest), as the Prophet (God's peace and blessings be upon him) said, 'A third and a third is more than enough' ".

24.4.2.1.4. *Section 4: The Time at which the Relinquishment is Made*

With respect to time, the school (of Mālik) agreed on the obligation of discharging (payment) because of calamities at the time in which there is need for leaving the fruit on top of the trees so that its ripening is achieved. They disagreed when the buyer makes the seller keep the fruit (on the trees) so that he may sell it fresh in small quantities. It is said that the (rule of) calamities is applicable here also due to its similarity with the agreed-upon time. It is also said that (the rule of) calamities would not apply because of the difference between this and the agreed-upon time in which remittance for calamities is obligatory. This is so as this time-period is similar to the agreed-upon time from some aspects while it is not from other aspects. Those who think that the time-periods coincide made (remittance because of) calamities obligatory, while those who inclined toward the distinction did not make it obligatory. I mean by this that those who thought freshness (of fruit) is required in purchase as is ripeness, made (remittance because of) calamities obligatory, while those who did not view the issue to be the same said that the (rule of) calamities would not apply. Hence, they disputed the obligation of calamities in vegetables.

24.4.3. Unit 3: Things Accompanying the Subject-Matter

Among the issues of this discussion there are two that are well-known.

24.4.3.1. Issue 1: Sale of date-palms carrying fruit

The question is when will the fruit go with the date-palm and when it will not? The majority of the jurists maintain that if a person sells a date-palm carrying fruit prior to pollination the fruit is for the buyer. If the sale takes place after pollination; then the fruit belongs to the seller, unless the buyer stipulates it for himself. All other fruit fall within the meaning of the date-palm due to the confirmed tradition of Ibn ᶜUmar from the Messenger of Allāh (God's peace and blessings be upon him), who said, "(When) one sells a date-palm that has pollinated, the fruit is for the seller unless the buyer has stipulated it (for himself)". They said that when the Prophet (God's peace and blessings be upon him) ordered that the price, after pollination, was for the seller, we came to know by implication of the text that it belonged to the buyer before pollination in the absence of stipulation. Abū Ḥanīfa and his disciples said that it belongs to the seller both before and after pollination and they did not deem the understanding here to be an implication of the text, but from the category of the explicit and primary. They said: "This is so as the fruit if it belongs to the seller after pollination, it is more appropriate that it belong to him before pollination". They compared the blossoming of fruit with the birth of offspring. Just as one sells an *ama*, who has a child, the child belongs to the seller unless stipulated for himself by the buyer, similarly in the case of fruit. Ibn Abī Laylā said that irrespective of pollination, when the tree is sold the fruit belongs to the buyer, whether he stipulates it for himself or not. He rejected the tradition in opposition to analogy, as he was of the view that the fruit is a part of the *mabīᶜ*. This view has no meaning, unless the tradition is not considered authentic by him. Abū Ḥanīfa did not reject the tradition, but he opposed the implied meaning in it.

The reason for disagreement, then, in this issue between Abū Ḥanīfa, al-Shāfiᶜī and Mālik, along with those who upheld their opinions, is the conflict of the implication of the text with the explicit and primary meaning, which is also called the signification of the communication (*faḥwā al-khiṭāb*), but it is weak here though originally it is stronger than the implication of the communication. The cause of Ibn Abī Laylā's opposition to them is the conflict between analogy and transmission, which is weak as we indicated.

Pollination, according to the jurists, is the meeting of the spadix of the date-palm with the spathe and the inflorescence in the rest of the tree. Masculinity in a tree is the spadix within the meaning of pollination. The pollination of crops is disputed within the school. Ibn al-Qāsim related from Mālik that its pollination takes place by rubbing (cross pollination?) on the analogy of the rest of the fruits. Is then the obligating cause of this *ḥukm* actual pollination or the time of pollination? It is said that it is the time and it is also said that it is pollination. It is on this basis that a disagreement arises when some trees in an orchard are pollinated while the rest are not. Does that which has not pollinated follow (take the *ḥukm* of) that which has? They agreed, as far as I know, that when the fruit is sold and it is the time of pollination, the part that has not pollinated takes the *ḥukm* of that which has.

24.4.3.2. Issue 2: Sale of the wealth of the slave

This relates to the disagreement about the sale of a slave's wealth, as they disagreed whether the slave's wealth accompanies him in sale and manumission. There are three opinions. First is that his wealth in sale and manumission belongs to his master. This was the opinion of al-Shāfiᶜī and the Kūfīᶜs. Second, that his wealth goes with him in sale and manumission, which is the opinion of Dāwūd and Abū Thawr. Third, that it goes with him in manumission, but not in sale unless the buyer stipulates it. This was the opinion of Mālik and al-Layth.

The proof, of those who were of the view that his wealth is for his master in sale unless the buyer stipulates it, is the well-known tradition of Ibn ᶜUmar from the Prophet (God's peace and blessings be upon him) that he said; "(When) one sells a slave who owns wealth, then the wealth is for the one who sells him unless the buyer stipulates it (for himself)". Those who deem it to belong to the master in manumission, do so through analogy on sale. The proof of those who were of the view that it follows the slave in all cases is based on their own verdict that the slave was the owner. This is an issue on which the jurists have disagreed considerably, I mean, on whether or not the slave can own (wealth). It appears that these (jurists) have attached more weight to analogy over transmission, as the tradition of Ibn ᶜUmar is one in which Nāfiᶜ has contradicted Sālim. Nāfiᶜ related it from Ibn ᶜUmar, while Sālim has related it from Ibn ᶜUmar from the Prophet (God's peace and blessings be upon him). Mālik, however, attached more weight to analogy in manumission and to transmission in sale. Mālik says in the *Muwaṭṭā*ᵓ: "The matter that is agreed upon is that if the buyer stipulates the wealth of the slave—whether cash, goods, or debt—then it is for him".

It is related from the Prophet (God's peace and blessings be upon him) that he said, "(If) one frees a slave then his wealth belongs to him, unless his master exempts it". It is permitted, according to Mālik, that the slave may be purchased along with his belongings with *dirhams*, even when the belongings of the slave are *dirhams* or include *dirhams*. Abū Ḥanīfa and al-Shāfiᶜī opposed him when the wealth of the slave consists of cash. They said: "The slave and his wealth are like two things sold by someone and only that which is permitted in the rest of the sales is permitted in them". The disciples of Mālik disagreed about the stipulation by the buyer of some of the slave's wealth in the single transaction of sale.

Ibn al-Qāsim said that this is not permitted, while Ashhab said that it is permitted that he stipulate some of it. Others made a distinction and said: "If the thing with which the slave is being purchased is corporeal property (*ᶜayn*) (as opposed to *dayn*; debt) and the property of the slave also contains corporeal things, it is not permitted, as it amounts to exchanging *dirhams* with goods and *dirhams*, but if he is being purchased with goods, or there are no *dirhams* in his wealth, it is permitted".

The reason for the opinion of Ibn al-Qāsim, that it is not permitted to him to stipulate part of the slave's property, is its similarity with the (sale of the) fruit of the date-palm after pollination. The basis for the opinion of Ashhab in permitting it is the similarity between a part and its whole. In this topic there are many other issues not mentioned as they do not belong to our objective.

Among the best-known issues in this topic is the increase and decrease that may occur in the price, on the basis of which sale has been transacted, after the sale has been consented to by the parties to the contract. I mean that the buyer increases the price, on which sale has been transacted, for the seller after the sale or the seller reduces the price. Does this (increase or decrease) follow the *ḥukm* of the price? The usefulness of the distinction is that those who said that it is a part of the price obligate its return as detinue or as restoration due to defect or whatever is similar to it. Similarly, those who deem it as within the *ḥukm* of the original price if the sale was void and those who do not consider it a part of the original price, do not obligate any thing. Abū Ḥanīfa said that it is a part of the price, except that it is neither established in favour of the pre-emptor nor in the sale of *murābaḥa* and the *ḥukm* is for the original price. Mālik and al-Shāfiʿī said that increase or decrease are not essentially associated with the price and bear the *ḥukm* of a gift (*hiba*).

Those who associated the increase with the price argued on the basis of the words of the Exalted, "And there is no sin for you in what ye do by mutual agreement after the duty (hath been done)".[142] They said that if the increase in *ṣadāq* (dower) is associated with *ṣadāq* it would be associated with the price in a sale. The others argued on the basis of their agreement that it is not associated in pre-emption. On the whole, those who hold that the contract is settled said that the increase is *hiba*, while those who maintain that it amounts to a rescission of the sale, counted it as a part of the price in the second contract.

24.4.4. Unit 4: Agreement of the Parties on Sale and Disagreement on Price

If the parties to the sale agree on the sale and disagree on the quantity of the price, without there being any evidence, then the jurists of different regions agree on the whole that they should both take oaths and cancel the sale. These jurists, however, disagree in details; I mean, about the time when verdict is to be given about the oaths and cancellation. Abū Ḥanīfa and a group of jurists, said that they take the oaths and cancel the sale as long as the substance of the goods has not been converted. If it has changed then the prevalent claim is that of the buyer along with his oath. Al-Shāfiᶜī, Muḥammad ibn al-Ḥasan (al-Shaybānī) the disciple of Abū Ḥanīfa and Ashhab the disciple of Mālik said that they can take oaths at any time. From Mālik there are two narrations. First, that they take oaths and cancel prior to (delivery of) possession and after possession the prevalent claim is that of the buyer. The second narration is like the opinion of Abū Ḥanīfa, which is the narration of Ibn al-Qāsim and the other is the narration of Ashhab. Conversion (in the subject-matter), according to him, is through the fluctuation in the market and by any increase or decrease in the *mabī*ᶜ. Abū Dāwūd and Abū Thawr said that the prevailing claim is that of the buyer in every situation. Zufar had the same opinion, unless they disagreed about the species of the price, in which case they would cancel and take oaths. There is no dispute that if they disagreed about the species of the price or of the priced commodity the *ḥukm* is to cancel and take oaths.

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[142] Qurʾān 4 : 24

The jurists of the provinces generally came to an agreement about cancellation and oath-taking in case of a dispute about counting of the price, because of the tradition of Ibn Masᶜūd that the Messenger of Allāh (God's peace and blessings be upon him) said, "Whenever two merchants contracting a sale (disagree), the claim of the buyer is to be granted, or they (are to) retract". Those who interpreted this tradition to mean the obligation to rescind generally, said that they take oaths in any case and rescind. The underlying cause in this, according to them, is that each one of them is a plaintiff and a defendant. Those, however, who maintained that the tradition is obligatory in the case where the claims of the buyer and the seller are equipoised, said that if the goods have been delivered or have been converted then possession provides evidence on behalf of the buyer that he is most likely truthful. Oath, on the other hand, is obligatory for the apparently stronger claimant. This is the principle of Mālik in oaths and it is for this reason that he makes oath obligatory for the plaintiff on some occasions and for the defendant on others. This is so as oath is not obligatory on the defendant through the texts in so far as he is the defendant, but becomes obligatory on him as in all probability he appears more truthful. If the plaintiff, at times, has the stronger claim it is obligatory that the oath be in his domain. Those who maintain that the prevailing claim is that of the buyer hold that the seller is content about the purchase by the buyer and is a claimant only for the disputed count of the price. Dāwūd and those who upheld his opinion, rejected the tradition of Ibn Masᶜūd as it is *munqaṭi*ᶜ, for which reason it has not been recorded by the two Shaykhs al-Bukhārī and Muslim, however, Mālik did record it.

About the refusal of the parties to take oath, there are two narrations from Mālik. First is rescission while the second is the preference of the claim of the seller. There is also a disagreement as to who is to commence oath-taking. The well-known view is that it is the seller as it occurs in the tradition. There is then the question, if cancellation has taken place is it permitted to one of the parties to accept the claim of the other party? There is a dispute about this in the school.

24.5. Part 5: A General Look at the Effect (*Ḥukm*) of the Vitiated Sale after it has taken place

The jurists agreed that in *fāsid* sales that have taken place, as long as the *mabīᶜ* has not been converted—through new contracts, growth, decrease, or the fluctuation of the market—its *ḥukm* is restoration, I mean, the seller returns the price and the buyer the priced commodity. They disagreed, when after possession, it is disposed of through manumission, gift, sale, mortgage, or through other means of disposal, whether it is an alienation of the *mabīᶜ* necessitating (return of) value. Similarly when there is growth in it or there is some deficiency. Al-Shāfiᶜī said that all this is neither alienation nor the semblance of ownership (*shubhat al-milk*) in a vitiated sale and the obligation is restoration. Mālik said that all this is disposal that necessitates (return of value), except what has been narrated from him by Ibn Wahb in (the section on) *ribā* that it is not disposal. A similar opinion was held by Abū Ḥanīfa.

The vitiated sales are divided, according to Mālik, into prohibited and disapproved. The prohibited, if they change, are passed on in value. The disapproved, if converted, become valid according to him. Perhaps some of the vitiated sales were held valid by him through possession, because disapproval in them is slight. The Shāfiᶜites compare the *mabīᶜ* in a void sale to *ribā* and *gharar*, because of the prohibition of its essence like in the sale of *khamr* and *khinzīr*. There is no such category as conversion according to them.

Mālik is of the view that the prohibition in these matters, I mean, the sales of *ribā* and *gharar*, is due to the lack of justice in them. If the goods have been converted (in a void sale), fairness requires that they be restored in value. As he (the buyer) takes possession of the goods when they are probably valued at (say) one thousand and he restores them when they may have a value of five hundred, or *vice versa*. It is for this reason that Mālik views the fluctuation of markets as the conversion of the subject-matter in a void sale. In sale with a loan, Mālik views that if the subject-matter is converted and the seller is the one who has granted the loan, the buyer will return the value as long as it does not exceed the price, for the buyer had already raised the price because of the loan and it is, therefore, not fair that he pay more than that. In case it was the buyer who had made the loan, then the seller had discounted the price because of the loan and on an obligation to return the value the buyer will not pay less than the price. The reason is that in these sales prohibition was caused by invoking compensation against the loan, which is the subject of mutual assistance among people. Mālik in this issue is more profound than all the rest.

They disagreed when the condition was dropped before possession, I mean, the condition of loan. Would the sale become valid? Abū Ḥanīfa, al-Shāfiᶜī and the rest of the jurists said that the sale is rescinded. Mālik and his disciples said that the sale is not rescinded, except for Ibn ᶜAbd al-Ḥakam who maintained that the sale is to be rescinded. An opinion like that of the majority has also been related from Mālik.

The proof of the majority is that the proscription implies vitiation of the prohibited thing. If the sale has occurred in a vitiated form it cannot be validated at all by the removal of the condition, because of which the vitiation occurred, just as removing the cause of corruption in things perceptible through the senses (tangible), after the corruption has occurred, does not return the thing to its original wholesomeness, so keep it in mind. It is related that Muḥammad ibn Aḥmad ibn Sahl al-Barmakī enquired about this problem from Ismāᶜīl ibn Isḥāq al-Mālikī, who said to him: "What is the difference between a loan and a sale and between a man who sells a slave for a hundred *dīnārs* and a skin of *khamr*? When the sale between them had taken place he said that he would drop the skin. This sale is vitiated, according to the jurists, by agreement. It is, therefore, necessary that sale and loan be like that too". He (al-Barmakī) provided an answer for this which is not persuasive and the discussion of which has already preceded.

As the discussion of the principles of vitiated sales, the principles of valid sales and the fundamental *aḥkām* of vitiation common to and general for all sales or most of them is now over, let us cover what is specific to each one of these four categories by listing those that are in the nature of principles.

XXV

THE BOOK OF *ṢARF* (EXCHANGE)

As two conditions are specific to this sale—first the absence of delay (*nasīʾ*a), that is, immediate delivery and second, the absence of excess (*tafāḍul*), which is the stipulation of similarity—the study of this book is to be undertaken in (the following) five parts. First is the delineation of that which is delayed from that which is not. Second is the delineation of that which is similar from that which is not. (As these two divisions are divided into a number of sections, the disagreement (of the jurists) will be presented there.) Third, which also falls within this topic in a disputed form, is whether it is a means (*dharīʿ*a) to one of the two (conditions), I mean excess and delay, or to both, according to those who uphold the principle of means (*dharāʾiʿ*), that is, Mālik and his disciples. This is also divided into two kinds like the division of its source (and includes the fourth part). The fifth relates to the *aḥkām* of this sale from the aspect of invoking one of these conditions—that is, the absence of delay or excess—or both, because this sale differs from other sales in a number of *aḥkām* by virtue of these two conditions.

When you examine the books written about the detailed cases of this topic, which they designate as the Book of *Ṣarf*, you will find all issues referred back to these five categories, or to what is consequential to them, except for the issues that they (the authors) assimilate in this single book when they do not relate to this book, like the insertion by the Mālikites into *ṣarf* of issues that actually pertain to the category of the demand of loans. They included them in this book as the vitiating element in them refers back to one of these two bases, I mean to *ṣarf* with delay or with excess, just as they discussed other independent issues jointly or separately.

As our purpose is to record the issues that are expressly covered by the law or are very close to those expressly covered, we thought it desirable to record in this book seven well-known issues, which are like principles, or models for the guidance of the (would be) *mujtahid* in whatever he may encounter of the issues of this book. We have designed the book in such a way that with the help of its methodology he may attain the status of *ijtihād*, if he has acquired what is sufficient for him of *ʿilm al-nahw*, language and the methodology of *uṣūl al-fiqh*—and out of these it is sufficient to know what is proportionate to the requirements of this book or even less. It is by learning the relevant issues and being equipped with these tools, that he deserves to be called a *faqīh*, not by merely learning too many details of *fiqh*, even if he has memorized the maximum that is possible for a human being. We find the (so-called) jurists of our times believing that the one who has memorized the most opinions has the greatest legal acumen. Their view is like the view of one who thought that a cobbler is he who possesses a large number of shoes and not one who has the ability to make them. It is obvious that the person who has a large number of shoes will (some day) be visited by one whose feet the shoes do not fit. He will then go back to the cobbler who will make shoes that are suitable for his feet. This is the position of most of the *faqīh*s of these times.

We have deviated from the path we were treading and now return to it in so far as we had promised to discuss the (seven) issues.

25.1. Issue 1: Sale of gold for gold, silver for silver and their *ḥukm*

The jurists agreed that the sale of gold for gold and silver for silver is not allowed, except from hand to hand and like for like (in similar quantity and quality). The exception is what is related from Ibn ᶜAbbās and those who followed him from among the Meccans. They permitted the sale with excess and disallowed it with delay alone. Ibn ᶜAbbās adopted this opinion because of what he related from Usāma ibn Zayd from the Prophet (God's peace and blessings be upon him) that he said, "There is no *ribā* except in *nasīʾa* (delay)". This is an authentic tradition. Ibn ᶜAbbās took the apparent meaning and did not render as *ribā* anything besides *nasīʾa* (delay). The majority of the jurists followed what is related by Mālik from Nāfiᶜ from Abū Saᶜīd al-Khudrī that the Messenger of Allāh (God's peace and blessings be upon him) said, "Do not sell gold for gold except like for like and do not devour some of it with the rest, do not sell silver for silver except like for like and do not devour some of it with the rest and do not sell a thing absent for one that is present". This is one of the most authentic traditions of this topic. The tradition of ᶜUbāda ibn al-Ṣāmit is another authentic tradition within this topic. The majority accepted these traditions as they are explicit about the issue. The tradition of Ibn ᶜAbbās, however, is not explicit about the issue and has been narrated in two versions. First is that he said: "*Ribā* is in *nasīʾ*a alone". The permission of (dealing with) excess is not understood from this except by the indirect indication of the text (*dalīl al-khiṭāb*), which is weak especially when contradicting an explicit text. The second version is "There is no *ribā* except in *nasīʾa*", which is stronger than the first version as its apparent meaning implies that what is besides *nasīʾ*a is not *ribā*. It is probable that he (the Prophet) intended by his saying, "There is no *ribā* except in *nasīʾa*", that it occurs more often. If this is the likely meaning and the other text is explicit, it is necessary that they be interpreted in a way that reconciles the two.

The majority agreed that coins, ore, or moulds (of gold or silver) are the same for the purposes of prohibition of sale, one with the other, with excess, due to the generality of the preceding traditions, except for Muʾāwiya who used to permit excess in the exchange of ore and fabrications due the excess (value) of crafting. So also what is related from Mālik, who was asked about a person who came to a mint with silver and took in exchange *dīnārs* and *dirhams* equal in weight to the silver or (the value of) its weight in *dirhams* paying the cost of fabrication. He said: "If it is due to necessity for the departure of a company, I would say that there is no harm in it". This was also the opinion of Ibn al-Qāsim from among his disciples, while Ibn Wahb, one of his disciples, ʿĪsā ibn Dīnār and the majority of the jurists rejected this. Mālik also permitted the exchange of a deficient *dīnār* with one of standard weight, or two for one, over which there is disagreement among his disciples regarding the number that is customarily exchanged.

25.2. Issue 2: Ornamented swords and *muṣḥaf* exchanged for silver or gold

The jurists differed about an ornamented sword, or *muṣḥaf*, when it is sold for silver as it has silver ornamentation or for gold as it has gold ornamentation. Al-Shāfiʿī said that this is not permitted, because of the stipulated similarity in the sale of silver for silver and gold for gold being unknown. Mālik said that if the value of the gold or silver in it is a third or less (than the value of the whole) the sale is permitted—I mean, (sale) for silver if the ornamentation is in silver and (sale) for gold when the ornamentation is in gold—otherwise it is not permitted. It is as if he were of the view that the value of the silver in it being little it is not the object of the sale and amounts to a gift.

Abū Ḥanīfa and his disciples said that there is no harm in the sale when the silver (paid for it) is more than the silver in the sword. Same is the case with the sale of a sword ornamented with gold. They were of the opinion that the silver or gold in it is equivalent to (part of) the silver agreed upon while the excess is for the value of the sword.

The proof for al-Shāfiʿī is in the generality of the tradition explicitly laid down in this issue from the narration of Fuḍāla ibn ʿAbd Allāh al-Anṣārī, who said, "The Messenger of Allāh, when he was at Khaybar, was brought a necklace in which there was gold and pearls and it belonged to the spoils that were being sold. The Messenger of Allāh ordered that the gold be separated and then he said: 'Gold for gold, weight for weight' ". It is recorded by Muslim. Muʿāwiya, as we have already said, allowed this sale absolutely. Abū Saʿīd rejected his view and said, when the tradition was narrated, "I will not reside in the land in which you live".

25.3. Issue 3: The conditions of *ṣarf*

The jurists agreed that among the conditions of *ṣarf* is that it should be immediate (*nājiz*), however, they disagreed about the time in which this meaning is realized. Abū Ḥanīfa and al-Shāfiʿī said that *ṣarf* is immediate if it takes place before the two parties to *ṣarf* separate, irrespective of possession being prompt or delayed. Mālik said that if possession is delayed within the session *ṣarf* is void, even if they have not parted, so much so that he disapproved the fixing of a time in it.

The cause of disagreement is their divergence over the meaning of the saying of the Prophet (God's peace and blessings be upon him), "Except 'here you are', 'here you are' (i.e. immediate (spot) delivery)". This is so as it differs in measure through a long or short separation. Those who were of the view that these words are valid for one who has not withdrawn from the session, I mean, that it can be said of him that he has sold through spot delivery, said that delay is permitted within the session. Those who were of the view that the words are not realized unless possession has been taken immediately by the parties to *ṣarf*, said that if possession is delayed within the session after the (oral) contract *ṣarf* is void. It is because of their agreement on this meaning that they did not allow endorsement, surety and option within the contract of *ṣarf*, except for what is narrated from Abū Thawr that he allowed option in it. They disagreed (within Mālik's school) about delay that is compelling, occasioned by circumstances involving both parties or one of them. At times it is said that this is like the case which occurs out of choice, while at other times it is said that it is not like that. They have details in this, but it is not within our purpose to record them in this book.

25.4. Issue 4: Exchange of *dīnārs* with *dirhams* when there is a counterfeit (coin) in them

The jurists disagreed about one who exchanges, by way of *ṣarf*, *dirhams* with *dīnārs* and then finds a counterfeit coin in them and wishes to return it. Mālik said the *ṣarf* (here) is void. If the *dīnārs* are in excess, one *dīnār* is to be reduced in place of a *dirham* or what is more for the exchange value of the *dīnār*, if the *dirhams* are (now) more than the *dīnārs* another *dīnār* is to be reduced and so on till the value of the exchange *dirhams* is equal to the *dīnārs*. He said, however, that if he agrees to accept the counterfeit *dirham*, the exchange is not rendered void.

Abū Ḥanīfa said that *ṣarf* is not void because of the counterfeit *dirhams* and it is permitted to substitute them, unless the counterfeit *dirhams* are half or more of the total *dirhams*. If he returns these, *ṣarf* is void in the rejected coins. Al-Thawrī said that if the counterfeit coins are returned, he has a choice to substitute them or he becomes his partner in the *dīnārs* in proportion to their value, I mean with the owner of the *dīnārs*. Aḥmad said that *ṣarf* is not annulled by return, whether of less or more. Ibn Wahb from among the disciples of Mālik permits substitution in *ṣarf*. This is based on the fact that compelled postponement in *ṣarf* has no effect, especially in some parts and this is preferable. From al-Shāfiʿī, there are two opinions about the annulment of *ṣarf* due to counterfeit coins.

In summary, four opinions are derived from the (views of the) jurists of the provinces in this issue: one opinion annuls *ṣarf* absolutely in case of return; another opinion views the validity of *ṣarf* and the obligation of substitution; one opinion distinguishes between large and small quantities; and another provides a choice between substitution and becoming a partner of the other party.

The reason for disagreement in all this is whether the imposed delay is effective in *ṣarf*. If it is effective, then is it effective in large or in small quantities?

There is disagreement in (Mālik's) school about the existence of a deficiency. He (Mālik) maintained once that if he agrees to the loss, *ṣarf* is permitted. If he demands substitution, *ṣarf* is incompatible on the analogy of counterfeit coins. At other times he maintained that *ṣarf* is void even if he agrees to the loss, but this is weak.

They also disagreed when possession of some of the exchanged gold and silver is taken and the rest is delayed, that is, when the *ṣarf* is contracted with immediate delivery. It is said that the entire (contract of) *ṣarf* is void and this was the opinion of al-Shāfiʿī. It is also said that only the delayed part is void and this is the opinion of Abū Ḥanīfa, Muḥammad and Abū Yūsuf. Both opinions exist in the school (of Mālik). The cause of disagreement is the dispute whether the entire transaction is to be annulled or the prohibited part only, when permissible and impermissible things are mixed in a single contract.

25.5. Issue 5: Exchange of the same species by weight (*murāṭala*)

The jurists agreed that *murāṭala* is permitted in gold for gold and silver for silver with equality of weight, even though the number is different. This is so when the quality of the gold is the same. They disagreed about *murāṭala* in two cases. First is that when the quality of the gold is different. The second is that when one of the counter-values (of gold) is less than the other and the party desires to increase it with goods or *dirhams* when *murāṭala* is in gold, or with gold when the *murāṭala* is in *dirhams*.

According to Mālik, in the first case where the quality of the exchanged species is different, when one of the parties presents a single quality of gold whereas the other presents two kinds, one of a quality better than the single quality and the other of a lower quality, this is not permitted. When the single kind of gold, which is offered by one of the parties, is better than the two kinds taken together or worse than them, or it is similar to one of them and better than the other kind *murāṭala* is permitted according to him (i.e. Mālik). Al-Shāfiʿī said that when the two kinds are different it is not permitted. Abū Ḥanīfa, all the Kūfīs and all the Baṣrīs said that all this is allowed.

The reliance of the school of Mālik in the prohibition of this is uncertainty, which leads to the course of *sadd al-dharāʾiʿ*, as there is suspicion that the person exchanging by way of *murāṭala* intended the exchange of gold through *tafāḍul*. It is as if he gave a part of medium quality for an excess of bad quality or for a lesser amount of better quality and through that passed on to the sale of gold for gold with excess. An example of this is that an individual says to another: "Take from me twenty-five *mithqāls* of medium quality for twenty of a higher quality". The other says to him: "This is not permitted to us, but I will give you twenty of a higher quality and another ten of a lower quality than yours, while you will give me thirty of a medium quality. The ten of a lower quality will be equivalent to five of your gold, while twenty of a medium quality will exchange for twenty of a higher quality".

The reliance of al-Shāfiʿī is on the excess (*tafāḍul*) that exists in the countervalue. The basis for Abū Ḥanīfa is the consideration of weight in both values and the rejection of the doctrine of *sadd al-dharīʿa*.

Similar to of their disagreement about *ṣarf* undertaken by weight is their disagreement about it when undertaken by count, I mean, when the quality of gold on the two sides is different. Their disagreement about deficiency in weight, where one of the parties wished to increase the amount by something where there was *ribā* or even where there was no *ribā*, is quite similar to their dispute here. For example, one of the parties exchanges gold for gold by weight with another person and the gold on one side is found to be less than that on the other. The person whose gold is less desires to compensate the deficiency with *dirhams* or goods, then, Mālik, al-Shāfiʿī and al-Layth said: "This is not permitted and the *murāṭala* is void". Abū Ḥanīfa and the Kūfīs allowed all this. The basis for the Ḥanafites is the estimation of the existence of similarity in the gold with the excess becoming an equivalent for the goods. The basis for al-Shāfiʿī is the absence of similarity arrived at through measure, weight, or counting owing to excess. In the same way they disagreed when the exchange is made through counting.

25.6. Issue 6: Exchange of debts when one is in *dirhams* and the other in *dīnārs*

They disagreed about two individuals with one of them having a claim on the other in *dīnārs* and the other having a claim on the first in *dirhams*: Is it permitted to them to exchange these when they are liabilities? Mālik said that this is permitted if both are due at the same time. Abū Ḥanīfa said that it is permitted irrespective of their becoming due simultaneously. Al-Shāfiʿī and al-Layth said that this is not permitted whether they are due or they are not due. The proof of those who do not permit it is that it is an exchange of an absent thing with an absent thing, when an absent thing cannot be exchanged with a thing present it is more appropriate that (exchange of) two absent things should not be permitted. Mālik considered the time of payment as a substitute for their being present. He, therefore, stipulated that they should be due at the same time so that it does not amount to a sale of a debt for a debt. The opinion of Ibn Wahb and Ibn Kināna, from among the disciples of Mālik, was the same as that of al-Shāfiʿī.

Similar to this is their disagreement about the permissibility of *ṣarf* when the parties do not have what they exchange, but one party delivers it to the other before parting from the session; as for example, they borrow it and possess it within the session and before parting. This was permitted by al-Shāfiʿī and Abū Ḥanīfa, but was disapproved by Ibn al-Qāsim when it occurred from both sides and allowed when it was from one, that is, when only one of them borrowed. Zufar said that this is not permitted except when it is from one side.

In the same category is the disagreement about the person who has a claim for *dirhams* on another after a period: is he permitted to take gold from him after the termination of the period or *vice versa*? Mālik inclined toward its permissibility if possession is taken before parting. Abū Ḥanīfa had the same opinion, except that he permitted this even when the period had not terminated. A group of jurists did not permit this irrespective of the termination of the period.

This was also the opinion of Ibn ʿAbbās and Ibn Masʿūd. The proof of those who permitted this is the tradition of Ibn ʿUmar, who said, "I used to sell camels at Baqīʿ, selling in *dīnārs* and taking *dirhams* and selling in *dirhams* and taking *dīnārs*. I asked the Messenger of Allāh (God's peace and blessings be upon him) about this and he said, 'There is no harm in this if it is at the rate of that day' ". It is recorded by Abū Dāwūd. The proof of those who did not permit this is what is narrated in the tradition of Abū Saʿīd and others: "Do not sell anything absent for things present".

25.7. Issue 7: Sale with *ṣarf*

They disagreed, in Mālik's school, about sale with *ṣarf*. He said that this is not permitted unless one of them is a major part and the other is secondary, irrespective of whether *ṣarf* is for one *dīnār* or in more. It is said that if *ṣarf* is for one *dīnār* it is permitted whatever form it takes, but if it is in more the fact of one of them being subsidiary to the other is to be considered for purposes of permissibility. If both are intended together, it is not permitted. Ashhab permitted *ṣarf* and sale and this is to be preferred as there is nothing in it that leads to *ribā* or *gharar*.

XXVI

THE BOOK OF *SALAM* (ADVANCE PAYMENT)

In this book there are three chapters. The first chapter is on the subject-matter and its conditions. The second chapter is on what can lawfully be demanded from the *muslam ilayh*[143] as a substitute for subject-matter agreed to in the contract of *salam* and on the issues arising in it regarding *iqāla*,[144] premature payment, and delay. The third chapter covers the disputes (of the parties) over *salam*.

26.1. Chapter 1: Subject-Matter and its Conditions

With respect to the subject-matter, they (the jurists) agreed about the permissibility of *salam* in everything that is measured and weighed, as has been established through the well-known tradition of Ibn ʿAbbās that he said, "The Prophet (God's peace and blessings be upon him) arrived in Medina and they used to undertake *salam* in dates for a period of two or three years. The Messenger of Allāh said, 'He who undertakes a debt (of *salam*) should do it through a determined price, a determined weight, and for a determined period' ". They agreed about its prohibition in everything that cannot be a debt, and these are houses and structures. They disagreed about other categories of goods and animals. Dāwūd and a group of the Ẓāhirites prohibited this (i.e. *salam* in these goods), inclining toward the apparent meaning of the tradition. The majority permitted it in goods that can be determined by description and number, but within this they disagreed as to what goods can or cannot be determined with description. Among these are animals and slaves. Mālik, al-Shāfiʿī, al-Awzāʿī and al-Layth were of the view that *salam* is permitted in them, and this is also the opinion of Ibn ʿUmar from among the Companions. Abū Ḥanīfa, al-Thawrī, and the jurists of Iraq said that *salam* is not permitted in animals, and this is also the opinion of Ibn Masʿūd, while from ʿUmar there are two opinions on this.

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[143] The person to whom the advance payment is made.

[144] Negotiated recission of the contract.

The reliance of the jurists of Iraq in this (prohibiting *salam* in animals and slaves) is on what has been related from Ibn ʿAbbās "that the Prophet (God's peace and blessings be upon him) prohibited incurring a debt (of *salam*) in the case of animals". This tradition is weak according to the first group. Perhaps, they also argued on the basis of the prohibition by the Prophet (God's peace and blessings be upon him) of the sale of an animal for an animal with a period of delay. The reliance of those who permitted *salam* in animals is what has been related from Ibn ʿUmar "that the Messenger ordered him to equip a troop, when they had run out of camels, so he directed him to take an advance on the *ṣadaqa*. He then took one camel for two toward the camels of the *ṣadaqa*". They also related, in support, the tradition of Abū Rāfiʾ that "the Prophet (God's peace and blessings be upon him) transacted *salam* involving a young camel". They said that this indicates the raising of a liability in the case of animals.

The reason for their disagreement are two things. First, the conflict of the traditions on this issue. Second, the vacillation of an animal between being capable of determination by description and not being so. Those who drew distinctions between animals about inborn features and description, particularly the traits of temperament, said that they cannot be determined. Those who found similarities in them said that they can be determined.

Within this is also their disagreement about eggs, milk and other things. Abū Ḥanīfa did not permit *salam* in eggs, while Mālik did through counting. Similarly in meat, Mālik and al-Shāfiʿī permitted it, but Abū Ḥanīfa prohibited it. So also in cattle and sheep, Mālik permitted it and Abū Ḥanīfa prohibited it. In this, Abū Ḥanīfa's opinion was different from that of al-Shāfiʿī. Again in pearls and gems, Mālik permitted it, but al-Shāfiʿī prohibited it.

Our purpose in (describing) these issues was the identification of the controlling principles in the law and not the listing of detailed cases, as these are unlimited.

26.1.1. Conditions

Among these are conditions that are agreed upon and those that are disputed.

26.1.1.1. Conditions agreed upon

Those agreed upon are six in number. Among them is that the price and the priced commodity must be those things in which *nasāʾ* (delay) is permitted, thus, those in which delay is not permitted are prohibited (for purposes of *salam*). These are things that have identical benefits, in Mālik's view, a similar genus, according to Abū Ḥanīfa's opinion, and the consideration of food value with species, according to al-Shāfiʿī's opinion. One of the conditions is that the thing should capable of estimation either by measure, by weight, or by number, that is, in case it is something that requires estimation, or it should be identified through description, if it is something that requires to be described. Another condition is that it should be something that exists by the end of the period. Another condition is that the price should not be delayed through a period that is extensive, so that it does not become an exchange of a debt for a debt, that is, on the whole. They disagreed about the stipulation of two or three days, delay in the payment of the price, although they agreed that it should not be delayed for an extensive or unlimited period. Mālik permitted the delay of two or three days, and also permitted its delay without any stipulation. Abū Ḥanīfa and al-Shāfiʿī were of the view that among its conditions is possession within the session like *ṣarf.* This is a practice agreed upon.

26.1.1.2. Disputed Conditions

They disagreed about four conditions. First is the period of delay, whether it is a condition in it. Second, whether the species of the *muslam fīh* (that is, the subject-matter of the contract) should be in existence at the time of the contract of *salam*. Third is the specification of the place of delivery of the *muslam fīh*. Fourth, that the price should be determined either by measure, weight, or counting and that it should not be *juzāf* (approximate).

26.1.1.2.1. Condition 1

The period of delay is definitely a condition of its validity according to Abū Ḥanīfa. The preferred and well-known narration from Mālik is that it is a condition of *salam*. It is said that there are some narrations in which he permitted immediate *salam*. Al-Lakhmī made a distinction in this and said, "*Salam* in the school (of Mālik) is of two types: immediate *salam*, which is the sale of ready goods; and delayed *salam*, the purpose of which is not the sale of ready goods".

The reliance of those who stipulated a period of delay are two things: first, the apparent meaning of the tradition of Ibn ʿAbbās; and second, that if the period of delay is not stipulated in it, it would amount to the sale of a thing that the buyer does not have, which is prohibited. The reliance of al-Shāfiʿī (who does not stipulate delay) is on the fact that if it is permitted with delay its permissibility for immediate delivery is more appropriate, as there is the least amount of *gharar* in this. Perhaps, the Shāfiʿites also argued on the basis of the tradition "that the Prophet (God's peace and blessings be upon him) purchased a camel from a Bedouin for a load of dates. When he entered his house he did not find the dates. The Prophet (God's peace and blessings be upon him) then borrowed the dates and gave the same to him". They said that this is immediate sale with dates as a liability. For the Mālikites, by way of interpretation, *salam* has been permitted for compassion as one making an advance payment is inclined to proffer the price for facilitating the (delivery) of the *muslam fīh*, while the *muslam ilayh* is inclined toward it due to the existence of a delay (*nasīʾa*). Thus, if the period of delay is not stipulated, this meaning vanishes.

They disagreed about the period of delay on two points. First, whether it can be determined by naming the seasons (or events) rather than periods in days and months, like cutting, picking, harvesting, and season. Second, about the number of days (when the *ajal* is in days). The conclusion in Mālik's school about the number of days is that the *muslam fīh* is of two types: that which is required from the land in which the contract takes place, and second, that which is not required from the land where the contract took place. If it is required from the same place, then, according to Ibn al-Qāsim the period to be considered is that in which the markets are likely to change, and this is about fifteen days. It is related by Ibn Wahb from Mālik that he permitted two or three days. Ibn ʿAbd al-Ḥakam said that there is no harm even if it is one day. That, however, which is required from another land, the period of delay in it is the time taken to travel to and from that land, whether it is short or long. Abū Ḥanīfa said that the period of delay cannot be less than three days. Those who deemed the period of delay as a condition without an underlying cause, stipulated for it the minimum period to which the name is applied, while those who considered it as dependent on the fluctuation of the markets, stipulated days in which the markets normally change. Mālik permitted the period of delay, extending it till picking, cutting, and other similar events, but Abū Ḥanīfa and al-Shāfiʿī prohibited it. Those who saw that the uncertainty of the dates of these events makes an insignificant difference permitted it, as slight *gharar* is overlooked in the law. They compared it to the difference that arises in the case of months, which can be of thirty days or twenty-nine days each. Those who considered it as a major difference of time, unlike the case of months, which vary only by one day, did not permit it. (In case of fixation of dates by events, the difference in the period can be greater.)

26.1.1.2.2. Condition 2

About the condition whether the species of the *muslam fīh* should be in existence at the time of the contract, Mālik, al-Shāfiʿī, Aḥmad, Isḥāq, and Abū Thawr did not stipulate this and said that *salam* is permitted for a thing out of its season. Abū Ḥanīfa, his disciples, al-Thawrī and al-Awzāʿī said that it is not permitted unless it is the season of the *muslam fīh*. The proof of those who did not stipulate the season is what occurred in the tradition of Ibn ʿAbbās that the people used to contract *salam* for dates for a period of two or three years, this was approved and not rejected. The reliance of the Ḥanafites is upon the tradition related by Ibn ʿUmar that the Prophet (God's peace and blessings be upon him) said, "Do not contract *salam* in date-palms until they (the dates) begin to ripen". It is as if they viewed that *gharar* would be more if the species did not exist at the time of the contract, and as if this resembled more the sale of an absent thing, even though this is present and the other is a liability. In this way *salam* is distinguished from the sale of a thing which does not exist.

26.1.1.2.3. Condition 3

This relates to the place of taking possession. Abū Ḥanīfa stipulated this due to its similarity with (the condition of) time, but no one besides him stipulated this and they are the majority. Al-Qāḍī Abū Muḥammad held the view that it is better to specify the place of delivery, but Ibn al-Mawwāz said that it is not needed.

26.1.1.2.4. Condition 4

The price should be determined by way of measure, weight, count, or measured by length and should not be an approximate estimation. Abū Ḥanīfa stipulated this, but al-Shāfiʿī did not, nor did the two disciples of Abū Ḥanīfa, Abū Yūsuf and Muḥammad. No ruling is recorded from Mālik in this, although sale by estimate is permitted according to him except when excessive *gharar* is involved as explained earlier.

It is necessary to know that determination of the *muslam fīh* in *salam* is undertaken by weight in goods usually weighed, by measure in those usually measured, by length for those customarily measured by a standardized length, and by counting in countable goods. If none of these methods is applicable to it, it is determined by description of the desired attributes of the species along with the identification of the species if it is of different kinds, or without it if it is only one species.

They did not disagree on the point that *salam* is always undertaken as a liability and is not undertaken in things present. Mālik permitted it when present in a specified, safe village (i.e. in a place different from the place of contract) and when they are not likely to perish. It was as if he considered it to be a liability.

26.2. Chapter 2: Substitute for the Subject-Matter

There are a large number of cases falling under this chapter, but we will mention out of these the well known.

26.2.1. Issue 1

The jurists disagreed about the person who contracts *salam* for some kind of fruit and when the period is over its delivery becomes difficult, so much so that the subject-matter (*muslam fīh*) becomes non-existent due to the passage of its season. The majority said that when this happens the *muslim* (person making the payment) has an option to take back the price or to postpone the performance till the next season. This was the opinion of al-Shāfiᶜī, Abū Ḥanīfa and Ibn al-Qāsim, and their argument is that the contract created a liability for the described thing, which still remains applicable, and it is not a condition that the fruit should be of that very year, but it was a condition stipulated by the *muslim*, therefore, he has an option. Ashhab, from among the disciples of Mālik, said that *salam* (in this case) is rescinded by necessity and postponement is not permitted. It was as if he considered it to be a sale of a debt for a debt. Saḥnūn said that he has no right to take back the price and has to transfer it to the forthcoming (season). Mālik's opinion is ambiguous in this. The reliable opinion here is that which was held by Abū Ḥanīfa, al-Shāfiᶜī and Ibn al-Qāsim. It was this opinion that was preferred by Abū Bakr al-Ṭarṭūshī. The exchange of a debt for a debt is prohibited when it is the main object, not when it is undertaken due to necessity.

26.2.2. Issue 2

The jurists disagreed about the sale of the subject-matter when the period is over and possession has not been taken from the *muslam ilayh*. There are jurists who did not permit this at all. They are of the view that no sale is allowed before possession for anything. This was the opinion of Abū Ḥanīfa, Aḥmad and Isḥāq. Aḥmad and Isḥāq relied for this on the tradition of ᶜAṭiyya al-ᶜAwfī from Abū Saᶜīd al-Khudrī, who said: "The Messenger of Allāh (God's peace and blessings be upon him) said, 'He who contracts *salam* for a thing should not dispose it of for another thing' ". Mālik prohibited the sale of the *muslam fīh* in two cases. First, when the *muslam fīh* is food. This is based on his opinion that the thing for which possession is stipulated before sale is food, and about which texts of the tradition were quoted. Second, when the *muslam fīh* is not food and the *muslim* accepts as compensation that which is not permitted as payment in *salam*. For example, when the *muslam fīh* consists of goods and the payment is in goods different from these, the *muslim* takes from the *muslam ilayh*, at the end of the period, goods belonging to the species of the payment, then, this amounts to a loan with an excess if the goods acquired are more than the payment of the *salam*, or it amounts to a guaranty with a loan if the goods acquired are equal to it or less. Similarly, if the payment (*raʾs al-māl*) of *salam* consists of food, it is not permitted to take in exchange for it other food in excess, whether of the same or of a different species. According to Ibn Wahb, if it is the same kind of food with respect to species, measure, and description, it is permitted, as he deems it the same as goods. It is also permitted according to him to take food of the same description as that of the *muslam fīh*, even if it is of inferior quality, as it belongs, according to him, to the category of substitution for *dīnārs*. *Iḥsān* occurs, for example, when he has a claim on him for wheat and takes the same measure of barley. In all this it is a condition, according to Mālik, that possession should not be delayed; otherwise it amounts to an exchange of a debt for a debt. If the capital of *salam* is a thing present (*ʿayn*) and the *muslam fīh* is also an *ʿayn* of the same species, it is permitted as long as it is not in excess of it. It will not be regarded as a sale of an *ʿayn* for an *ʿayn* with a delay, if it was equal to it or less than it. Similarly, if he takes *dirhams* for *dīnārs*, it will not be a case of delayed *ṣarf*. It is the same if he takes *dīnārs* of a kind different from those of the capital of *salam*. The sale (of the subject-matter) of *salam* to someone other than the *muslam ilayh* is permitted in exchange for anything that can be sold, as long as it (the subject-matter) is not food, for if it were food, it would amount to sale of food before possession.

In the case of *iqāla*, it is a condition with Mālik that no increase or deficiency should result in it for otherwise it would amount to a sale, and all that is associated with a sale will be applicable to it, I mean, it will be rescinded, according to him, through that by which credit sales are rescinded. For example, it can lead to a sale with a loan, or to discount for premature payment, or to the sale of *salam* when it is not allowed. The example of its falling under a sale with a loan is that when the period comes to an end he enters into *iqāla* with him to take back part of it and leave some parts, this is not permitted according to him, as it leads to (the combining of) sale with a loan. It is, however, permitted according to al-Shāfiʿī and Abū Ḥanīfa as they do not prohibit sales that employ evasive means.

26.2.3. Issue 3

The jurists disagreed about purchase of a thing from the *muslam ilayh* with the capital (*rāʾs al-māl*) of *salam* after *iqāla* (has been contracted) through a method that is not permitted before *iqāla*. There are jurists who do not permit it at all and are of the view that *iqāla* is a means of making permissible that which is not permitted. This was the opinion of Abū Ḥanīfa and his disciples, and of Mālik and his disciples, except that according to Abū Ḥanīfa it is not permitted at all, just as the sale of the *muslam fīh* is not permitted at all, according to him, before possession. Mālik, however, prohibits it on occasions where the sale of *salam* is prohibited before possession, as we have elaborated earlier (regarding his opinion). Among jurists are those who permitted it, and this was the opinion of al-Shāfiʿī and al-Thawrī. Their argument is that through *iqāla* the *muslim* has become the owner of his capital. As he owns it now, it is permitted to him to purchase with it what he likes as casting suspicion over (the acts of) Muslims is not permitted. They also said that the prohibition in the tradition of Abū Saᶜīd applies to the stage prior to *iqāla*.

26.2.4. Issue 4

They disagreed about the buyer who regrets the (contract) of *salam* and says to the seller: "Enter into *iqāla* with me and I will postpone (claiming) the price that I have paid you". Mālik and a group said that this is not permitted. Another group said that it is. Mālik considered it erroneous because of the fear that when the period is over and the buyer has a claim on the seller for food he will delay taking it so that the seller may enter into *iqāla* with him, and this would amount to a sale of food with delay before taking possession. Others found it erroneous for purposes of prohibition as it is the rescission of a debt with a debt. Those who considered it permitted held that it is from the category of *maᶜrūf* and *iḥsān*, which Allāh has commanded. The Messenger of Allāh (God's peace and blessings be upon him) said, "He who agrees to relieve a Muslim from a burdensome contract, Allāh will forgive his shortcomings on the day of judgment, while he who postpones his claim from one in (financial) difficulty, Allāh will cover him with His shade on the day when there will be no shade besides His".

26.2.5. Issue 5

The jurists agreed that if a person has a claim on another for *dirhams* or *dīnārs* after a certain period and the other person remits them at the end of the period or later, then he (the claimant) is bound to accept them. They disagreed about goods due after a period in *salam* and other cases. Mālik and the majority said: "If he brings them before the termination of the period, he is not bound to accept them". Al-Shāfiᶜī said: "If it is a thing that does not change (alter or decay) and does not require care, like iron and copper, it is binding on him to accept it. If, however, it is a thing that requires care, like fruit, it is not binding on him".

When he delivers the goods after the termination of the period, then, the disciples of Mālik differ on this. It is narrated from him that it is binding on him to take possession, for example, when *salam* was contracted for the winter picking and he delivers them in the summer. Ibn Wahb and a group said that it is not binding on him.

The proof of the majority, in maintaining that possession of the goods is not binding before the termination of the period, is based on the fact that it is within his liability (in case of destruction) till the appointed period and there is a burden on him in this. This is not the case with *dīnārs* and *dirhams* as there is no burden in that. Those who do not obligate him to accept the goods brought later than the time of termination of the period, argue that the purpose served by the goods was at the appointed time and not at other times. Those who permitted this in both cases, that is, after the period and before it, hold them similar to *dīnārs* and *dirhams*.

26.2.6. Issue 6

The jurists disagreed—about the person who enters into a contract of *salam* with another, or buys food from him, on the basis of a measure and the seller or the *muslam ilayh* brings the food and informs the buyer that it has already been measured—whether the buyer can take possession from him without further measuring, acting in trust upon his statement. Mālik said that this is permitted in *salam* and in a cash sale, otherwise there would be fear that it belongs to the category of *ribā*: perhaps, he displayed trust in him so that he may delay payment of the price. Abū Ḥanīfa, al-Shāfiʿī, al-Thawrī, al-Awzāʿī and al-Layth said that this is not allowed unless the seller measures for the buyer a second time. Their argument is that as it is not for the buyer to sell it except after he has measured it, he cannot take possession unless the seller measures it for him. If measuring is a condition of sale, so is possession. They drew support from the tradition that the Prophet (God's peace and blessings be upon him) prohibited the sale of food before two measures had passed through it: the measure of the seller and the measure of the buyer.

They disagreed about the dispute of the parties over the measure when the food is destroyed in the hands of the buyer before measuring. Al-Shāfiʿī said that the prevalent view would be that of the buyer. This was also the opinion of Abū Thawr. Mālik said that the prevalent statement is that of the seller as the buyer believed him (about measure) when taking possession of it. This, according to him, is based on his opinion that sale is permitted by the very belief (in the seller).

26.3. Chapter 3: Disputes of the Parties over *Salam*

The parties in *salam* can differ over the price or over the priced commodity, either in their genus or about the period of delay or the place of delivery. With respect to their dispute over the quantity of the *muslam fīh*, the prevalent assertion is that of the *muslam ilayh* if his claim seemed contextually true; otherwise it is that of the *muslim* if his claim looks like the truth. If they make highly divergent statements, then analogy dictates that they take oaths and retract from the contract. If they dispute over the kind of *muslam fīh*, they take oaths and retract from the contract. For example, if one of them says that he made an advance payment for dates, while the other says that it was for wheat.

If their dispute about the period relates to its termination then the prevalent assertion is that of the *muslam ilayh*. If it is about the duration of the period, even then the assertion of the *muslam ilayh* prevails, unless he makes an unbelievable claim, in which case the view of the *muslim* prevails. For example, the *muslim* claims it to be the season of the *muslam fīh*, while the *muslam ilayh* claims it to be some other time.

The preferred opinion in their dispute about the place of delivery of possession is that one who claims it to be the place of the conclusion of the contract has the say. If none of them claims this then the opinion favoured is that of the *muslam ilayh*. Saḥnūn opposed the former position and said that the prevailing view is that of the *muslām ilayh* even when the other claims it to be the place of contract. Abū al-Faraj opposed the latter position and said that if none of them claims it to be the place of contract, then, they take oaths and withdraw from the contract. The *ḥukm* in their disagreement over price is the same as that of the dispute between parties to a sale before delivery of possession, (the discussion of) which has preceded.

XXVII

THE BOOK OF *KHIYĀR* (SALE WITH AN OPTION)

The discussion of the principles of this book first relates to (the question) whether it (sale with an option) is permitted. If it is, then, for what duration. Is cash payment stipulated in it? Who is liable for the *mabīᶜ* (in case of destruction) during the period of the option? Can options be inherited? For whom is *khiyār* permitted and for whom it is not? What acts have the same status as words and constitute *khiyār*?

Permissibility of option is upheld by the majority, except for al-Thawrī and Ibn Shubrama, as well as a group of the Ẓāhirites. The reliance of the majority is on the tradition of Ḥibbān ibn Munqidh, which contains the words "and you have an option for three days", and also what has been related of the tradition of Ibn ᶜUmar: "The parties to sale have an option as long as they have not parted, except in sale with an option". The reliance of those who prohibit it is (on the argument) that it constitutes *gharar* and that the basis of sale is that it is binding, unless definitive evidence is produced for the permissibility of sale with an option from the Qurʾān or the authentic *sunna* or *ijmāᶜ*. They also said that the tradition of Ḥibbān is either not authentic or it is specific to the case of the person who complained to the Prophet (God's peace and blessings be upon him) that he was deceived in sales. They said that the tradition of Ibn ᶜUmar and the words in it, "except sale with an option", have been interpreted through another version of this tradition in which the words "that he says to his counterpart: 'Choose', " have been recorded.

With respect to the extent of the duration, according to the opinion of those who permit it, Mālik was of the view that it does not have a determined limit in itself, but is determined by the demands of need in the various sales, and it therefore varies depending on the nature of the commodity. He said: "For example, it is a day or two for the choosing of a dress, a week or five days in the selection of a slave-girl, and a month or thereabouts in the choosing of a house". On the whole, it is not permitted according to him to have a longer duration than that required for choosing the *mabīᶜ*. Al-Shāfiᶜī and Abū Ḥanīfa said that the period of *khiyār* is three days; and more than that is not permitted. Aḥmad, Abū Yūsuf and Muḥammad ibn al-Ḥasan said that *khiyār* is permitted for any period that is stipulated. This was also the opinion of Dāwūd.

They differed about unlimited *khiyār* as distinguished from an option with a fixed duration. Al-Thawrī, al-Ḥasan ibn Jinniyy and a group permitted the stipulation of an absolute *khiyār*, in which the party will have an option forever. Mālik said that an absolute option is permissible, but the *sulṭān* should fix a reasonable period for it. Abū Ḥanīfa and al-Shāfiʿī said that an absolute option is not permissible and it renders the sale void. Abū Ḥanīfa and al-Shāfiʿī disagreed about the case where the option is exercised within three days of an absolute *khiyār*. Abū Ḥanīfa said that if it is exercised within three days it is permissible, but if three days pass the sale becomes void. Al-Shāfiʿī said that it is void in any case.

These, then, are the opinions of the *fuqahāʾ* about the duration of the *khiyār*, namely: Is it permitted without restriction or it is to be restricted? If it is permitted in a restricted form, then, what is its duration? If the unrestricted form is not permitted, then, is it a condition that it should be exercised within three days, or is it not permitted in any case even when exercised within three days?

Regarding their sources, the proof of those who do not permit *khiyār* is what we have already mentioned. The reliance of those who did not permit it except for three days is that essentially *khiyār* is not permissible, thus, it is not permitted beyond what has been laid down in the text of the tradition of Munqidh ibn Ḥibbān or Ḥibbān ibn Munqidh, which is like all the rest of the exemptions (*rukhaṣ*) from the general principles, like the exemption of *ʿarāyā* from (among the cases of) *muzābana* and others besides it. They said that the fixation (of the period of option) for three days was laid down in the tradition of the *muṣarrāt*, that is, the words of the Prophet (God's peace and blessings be upon him), "One who purchases a *muṣarrāt* has an option for three days". The best unbroken chain of the tradition of Munqidh is that related by Muhammad ibn Isḥāq from Nāfiʿ from ʿUmar that the Messenger of Allāh (God's peace and blessings be upon him) said to Munqidh, who was deceived in sales, "When you buy say, 'No deception', and you have an option for three days".

The reliance of Mālik's disciples is (on the argument) that the purpose of an option is the selection of the *mabīʿ*. If that is the case, then, it is necessary that it should be limited by a duration in which such selection is possible, which varies from *mabīʿ* to *mabīʿ*. It is as if the text is laid down as a reminder of this meaning, and it is for them from the category of *khāṣṣ* (particular) by which *ʿāmm* (general) is meant, but according to the first group it belongs to the category of the particular by which the particular is intended.

The stipulation of cash is not permitted, according to Mālik and all his disciples, because of its vacillation between sale and a loan, which is weak. They disagreed about who will be liable (in case of destruction) during the period of the option. Mālik, his disciples, al-Layth and al-Awzāʿī said that (liability for) a calamity is on the seller, while the buyer is a trustee irrespective of whether both have an option or only one of them. It is, on the other hand, said in the school that if it is destroyed in the hands of the seller, then, there is no dispute that he will compensate it, but if it is destroyed in the hands of the buyer, the *ḥukm* is the same as the *ḥukm* of *rahn* (pledge) and *ʿāriya*—if it was due to his negligence, the liability is on him, but if it was not due to his negligence, the liability is on the seller. Abū Ḥanīfa said that if the stipulation of option is for both of them, or for the seller alone, then, the liability is that of the seller, as the *mabīʿ* remains in his ownership; however, if the stipulation is for the buyer alone, the *mabīʿ* shifts from the ownership of the seller but has not as yet entered the ownership of the buyer, remaining suspended till the exercise of the option. It is also related from him that (in the latter case) the buyer has to pay the price and this indicates that the *mabīʿ* has moved to the ownership of the buyer. For al-Shāfiʿī there are two opinions. The better known is that the liability is that of the buyer, whoever possesses the option.

The argument, of those who hold that the liability is that of the seller in each case, is that sale with a *khiyār* is not a binding contract (as yet) and, therefore, the ownership of the seller is not transferred. It is as if the seller says: "I have sold it to you", but the buyer has not as yet said, "I have accepted". The argument of those who hold that the liability is that of the buyer, is based on the analogy of the binding sale, but this is weak due to its being an analogy drawn a disputed point from a settled point. Those who fix the liability to be that of the stipulator of the option, when one has stipulated it and the other has not, argue that if the seller is the stipulator then the option is for him with the *mabīʿ* remaining in his ownership, but if the buyer is the only stipulator then the seller has transferred it from his ownership and vacated it, and it must now move into the ownership of the buyer, if it was the buyer only who stipulated it. He (Abū Ḥanīfa) said: "It moved from the ownership of the seller, because he did not stipulate the option for himself, but it is not necessary that it enter the ownership of the buyer because he stipulated the option to return it to him". This opinion, however, prevents the *ḥukm* (from taking effect), as it is necessary that the liability be on one of them. The dispute refers back to whether option is stipulated for rescinding the sale or for completing it. If we say that it is for rescission of the sale, then, it (the *mabīʿ*) shifts from the liability of the seller, but if we say that it is for its completion, it remains within his liability.

The fifth issue is whether the option for the *mabīᶜ* can be inherited. Mālik, al-Shāfiᶜī, and their disciples said that it is inherited and if the possessor of the option dies his heirs have the same option as he had. Abū Ḥanīfa and his disciples said that the option is nullified with the death of the person who had it and the sale is concluded. The same is his opinion regarding options in pre-emption, accepting bequests, and *iqāla*. Abū Ḥanīfa conceded them (the other jurists) the option of rejection due to defects, I mean, that he said that it can be inherited. Similarly, in the cases of the right to spoils before division, option of *qiṣāṣ* (retaliation), and the option in *rahn* (pledge). Mālik conceded to them (the Ḥanafites) the case of revocation of what the father gifted to his son, that is, he did not grant the heirs of the deceased the option to reject what the father had gifted to his son according to what the law permitted him, I mean, to the father. Similarly, in the case of *kitāba*, divorce, and *liᶜān*. The meaning of the option of divorce is that a man says to another, "Divorce my wife whenever you want", and this man to whom the option was given dies, then, his heirs do not step into his shoes according to Mālik. Al-Shāfiᶜī conceded from the options to the Ḥanafites what the Mālikites had conceded, and in addition he conceded the option of *iqāla*, and acceptance of a bequest, saying that they are not inherited.

The reliance of the Mālikites and the Shāfiᶜites is (on the argument) that in the first instance rights and wealth are inherited, unless evidence is proffered alienating the right in this context. The argument of the Ḥanafites is that primarily wealth is inherited to the exclusion of other rights, except when evidence is proffered linking rights to wealth. The point of dispute, then, is whether rights are inherited like wealth. Each one of the parties judges by what the rival has not conceded out of these options and what he has conceded, and then argues against the rival. The Mālikites and the Shāfiᶜites use as an argument against Abū Ḥanīfa, his conceding the option of rejection due to defects, and hold similar all other options that can be inherited. The Ḥanafites, on the other hand, use as an argument against the Mālikites and the Shāfiᶜites what they have disallowed. Each of the parties tries to adduce a justifying distinction where his opinion differs from his main consistent view, and desires to treat the opinion of the rival in the opposite way, that is, making the distinction (applicable) where the rival has a main coherent view and agreeing where the rival makes an exception. For example, the Mālikites say: "Indeed, we have said that the option of the father revoking his gift is not inherited, as that is an option related to an attribute of the father himself and that is not found otherwise, which is paternity, and not an attribute of the contract. It is, therefore, necessary that it should not be inherited". This, then, is the reason for their disagreement in the inheritance of options, I mean, when a thing appeals to one as an attribute of the contract, he allows inheritance, and one to whom it appeals as a specific attribute of the possessor of the option denies inheritance.

The sixth issue is about the person whose option is valid. They agreed about the validity of the option of the parties to the sale, but disagreed about the stipulation of the option for a stranger. Mālik said that it is permitted and that the sale is valid. Al-Shāfiʿī in one of his opinions said that it is not permitted, unless he who has the right to stipulate an option appoints him as an agent. Option is not permitted, according to him, on the basis of this opinion for someone other than the contracting party. It is also the opinion of Aḥmad. Al-Shāfiʿī has another opinion like that of Mālik and Mālik's opinion is also held by Abū Ḥanīfa.

The school agreed on an option for a stranger when both parties to the sale grant it, and his word is substituted for theirs. The school disagreed, however, when one of them grants it and then the seller and the person to whom he granted an option disagree, or the buyer and the person to whom the buyer granted an option disagree. It is said that the verdict is for the conclusion of the sale and the rejection of the opinion of the stranger, whether the seller or the buyer granted him the option. The opposite of this view is upheld by those who consider the option of the stranger as consultation. It is also said that a distinction is to be made between the seller and the buyer, that is, the opinion concluding the sale is to be accepted, and the view of the seller is to be rejected, not that of the stranger, or the opinion of the stranger is rejected and not that of the buyer, if it is the buyer who has stipulated the option. It is also said that the prevailing view is of that person who desires conclusion (of the sale). If the seller desires conclusion and the stranger to whom the seller granted the option desires rejection, with the buyer agreeing with him, then, the prevailing opinion is that of the seller favouring conclusion. If the seller desires rejection and the stranger desires conclusion, the buyer agreeing with him, then, the prevailing opinion is that of the buyer. Similarly, when the buyer stipulates the option for a stranger, then, the prevailing view among them will be of the person who desires conclusion. Likewise is the case of the buyer; yet it is said that a distinction is to be made in this between the seller and the buyer, that is, if the seller stipulates it, the prevailing opinion will be of the person who desires conclusion, but when the buyer stipulates it, then, the prevailing view is that of the stranger, and that is the apparent view in the *Mudawwana*. All this is devoid of strength.

They disagreed about the (case of the) person who stipulates something impermissible along with the option. For example, he stipulates an unknown period or an option over and above three days, according to one who does not permit an option beyond three days, or the option for a person who is far away from the location (of the contract) itself, that is, for a stranger. Mālik and al-

Shāfiʿī said that the sale is not valid (in such a case), even when the irregular condition has been expunged. Abū Ḥanīfa said that the sale is valid after the irregular condition has been expunged. The basis of the disagreement is whether the irregularity occurring in the sale, because of the condition, extends to the contract itself, or is confined to the condition alone. Those who say it extends to the contract nullify it even with the dismissal of the condition, but those who say it does not extend to it, hold that the sale is valid if the irregular condition is expunged, as the sale itself is sound.

XXVIII

THE BOOK OF *MURĀBAḤA* (SALE AT STATED COST PRICE)

The majority of the jurists agreed that sale is of two kinds: *musāwama*, and *murābaḥa*. *Murābaḥa* takes place when the seller declares the price for the buyer at which he had bought the goods, and then stipulates some profit in *dīnārs* or *dirhams*. They (the jurists) disagreed, on the whole, over this on two points. First, over that which the seller can count, and which he cannot count, as a part of the capital of the goods out of the expenditure he made on the goods, after purchase. Second, when the seller lies to the buyer and informs him of a higher price than that for which he bought the goods; or if he mistakenly informs him of a lesser price than that at which he bought the goods and it later appears to him that he bought them for more.

In this book, then, there are two chapters in accordance with the disagreements of the *fuqahā*ʾ of different regions. Chapter one is on what is included, and what is not included, in the capital (*ra*ʾ*s al-māl*), and on the description of the *ra*ʾ*s al-māl* upon which profit is permitted to be charged. The second chapter is about the *ḥukm* of the excess and shortcoming in the statement of the seller about the cost.

28.1. Chapter 1: Things Counted and those not Counted in the Capital, and the Characteristics of Capital on which Profit can be based

The conclusion of Mālik's school about that which is included in the price, is that whatever the seller is entitled to for the goods over and above the cost is divided into three categories: one of the categories is that which is to be included in the cost and which also has a right to earn a profit; another may be included in the price, but has no share in the profit; and a third category is not to be included in the cost, and also has no share in the profit. Acts that are considered a part of the capital and have a share in the profit are factors that are effective in the essence of the goods, like tailoring and dyeing. Acts that are considered a part of the capital, but have no part of the profit, do not affect the essence of the goods and are those which the seller is not capable of undertaking himself, like transporting the goods from town to town and the renting of stores in which they are stocked. Those which do not fall under either case are acts that neither affect the essence of the goods nor is the seller able to undertake them himself, like brokerage, negotiation, and bargaining.

Abū Ḥanīfa, on the other hand, said that (the cost of) all that is undertaken with respect to the goods is added to the cost of the goods. Abū Thawr said that *murābaḥa* is not permitted except on the basis of the price for which he bought the goods and unless he distinguishes (between the cost and the profit), otherwise it is annulled, according to him, when it takes place as it amounts to falsehood; because the seller says to the buyer that the cost of my goods is so much, when that is not the case. It amounts to misrepresentation (*ghishsh*) according to him.

In the case of characteristics of capital, which are to be communicated, Mālik and al-Layth said about the person who purchases the goods with *dīnārs*, on a day when the exchange rate (*ṣarf*) is known, and then sells them for *dirhams*, when the exchange rate has changed and is now higher, that he has no right to communicate the rate of the day when he bought them for *dīnārs*, as this amounts to falsehood and breach of trust. Similarly, when he has bought with *dirhams* and is selling for *dīnārs*. In this context, the disciples of Mālik disagreed about one who has purchased goods with goods, whether it is permitted to him to sell them by way of *murābaḥa*. If we permit this, then, is it permitted in lieu of the value of the goods or with the goods themselves? Ibn al-Qāsim said that it is permitted to him to sell them for the goods with which he bought, but it is not permitted with value. Ashhab said that it is not permitted to one who has bought goods with any other kind of goods to sell them by way of *murābaḥa*, as he would be demanding goods of the same description from the buyer, who would generally not have such goods and it would result in the sale of a thing not possessed.

Mālik and Abū Ḥanīfa disagreed about the person who bought goods for *dīnārs*, but paid in place of such *dīnārs* other goods or *dirhams*. Is it permitted to such a person to sell them by way of *murābaḥa* without informing him (the buyer) of the form of payment? Mālik said that it is not, unless he informs him of the form of payment. Abū Ḥanīfa said that it is permitted to him to sell by way of *murābaḥa* the part of the goods he bought for *dīnārs* and not those for which he paid with goods or *dirhams*. Mālik also said about the person who bought goods for credit for a period and sold them by way of *murābaḥa*, that it is not permitted to him unless he discloses the period. Al-Shāfiʿī said that if this takes place, the buyer would have a period (of credit) similar to his. Abū Thawr said that it is like a defect and he has the choice of returning the goods. There are under this heading a number of cases, which it is not our purpose to recount.

28.2. Chapter 2: About the *Ḥukm* of Discrepancies Occurring in the Statement of the Seller

They disagreed about the person who bought goods by way of *murābaḥa* at a price that was stated, but it later became evident through acknowledgement or by evidence that the price was less; the goods still being intact. Mālik and a group said that the buyer has an option either to accept the goods at the adjusted price (or to reject them). It is not binding on the buyer to take the goods at the amended price as the seller had not made it binding for him. If, however, the seller had made it binding on him then it is necessary for him to accept them. Abū Ḥanīfa and Ẓufar said that the buyer has an absolute option and he does not have to accept the goods even if the sale was made binding. Al-Thawrī, Ibn Abī Laylā, Aḥmad and a group of jurists said that the sale remains binding on both of them after the excess has been removed from the price. From al-Shāfiʿī there are two opinions: an absolute option and another making the sale binding after the reduction of the price.

The argument of those who hold the sale to be binding after reduction of the excess is that the buyer has merely profited over the price at which he bought the goods and not beyond that. When a price different to what he had stated became evident it is necessary to revert to what is now true. It is just as if he had taken possession through a determined measure and the measure turned out to be different; it is obligatory that he utilize this true measure. The argument of those who uphold an absolute option is grounded on falsehood in this issue with a defect, that is, the way in which an option is imposed in case of defect is also imposed here in the case of falsehood.

When the goods are consumed (destroyed), however, al-Shāfiʿī said that the excess amount of the price is to be reduced along with the profit due to him. Mālik said, in a disputed narration from him, that if the value of the goods on the day of possession or the day of sale is the same as or less than that weighed by the buyer then the buyer has no recourse to him for anything. If the value is less the seller is given an option to return the value to the buyer, or to return the price, or to go through with the sale at the correct price. When a person sells his goods by way of *murābaḥa* and then produces evidence that the price was more than that stated and he was confused and made an error in this, the goods being in existence, al-Shāfiʿī says that such evidence is inadmissible as he lied, while Mālik says that it is admissible and the buyer is to be compelled to pay that price. This, however, is far-fetched as it amounts to a new sale. Mālik says in this issue, where the goods are consumed, that the buyer has an option between paying the value of the goods on the day of possession or accepting them at the adjusted price. These, then, are the well-known issues under this topic.

The knowledge of the *aḥkām* of this kind of sale are structured, within the school (of Mālik), upon the knowledge of the *aḥkām* of three issues and what is consequential to them: the *ḥukm* of the issue of falsehood; the *ḥukm* of the issue of deception; and the *ḥukm* of the issue of the existence of defects. The discussion of the issue of falsehood has preceded, and the *ḥukm* of return due to defects is the same as that in absolute sales. The *ḥukm* in the case of deception is the granting of an absolute option to the buyer and it is not for the seller to bind him to the sale even when he reduces the price by the extent of the deception, as was the case in the question of falsehood. This is the view of Ibn al-Qāsim. According to Ashhab, deception is divided into two kinds: a kind that affects the price and another that does not. The kind that does not affect the price has no *ḥukm* according to him, while that which affects the price has the same *ḥukm* as that of falsehood.

Things that are consequential are arranged into four issues: falsehood and deception, falsehood and swindling, deception and swindling through defects, and falsehood, deception, and swindling with defects. The principle in the view of Ibn al-Qāsim is to go by the *ḥukm* of that which remains when the *ḥukm* of the other is eliminated, or by the *ḥukm* of that which is preferable according to him when the others are not eliminated, either by granting an option if that is possible or through reconciliation where that is possible. The details of this are suited to the books of cases (*furūʿ*), that is about the opinions of Ibn al-Qāsim and others.

XXIX

THE BOOK OF THE *ʿARIYYA* (ADVANCE SALE)

The jurists differed about the meaning of *ʿariyya* and about the exemption stipulated for it in the *sunna*. The Mālikī *qāḍī*, Abū Muḥammad ʿAbd al-Wahhāb, related that *ʿariyya* in Mālik's school is the donation of fruit of a date-palm or of date-palms by a person, from his grove, to a specified individual. It is permitted to the donor to purchase from the donee the estimated equivalent in dried dates (*tamr*) with four conditions. The first is that the fruit should have fertilized. Second, that it should amount to five *awsuq* or less; it is not permitted if it exceeds this. Third, that the donee should deliver the dates at the time of cutting; if he delivers them on the spot, it is not permitted. Fourth, that the dates delivered should be of the same species as the dates of *ʿariyya*. In Mālik's school, the exemption exists only for the donor.

The concession found in it is an exemption from the (the prohibition of) *muzābana*, which is the sale of moist (fresh) dates for dry dates in respect of which prohibition has been stipulated. The exemption also relates to the two kinds of *ribā*, that is, *tafāḍul* and *nasāʾ*, because it is the sale of fruit determined by a known weight for another estimated for equivalence. This involves the sale (exchange) of the same species with a probable excess. It is also the exchange of fruit for fruit with a delay. This, then, is the opinion of Mālik as to what constitutes *ʿariyya*, the exemption in it, and for whom the exemption exists.

The application of the exemption in al-Shāfiʿī's view does not relate to the donor alone, but to any person who intends to purchase such a quantity of *tamr* with its estimated equivalent, that is, five *awsuq* or less. It is related that the exemption is dependent on this particular quantity of *tamr* due to the needs of individuals for consuming moist dates. This for the person who does not have moist dates but has *tamr* with which he can buy moist dates. Al-Shāfiʿī stipulates for the delivery of moist dates, with which *ʿariyya* is being contracted, that they be delivered immediately. He maintains that if they part before possession, the contract is vitiated.

ᶜAriyya is permissible, according to Mālik, in all things that can be dried and stored, but for al-Shāfiᶜī, it is only permitted in dates and grapes (raisins). There is no dispute about quantities that are less than five *awsuq* for al-Shāfiᶜī and Mālik, but a disagreement is related from them when the quantity is five *awsuq*; both permission and prohibition are related from them, but the well-known opinion of Mālik is about permissibility. Al-Shāfiᶜī, therefore, opposes Mālik in *ᶜariyya* on four counts. First, in the cause of the exemption as we have stated. Second, that *ᶜariyya*, which has been exempted, is not *hiba* (gift), but has been called so metaphorically. Third, in the stipulation of immediate delivery at the time of sale. Fourth, about its subject-matter, for it is permitted according to him, as we have said, only in dates and grapes (raisins) and for Mālik in all things dried and stored.

Aḥmad ibn Ḥanbal agrees with Mālik in so far as he considers *ᶜariyya* to be a gift (*hiba*), but he opposes him in that the exemption is made for the donee, that is, the *muᶜarra lahu* and not the *muᶜarrī*, because he is of the view that it is for the donee to buy from anyone he likes and not the donor specifically, as is the view of Mālik. Abū Ḥanīfa agrees with Mālik that *ᶜariyya* is *hiba*, but opposes him about the nature of the exemption. The exemption, according to him, is not from the category of an exception to *muzābana* nor does it belong on the whole to sale as such, but the exemption relates to the revocation of the gift by the donor as long as the donee has not taken possession of it and is not related, for him, to sale. It is a revocation of a gift of a specific nature in which the donee delivers a counter-value in *tamr* by estimate.

The basis for Mālik's opinion in *ᶜariyya* is that it follows the practice well known in Medina. They said the origin of this is that a person used to give away as a gift date-palms in his grove, but the breaking in by the donee became unbearable for him; so it was permitted to him to sell the date-palms for an estimated equivalent in *tamr* at the time of cutting. His proof about the exemption being specific for the donor is the tradition of Sahl ibn Abī Ḥathma that "the Messenger of Allāh (God's peace and blessings be upon him) prohibited the sale of *tamr* for moist dates, except that he made an exemption in the case of *ᶜariyya* that it be purchased for an estimated equivalent so that the owners may consume moist dates". The Mālikites, however, said that the words "the owners may consume moist dates" are an indication that the exemption is specifically for the donors for it is they who are the owners according to the apparent meaning. It is possible to say that the owners are those who purchased them, whoever they may be, but the word *ruṭab* (wet) does not conform with the situation of the donor. It does conform though according to the opinion of al-Shāfiᶜī, for it is those persons who neither have *ruṭab* nor *tamr* with which they buy them (the date-palms). The argument, therefore, lies with al-Shāfiᶜī.

ʿAriyya being *hiba*, according to him (Mālik), the argument is based on literal construction. The experts said that *ʿariyya* is *hiba*, but they disagreed about its denotation with this term. Some said it is so because it is stripped of the connotation of the term price, while others said it relates to the idea of asking for charity, as it occurred in the words of the Exalted: "*Wa atʿimuʾl-qāniʿa waʾl-muʿtarra*".[145] Mālik stipulated that the delivery of the price should be at the time of cutting, that is, its delay till such time, because it is *tamr* and the law had ordained its return through an estimated equivalent, then it is the practice that it be delayed till cutting as in *zakāt*. This is weak, as it clashes with the analogy from the rule in the *sunna*. According to him, if he delivers earlier, voluntarily, after the conclusion of the contract, it is permitted. The basis for his stipulating its permissibility in five *awsuq* or less is what has been related from Abū Hurayra "that the Messenger of Allāh (God's peace and blessings be upon him) made an exemption in the sale of the *ʿarāyā* in less than five *awsuq* or in five *awsuq*". There are two narrations from Mālik about *ʿarāyā* in five *awsuq* due to the doubt about the narrator in this tradition. The stipulation of its being of the same species, when it dries up, is based on what is related from Zayd ibn Thābit, as recorded by Muslim, "that the Messenger of Allāh (God's peace and blessings be upon him) made an exemption for the possessor of *ʿariyya* to sell it for an estimated equivalent of *tamr*". Al-Shāfiʿī's reliance is on the tradition of Rāfiʿ ibn Khadīj and Sahl ibn Abī Hathma from the Prophet (God's peace and blessings be upon him) "that he prohibited *muzābana* exchanging *tamr* for *tamr*, except in the case of *ʿarāyā*, for he permitted them to undertake that", as well as on the words "the owners may consume moist dates". For them (the Shāfiʿites) *ʿariyya* is limited to less than five *awsuq* of *tamr*, as it was customary, in their view, that a person usually gives away only this amount or even less from his date-palms, and therefore this amount became specific as it was the amount usually given as *hiba* so that the amount of gift should conform with it. He argued for his opinion on the basis of a tradition related through a *munqatiʿ* chain (i.e. with a missing link) from Maḥmūd ibn Labīd, who himself said to one of the Companions of the Messenger of Allāh, either Zayd ibn Thābit or someone else, "What are these *ʿarāyā* of yours?" He (Zayd or the other Companion) said naming some needy persons from among the Anṣār, who complained to the Messenger of Allāh (God's peace and blessings be upon him) that the *ruṭab* season was around but they did not have cash at hand with which to purchase it and enjoy it along with the other people, while they had a surplus of *tamr*. He (the Prophet) made an exemption for them to buy *ʿarāyā* with an estimated equivalent of *tamr* that they possessed so that they may consume *ruṭab*. He (al-Shāfiʿī) did not allow delay in the delivery of *tamr* as it amounted to the sale of food for food with a delay.

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[145] "Eat thereof and feed the beggar and the suppliant". Qurʾān 22 : 36

The basis for Aḥmad's opinion is the apparent meaning in the foregoing traditions that the Prophet made an exemption in ʿ*arāyā* and did not differentiate the donor from the others. For Abū Ḥanīfa, as *muzābana* was not permissible and if it (ʿ*ariyya*) was considered a sale it would be a category of *muzābana*, he considered the specification of ʿ*ariyya* for the donor not as a category of sale, but as the recourse of the donor in what he had gifted to an estimated equivalent of *tamr*. The designation of ʿ*ariyya* as sale is metaphorical for him. In some of the narrations from Mālik, he also inclined toward such a meaning and did not allow its sale for *dirhams* or for any other thing beside an estimated equivalent, though his well-known opinion is that he permitted this. It is said that this opinion of Abū Ḥanīfa is due to his practice of preferring *qiyās* over tradition that is not *mashhūr*. In this case too he went against the implications of the traditions in different respects; he did not call it *bay*ʿ whereas the Lawgiver has explicitly called it *bay*ʿ. And, unlike the text of the tradition here stated "that he (the Prophet) prohibited *muzābana* and made an exemption in the case of *arāyā*", in Abū Ḥanīfa's opinion ʿ*ariyya* is not an exemption from *muzābana* as *muzābana* is a sale, and he regarded ʿ*ariyya* as a revocation of *hiba*. It is surprising that it was easy for him to treat it as an exemption from the proscription of revocation of the gift, though no such exemption is recorded from the Lawgiver. But it was difficult for him to exempt it from that in which the Lawgiver has made an exemption, which is *muzābana*. Allāh knows best.

XXX

THE BOOK OF *IJĀRA* (HIRE)

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The discussion in this book resembles the discussion in (the Book of) Sales, that is, its fundamental principles are covered through a discussion of its different kinds, their conditions of validity (*siḥḥa*) and vitiation (*fasād*), and through a discussion of its *aḥkām*, those that are specific to one of its kinds and those that are more general being related to more than one kind. The book is, therefore, divided initially into two parts. Part one relates to its kinds and the conditions of validity and vitiation, while part two deals with the identification of the *aḥkām* of *ijāra*. All this, however, is to be discussed after establishing the proof (*dalīl*) of its legality. We shall mention first the disagreement related to this and then move on to the discussion of the well-known issues in these two parts. The intention is to discuss those issues that relate to fundamentals and these are the ones in which disagreement became well known.

We say: *Ijāra* is permissible according to the jurists of all the regions and those of the first period. Its prohibition is related from al-Aṣamm and Ibn ʿUlayya. The proof of the majority are the words of the Exalted, "He said: Lo! I fain would marry thee to one of these two daughters of mine on the condition *that thou hirest thyself* to me for (the term of) eight pilgrimages",[146] and His words, "Lodge them where ye dwell, according to your wealth, and harass them not so as to straiten life for them. And if they are with child, then spend for them till they bring forth their burden. Then, if they give suck for you, *give them their due payment* (*ujūrahunna*) and consult together in kindness".[147] (The proof) from the *sunna* is what has been recorded by al-Bukhārī from ʿĀʾisha, who said, "The Messenger of Allāh (God's peace and blessings be upon him) and Abū Bakr (God be pleased with him) hired a man of Banū al-Dayl, who professed the faith of the *kuffār* of Quraysh, as a professional guide. They delivered to him their riding camels and agreed to meet him at the cave of *Thawr* along with their camels after three nights". Further, there is the tradition of Jābir "that he sold a camel to the Prophet (God's peace and blessings be upon him), and stipulated riding it to Medina as a condition". And whatever is admissible through a condition is admissible through hire.

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[146] Qurʾān 28 : 27. Emphasis added.

[147] Qurʾān 65 : 6. Emphasis added.

The doubt arises, for those who prohibit hire, (by looking at) the contracts of exchange (commutative) in which the delivery of the price becomes necessary through the delivery of the subject-matter (*ʿayn*), as in corporeal things, while the benefits of hire are non-existent at the time of the contract. This amounts to *gharar* (uncertainty) and the sale of uncreated things. We say: even though they are uncreated at the time of contract, they are usually retrievable; the law has acknowledged those benefits from among these that are mostly retrievable or (the chances of) whose recovery and non-recovery are equal.

30.1. Part 1: Kinds of *Ijāra* and the Conditions of Validity and Vitiation

In this part the discussion is about the species of *thaman* (lit. price, but wages or rent in this context) and the species of *manfaʿa* (benefits, utility), for which the *thaman* is a counter-value and an attribute. The *thaman* must be something the sale of which is permitted, and a comprehensive discussion of this has preceded in the Book of Sales. Benefits, however, must comprise that which has not been declared unlawful by the law. In all of these issues there are points on which the jurists agreed and disagreed.

30.1.1. The Species of *Manfaʿa* (Benefits, Utility)

Among those (benefits) on which they agreed as nullifying *ijāra* are: each benefit arising out of a thing prohibited in itself; each benefit prohibited by the law, like female mourners and singers; and each benefit that is a *farḍ ʿayn* (universal obligation) imposed on man by the law, like prayers and others. They agreed on the hiring of houses, animals, and men for permissible (*mubāḥ*) acts, as well as on the hiring of clothes and rugs.

They disagreed about renting land and water springs, hiring of a *muʾadhdhin* and instruction for learning the Qurʾān, and about the hiring of animals for mating. They disagreed extensively about the renting of land. Some of them did not allow this at all, but they are few. This was the opinion of Ṭāwūs and Abū Bakr ibn ʿAbd al-Raḥmān. The majority permitted it, but disagreed about the thing with which it could be rented. A group said that renting it is not permitted, except with *dirhams* and *dīnārs*. This was the opinion of Rabīʿa and Saʿīd ibn al-Musayyib. Another group said that it can be rented with anything except food whether it grows out of this land or from another land, or with any vegetation in it whether food or something else. This was the opinion of

Mālik and most of his disciples. Some others said that renting of land is permitted with anything other than food. Some permitted the renting of land with all kinds of goods, food, and other things as long as they did not form part of food grown in such land. Those who held this opinion include Sālim ibn ᶜAbd Allāh and others from among the earlier jurists. It is also the opinion of al-Shāfiᶜī and the preferred opinion of Mālik in *al-Muwaṭṭa*ᶜ. A group said that renting it is permitted with anything, including a part of that which grows in it. This was the opinion of Aḥmad, al-Thawrī, al-Layth, Abū Yūsuf and Muḥammad the disciples of Abū Ḥanīfa, Ibn Abī Laylā, al-Awzāᶜī and a host of others.

The reliance of those who did not permit renting of land in any circumstances is what has been narrated by Mālik with its *sanad* (chain) from Rāfiᶜ ibn Khadīj "that the Messenger of Allāh (God's peace and blessings be upon him) proscribed renting through *muzāri*ᶜ (tenancy in land)". They said this has a general (ᶜ*āmm*) implication, but they did not refer to the qualification of the narrator related by Mālik. Ḥanẓala is reported to have said: "I asked Rāfiᶜ ibn Khadīj about renting it with gold and silver and he said there is no harm in it". This was related from Nāfiᶜ by Ibn ᶜUmar, who accepted its generality. Ibn ᶜUmar used to rent out his land before this, but gave it up (on hearing this). This is based on the opinion of those who do not think that a general implication can be restricted by the opinion of the narrator. It is related from Rāfiᶜ ibn Khadīj, from his father that "the Messenger of Allāh (God's peace and blessings be upon him) proscribed the renting of lands". Abū ᶜUmar ibn ᶜAbd al-Barr said that they also argued on the basis of the tradition of Ḍumra from Ibn Shawdhab from Maṭar from ᶜAṭāʾ from Jābir, who said, "The Messenger of Allāh (God's peace and blessings be upon him) addressed us and said, 'He who has land should cultivate it or have it cultivated, but should not rent it out' ". These are all the traditions relied upon by those who do not allow the renting of land. They also said, from the aspect of the underlying reason, that letting out on rent is not allowed as it involves *gharar*, because it is possible that a calamity like fire, famine, or flood may hit it and payment of rent would be obligatory even though the tenant has not benefited from it at all. Al-Qāḍī (the author) said it is likely that the underlying reason is compassion for human beings by preventing sale of what Allāh created in abundance, like abundance of land, as in the case of water; an aspect of resemblance between them is that both are natural sources of survival.

The reliance of those who did not permit it except for *dirhams* and *dīnārs* is the tradition of Ṭāriq ibn ᶜAbd al-Raḥmān from Saᶜīd ibn al-Musayyib from Rāfiᶜ ibn Khadīj from the Prophet (God's peace and blessings be upon him) that he said, "Three persons cultivate the land: a man who owns the land and cultivates it himself; a man who has been granted (gifted) the land, and cultivates what he has been granted; and a man who rents it with gold or silver". They said that it is not allowed to go beyond what has been stipulated in this tradition. The other traditions are absolute (*muṭlaqa*), while this is qualified (*muqayyad*), and it is obligatory to qualify the absolute in the light of the qualification.

The reliance of those who permit renting with anything except food, irrespective of whether the food can be stored, is the tradition of Yaᶜlā ibn Ḥakīm from Sulaymān ibn Yasār from Rāfiᶜ ibn Khadīj, who said, "He who has land should cultivate it (himself), or his brother should cultivate it for him, and he should not rent it out for a third or fourth (share) nor for a determined (quantity of) food". They said that this is the meaning of *muḥāqala*, which was prohibited by the Prophet (God's peace and blessings be upon him), and mentioned the *marfūᶜ* tradition of Saᶜīd ibn al-Musayyib in which it is stated that *muḥāqala* is the renting of land for wheat (*ḥinṭa*). They said that it also amounts to the sale of food for food with a delay.

The basis for those who do not allow renting of land with food, or with any other thing drawn from the land, is the same as the basis of those who do not permit renting with food. The proof of prohibition (of renting) with any kind of produce of the land is found in the proscription of the Prophet (God's peace and blessings be upon him) laid down for *mukhābara*. They said that it is the renting of land with some of its produce. This is the opinion of Mālik and all his disciples.

The reliance of those who permitted the renting of land with all kinds of goods, food, and other things produced from it, was on the basis that it is the renting of a determined benefit with a determined thing, and this was permitted by analogy (*qiyās*) on the permission of hiring all other benefits. It was as if they considered the traditions of Rāfiᶜ as weak (*ḍaᶜīf*). It is related from Sālim ibn ᶜAbd Allāh and others about the tradition of Rāfiᶜ that they said, " Rāfiᶜ himself rented out (land)." They said that in some narrations a tradition is reported from him, which should be preferred over all others; he said, "We, the people of Medina, most of us were occupied with agriculture. One of us would rent out his land saying, 'This part is for me and that part for you'. Sometimes one part would yield something, while the other would not, therefore, the Prophet (God's peace and blessings be upon him) prohibited (it for) them". It is recorded by al-Bukhārī.

Those who did not allow renting it for what was produced from it rely on rational arguments and on tradition (*athar*). The tradition is that in which is found the proscription of *mukhābara*. This is in addition to the tradition of Ibn Khadīj from Ẓuhayr ibn Rāfiᶜ, who said: "The Messenger of Allāh (God's peace and blessings be upon him) forbade us a practice that we thought was convenient for us". I said: "What the Messenger of Allāh (God's peace and blessings be upon him) said is right". He said: "The Messenger of Allāh called me and said: 'In what way do you transact the fields?' We said: 'We rent it out on a fourth (share) and for some *awsuq* of *tamr* and barley'. The Messenger of Allāh (God's peace and blessings be upon him) said: 'Do not do this. Cultivate it or have it cultivated or hold on to it' ". This is a tradition that is agreed upon for its authenticity by the two *imāms* al-Bukhārī and Muslim.

Those who permit renting of land with what is produced from it, their reliance is on the established tradition of Ibn ᶜUmar "that the Messenger of Allāh (God's peace and blessings be upon him) gave to the Jews of Khaybar the palm-groves and the land of Khaybar on the condition that they work on them with their own resources for half the produce and fruit". They said that this tradition is better than the traditions of Rāfiᶜ as their texts are conflicting, and even if the traditions of Rāfiᶜ are deemed authentic, we interpret them to indicate mere disapproval, not prohibition. This is so on the basis of what has been recorded by al-Bukhārī and Muslim from Ibn ᶜAbbās, who said, "The Prophet (God's peace and blessings be upon him) did not prohibit it, but he said: 'If one of you grants it to his brother, it is better for him than that he should take something from him' ". They said that when Muᶜādh ibn Jabal reached Yemen, on being sent there by the Messenger of Allāh (God's peace and blessings be upon him), and found the people practising *mukhābara*, he confirmed it.

30.1.1.1. Hiring a *muʾadhdhin* and hiring for the teaching of the Qurʾān.

A group of jurists did not see any harm in the hiring of a *muʾadhdhin*, while another group considered it reprehensible. Those who deemed it reprehensible and prohibited it argued on the basis of what is related from ᶜUthmān ibn Abī al-ᶜĀṣ, who said, "The Messenger of Allāh (God's peace and blessings be upon him) said, 'Take that person as *muʾadhdhin* who does not take wages for his *adhān*' ". Those who considered it permissible, held it as analogous to other non-obligatory acts, and that is the reason for the disagreement, that is, whether it is obligatory (*wājib*).

They also differed about hiring for Qurʾānic instruction. Some disapproved it, while others permitted it. Those who permitted it compared it to all the other acts, and argued on the basis of what has been related from Khārija ibn al-Ṣāmit from his uncle, who said, "We returned from a visit to the Messenger of Allāh (God's peace and blessings be upon him) and reached one of the villages of the Bedouin. They said, 'You have come from this man. Do you possess a medicine or a charm, for we have an idiot possessed'. We said to them, 'Yes'. So they brought him and I started reciting over him the *Fātiḥat al-Kitāb* for three days, morning and evening, and collected my saliva and then spitted it out on him. It was as if he had been released from a fetter. They brought me a reward, but I refused saying, 'Not until I ask the Messenger of Allāh (God's peace and blessings be upon him)'. I asked him and he said: 'Take it. Upon my life, there are those who consume on the basis of false charms, while you would be consuming for a legitimate charm' ". They also argued on the basis of what has been related from Abū Saᶜīd al-Khudrī "that the Companions of the Messenger of Allāh (God's peace and blessings be upon him) were on an expedition when they passed by a village of the Arabs, and the people said: 'Do you possess a charm, as the chief of the village has been stung or has been possessed". He said, "One of the men recited the *fātiḥat al-Kitāb* as a charm and the person recovered. He was given cattle (as a reward), but refused to accept them. He asked the Messenger of Allāh (God's peace and blessings be upon him), who said: 'What did you use as a charm?' He said: 'The *Fātiḥat al-Kitāb*'. The Prophet said: 'And what told you that it is a charm?' He later added, 'Accept the cattle and set aside a share for me' ".

Those who disapproved of rewards for teaching of the Qurʾān, said that it belongs to the category of rewards for teaching prayers. They also maintained that the rewards mentioned (in the traditions) do not relate to the teaching of the Qurʾān, but to voicing charms; wages for charms are permitted in our view, whether they are through the Qurʾān or some other means, as they are like other medical treatment. They also maintained that issuing charms is not obligatory on people, while the teaching of the Qurʾān is.

30.1.1.2. Hiring of animals for mating

In the hiring of animals for mating from among camels, cattle, and riding beasts, Mālik allowed that a man may give his animal on hire for impregnating a specified number of animals. It was not permitted by Abū Ḥanīfa nor by al-Shāfiᶜī. The proof of those who did not permit it is the prohibition of (charging wages for) the copulation of animals. Those who allowed it, held it similar to all other benefits, but this is weak as it is the preference of *qiyās* (analogy) over transmitted texts. The hiring of a dog is also related to this category, and it is not permitted either by Mālik or by al-Shāfiᶜī. Al-Shāfiᶜī lays down as a condition for hiring of benefits that they should have an independent inherent value. Thus it is not allowed to rent out fruit for its smell, nor food for decorating a shop, as these benefits cannot be valued independently. This is not permitted by Mālik or by al-Shāfiᶜī.

Within this category is the disagreement over the hiring of *dirhams* and *dīnārs*, and on the whole every thing that is not identified by its own essence. Ibn al-Qāsim said that the letting out on hire of this species is not permitted, but this is a loan (*qarḍ*). Abū Bakr al-Abharī and others used to think that it is valid and payment of wages is binding in this. Those who disallowed rent in this, did so as they could not conceive of a utility in this except by consumption (destruction of their essence), while those who permitted it could visualize such a utility, like using them as units of weight and measure or other uses that can be conceived in this regard. These are the well-known disputed issues related to the genus of utility.

30.1.2. The Species of *Thaman* (Rent; Wages)

The disputed issues about the species of the *thaman* are the issues related to what is valid as *thaman* in sales and what is not. Among the prohibitions laid down in this category is the tradition that "the Prophet (God's peace and blessings be upon him) prohibited (wages for) the copulation of animals, for the profession of cupping (bloodletting), and the *qafīz* (cafiz, a dry measure) of the miller". Al-Ṭaḥāwī said that the meaning of the prohibition by the Prophet of the *qafīz* of the miller is that they used to give wheat to the miller to grind in return for a part of the flour that he would produce. They said that this was not permitted in their opinion, as it amounts to hiring of the worker with something that is not possessed, nor is it something that exists as a liability. Al-Shāfiᶜī agreed with him (al-Ṭaḥāwī) in this and his disciples said that if a skinner is hired for the skin or a miller with bran or a measure of flour, it is void due to the prohibition of the Prophet about the *qafīz* of the miller. This is permitted in Mālik's opinion, as hiring is for a known quantity of food, and the wages of the miller are a part that is also determined.

Regarding the work of the cupper, a group were inclined toward prohibition, while others opposed them, saying that his work is simply lowly, looked down upon (but not *ḥarām*). Others said that it is permissible. The reason for their disagreement is the conflict of *āthār* (traditions) in this connection. Those who considered it prohibited argued on the basis of what is related from Abū Hurayra, who said, "The Messenger of Allāh (God's peace and blessings be upon him) said, 'The earning of the bloodletter is illegal' ", and also on the basis of what is related from Anas ibn Mālik, who said, "The Messenger of Allāh (God's peace and blessings be upon him) prohibited the work of the bloodletter". It is related from ᶜAwn ibn Abī Juḥayfa, who said, "My father hired a cupper and destroyed his cup. I said: 'Father, why have you destroyed it?' He said, 'The Messenger of Allāh (God's peace and blessings be upon him) prohibited the wages of blood' ".

Those who upheld its permissibility, argued on the basis of what is related from Ibn ᶜAbbās, who said: "The Messenger of Allāh (God's peace and blessings be upon him) submitted to cupping and paid the cupper his wages". They said that if it had been prohibited he would not have paid him; the tradition of Jābir "that the Messenger of Allāh (God's peace and blessings be upon him) called for Abū Tayba, who cupped him, and asked him, 'What are your wages?' He replied: 'Three *ṣāᶜs*'. He then reduced a *ṣāᶜ* "; and also from

Jābir "that he (the Prophet) ordered a *ṣāᶜ* of food for the cupper and asked his clients to be generous to him".

Those who deemed it reprehensible relied on the tradition which says that Rafāᶜa ibn Rāfiᶜ or Rāfiᶜ ibn Rafāᶜa came to a gathering of the Anṣār and said, "The Messenger of Allāh (God's peace and blessings be upon him) prohibited the earning of the cupper and ordered us to feed it to our water-carrying beast". They also relied on what is related from a man from Banū Ḥāritha who had a cupper, and he asked the Messenger of Allāh (God's peace and blessings be upon him) about his work. The Prophet prohibited it. He asked him again and he prohibited it (again). He kept on persisting till the Messenger of Allāh (God's peace and blessings be upon him) said, "Feed his earning to your water-carrying beast and feed your slave on it".

In this category is also their disagreement about renting a house in exchange for residence in another house. Mālik permitted this, but Abū Ḥanīfa disallowed it, perhaps he viewed it as a category of (the exchange of) a debt for a debt, which is weak. These were the well-known issues related to the genera of *thaman* and *manfaᶜa*. We shall, however, relate their best-known attributes.

30.1.3. The Attributes of *Manfaᶜa* and *Thaman*

The majority of the jurists of different regions—Mālik, Abū Ḥanīfa, and al-Shāfiᶜī—agreed on the whole that among the conditions of *ijāra* is that the *thaman* should be known and the *manfaᶜa* should be of a determined quantity. This is either accomplished through the purpose, like the sewing of a dress and manufacturing of a door, or by the fixation of time if there is no determined purpose like the work of a labourer. It is also determined by fixing the period, if it is a service, and (by fixing) the derivation of utility associated with the thing, like the renting of houses and shops, or by destination, as in the renting of camels.

The Ẓāhirites and a group of the earlier jurists permitted *ijāra* in unknown things, for example, a person gives his donkey to another who carries water and firewood on it for half of what he earns. The basis for the majority (who prohibited such *ijāra*) is that *ijāra* is a sale and, therefore, uncertainty is prohibited in it for reasons of risk as it is prohibited in sales. The other party rely on the analogy comparing *ijāra* to *qirāḍ* (*muḍāraba, commenda*) and *musāqāh* (share-cropping). The majority, however, maintain that *qirāḍ* and *musāqāh* have been exempted by *sunna*, therefore, analogy cannot be constructed on them as they have been excluded from the *uṣūl* (bases of analogy). Mālik and al-Shāfiᶜī agreed that if the two parties stipulated benefits that do not have a fixed period of time, but they determined the commencement of the period, which is to follow the contract immediately, then, this is permitted. They disagreed, however, when the commencement of the period is not determined or it is determined but does not follow the contract. Mālik said that it is permitted if the period is determined, but not its commencement, for example, one says to the other, "I have rented from you this house for a period of one year for so much, or for a month with so much", but he does not mention the beginning of the month nor the commencement of the year. Al-Shāfiʿī said that this is not permitted. The commencement of the period for Mālik becomes the time of the conclusion of the contract, but al-Shāfiʿī prohibited it as it amounts to *gharar*; Mālik permitted it as it is known through practice. Similarly, al-Shāfiʿī did not permit it when the commencement of the period was delayed after the contract, but Mālik permitted it. The opinions of his (Mālik's) disciples differed about the leasing of unproductive land, and about subsequent changes in the period of time.

Mālik and al-Shāfiʿī also differed about the period of time to which the benefits are to be limited. Mālik permits this for periods extending over a number of years, for example, a person rents a house for ten years or more, a period in which the house is not likely to change in shape. Al-Shāfiʿī said that this is not allowed for a period of more than one year. The opinions of Ibn al-Qāsim and Ibn al-Mājishūn differed about rain-fed land, land irrigated by natural springs, and land irrigated by wells and streams. Ibn al-Qāsim permitted their leasing for any length of time, even for periods extending over several years. Ibn al-Mājishūn made a distinction saying that the leasing of rain-fed land is permitted for up to a year (at a time), that of land irrigated by natural springs for up to three or four years, and that irrigated by wells and streams for up to a fixed period of ten years. The disagreements here are on three points: the fixation of the time of commencement; the length of the period; and the gap between the time of the contract and commencement.

Mālik and al-Shāfiʿī also disagreed when the duration is not determined, but the rate per unit of time is fixed, for example, a person says to another that he will rent his house for so much per month without limiting the total duration of the period. Al-Shāfiʿī said that this is not permitted. Mālik and his disciples said that it is permitted on the basis of the analogy: "I will sell you the substance of this pile at (the rate of) a *qafīz* for a *dirham*". This, however, is not permitted by others. The reason for the disagreement is the uncertainty resulting in these things and whether it amounts to tolerable *gharar*.

In this category is also their disagreement about (the association of) sale and *ijāra*. Mālik permitted this while al-Shāfiʿī and Abū Ḥanīfa disallowed it. Mālik, however, did not allow anything else to be associated with sale except *ijāra*. Within this category is also their disagreement about the *ijāra* of joint property. Mālik and al-Shāfiʿī said that this is permitted, while Abū Ḥanīfa said that it is not as he considered the utilization of joint property (with other owners) as not being feasible. According to Mālik and al-Shāfiᶜī such utilization is possible with co-owners just like the utilization of the person renting out his share, that is, the *rabb al-māl*. In the same category is the hiring of a labourer for food and clothing; similarly, wet-nursing. Al-Shāfiᶜī declared it to be prohibited absolutely, while Mālik granted absolute permission, I mean, for all types of labour. Abū Ḥanīfa permitted this for wet-nursing alone. The reason for their disagreement is whether it is uncertain *ijāra*. These, then, are the conditions pertaining to the *thaman* and the *mathmūn* (the object of the price).

30.1.4. The Kinds of *Ijāra*.

The jurists consider the kinds of *ijāra* to be of two categories: *ijāra* of the benefits of corporeal property; and the *ijāra* of benefits existing as a liability, on the analogy of *bay*ᶜ. Those that are a liability have description as a condition, while those that are related to a (corporeal) thing have examination or description as conditions, as is the case with sales. According to him (Mālik), the required description is by mentioning of the species and its category for a thing whose benefits are derived directly, while for the thing whose benefits are derived indirectly, for example a loading animal, it is necessary to describe the nature of the mount and the load through which the benefits of the mount are to be derived. In Mālik's opinion a rider may not be described, but according to al-Shāfiᶜī such a description is required. In Ibn al-Qāsim's opinion, if a shepherd is hired for a determined number of cattle, the validity of the contract requires the mentioning of a succession (of cattle), but according to others the whole is implied without stipulation.

One of the conditions of *ijāra* through liability, according to Mālik, is that payment should be immediate so that it is excluded from the category of (the exchange of) a debt for a debt. Similarly, in the *ijāra* of land with uncertain sources of irrigation, he does not stipulate payment till after irrigation. They differed about renting, whether its different kinds involve an option (*khiyār*). Mālik said that option is valid in both kinds of renting, determined and that of liability. Al-Shāfiᶜī said that it is not permitted.

These are the well-known issues falling under the first part of this book, which treats of the subject-matter of the contract, its attributes, and kinds. These are things that resemble the basic elements of the contract. It is through them that the contract is described with respect to the legal conditions of validity and vitiation when it does not conform with them. It remains to discuss the second part, which relates to the *aḥkām* of the contract.

30.2. Part 2: The *Aḥkām* of *Ijāra*

The *aḥkām* of *ijāra* are many, but they are covered in two sections. The first section is about the requisites of the contract and its necessities without the occurrence of other contingencies. The second section is about the contingent *aḥkām*. This section is divided, according to the well-known practice, into the identification of the requisites of restitution and their absence, the identification of the requisites of rescission and their absence, and the identification of the *ḥukm* relating to dispute.

30.2.1. *Section 1: The Requirements of the Contract*

Among the well-known issues of this section is when does it become binding on the tenant to pay the rent if the contract was made general and the possession of *thaman* was not stipulated? According to Mālik and Abū Ḥanīfa, the payment of the *thaman* becomes due gradually in parts in proportion to the gradual acquisition of the benefits, unless this is stipulated (that is, complete payment), or there is reason for prior payment, as for example there is a determined benefit or the rent exists as a liability. Al-Shāfiʿī said that the payment of the *thaman* becomes obligatory on the conclusion of the contract itself. Mālik was of the view that the entitlement to *thaman* arises in proportion to the derivation of the benefit, while for al-Shāfiʿī it was as if he excluded it from the category of the exchange of a debt for debt.

Within this category is their dispute about a person who hires an animal or a house or whatever is similar, whether he has a right to let it out on hire for more than he paid. Mālik permitted this, as well as al-Shāfiʿī and a group of jurists, on the analogy of *bayʿ*. Abū Ḥanīfa and his disciples prohibited this as it amounts to gaining profit without a corresponding liability, and as the liability of the property is being borne by the owner, and also because it belongs to the category of sale of that which is not possessed. Some of the jurists permitted this when the hirer has provided some additional service. Among those who did not consider this reprehensible when it actually occurred in this form are Sufyān al-Thawrī and the majority of the jurists. They were of the view that *ijāra* in this form resembles sale. The renting of a house to a person from whom it was rented, belongs to this category. Mālik said that it is permitted; Abū Ḥanīfa said it is not, and it was as if he viewed the excess in the rent to be of the category of false devouring of wealth. Among these is also the renting of agricultural land for growing wheat, but instead of the original intention he wants to sow barley or that whose burden (on the land) is the same as burden of wheat or less than it. Mālik said that he has the right to do so, while Dawūd (al-Ẓāhirī) said that he cannot do this. Among the issues is also the sweeping of the toilets of the rented house. The well-known opinion of Ibn al-Qāsim is that it is the duty of the owners of the house, but it is also related from him that it is the duty of the hirer, which was also the opinion of al-Shāfiʿī. Ibn al-Qāsim, however, excluded from this the case of inns where the public came and went, and he said that cleaning in this case is the duty of the owner of the house. Within these is also the minor damage to the house: is it binding on the owner of the house to repair it, or is not binding, or is the rent to be reduced accordingly? Ibn al-Qāsim said that this is not binding, while some other disciples of his (Mālik's) said that it is. The cases under this category are many and it is not our intention to elaborate the various cases.

30.2.2. *Section 2: The* Aḥkām *of Contingencies*

30.2.2.1. Chapter 1: Rescission

We say: The *fuqahāʾ* differed about the contract of *ijāra*. The majority were of the view that it is a *lāzim* (binding) contract. It is related from a group, however, that it is a *jāʾiz* contract (terminable at the will of the parties) resembling *jiʿāla* and partnership. Those who said that it is a binding contract disagreed about its mode of revocation. A group of the jurists of the provinces—Mālik, al-Shāfiʿī, Sufyān al-Thawrī, Abū Thawr and others—held that it is revoked by those acts with which all the other binding contracts are revoked, like the existence of a defect or the destruction of the source of the derivation of benefits. Abū Ḥanīfa and his disciples said that the contract of *ijāra* may be revoked due to a disaster suffered by the tenant, as when he hires a shop for trading, but his goods get burned or stolen.

The reliance of the majority is on the words of the Exalted: "O ye who believe! Fulfil your undertakings (*ʿuqūd*)".[148] As hiring is a contract for benefits, it resembles marriage (*nikāḥ*), and because it is a contract of exchange, its essence comprising sale is not revoked. The basis for Abū Ḥanīfa is that he compared the destruction of the means of benefits with the destruction of the thing (*ʿayn*) comprising the benefits.

Mālik's opinion differs when hiring is not of a particular (property), but the benefits are to be derived from a particular species generally. ʿAbd al-Wahhāb said that the preferred opinion of our jurists is that the source of the benefits may not be determined in *ijāra*. If it is, then it becomes a particular attribute and (its contract of hire) is not revoked by its sale or loss, as against the destruction of the hired property. He says that the example is that of shepherding a particular herd of cattle or tailoring a particular shirt; if the cattle and the shirt are destroyed, the contract is not revoked and it is up to the hirer to get similar cattle for shepherding or a shirt for stitching. It is also said that these things become particularized by specification and the contract is then revoked if the subject-matter is destroyed. Some of the later jurists said that this is not a dispute in the school, rather they are two cases. The first is that where the source of the benefit in itself may be the object, or it may not be the object in itself. If a particular thing is intended in itself, the contract is revoked if the object is destroyed, as in the case of wet-nursing when the infant dies. If a particular thing is not intended in itself, *ijāra* is not revoked by its destruction, as in the case of shepherding a number of cattle or the selling of food in a shop and in other similar cases. Ibn al-Qāsim stipulated in *al-Mudawwana* that if a person hires for the shepherding of a particular group of cattle, it is not permitted unless the succession (of cattle) is also stipulated. This is an inclination on his part toward the fact that the contract is revoked by the loss of a determined subject-matter. As the opinion on destruction leads to revocation, he held that (such a stipulation) amounts to *gharar*, therefore, he did not permit it without the stipulation of succession.

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[148] Qurʾān 5 : 1

Similar to this is their disagreement over whether the hire (contract) is revoked by the death of one of the parties, that is, the hirer and the owner. Mālik, al-Shāfiʿī, Aḥmad, Isḥāq and Abū Thawr said that it is not revoked and the contract is inherited. Abū Ḥanīfa, al-Thawrī and al-Layth said that it is revoked. The reliance of those who do not declare it to be revoked is that it is a contract of exchange (commutative), therefore, it is not revoked by the death of one of the parties as its basis lies in sale. The reliance of the Ḥanafites is (on the argument) that death causes the transfer of the actual property from one kind of ownership to another, it is, therefore, necessary that its original basis in sale be invalidated in the property itself with respect to a long duration, that is, it is not permitted. As the assimilation of two contracts is not possible, the transfer of ownership is predominant, otherwise the ownership (rights) shall subsist without there being an heir, which is against consensus (*ijmāʿ*). Perhaps, they held *ijāra* to be similar to *nikāḥ* as both pertain to the derivation of utility and *nikāḥ* is terminated with death. This, however, is far-fetched. They probably argued against the Mālikites only in so far as the rent becomes due in parts in proportion to what is possessed from the benefits. They said that if this so and the owner dies and the *ijāra* subsists, then, the hirer derives a right in the ownership of the heir by virtue of the contract in something that no longer belongs to the contracting party. This is incorrect. On the other hand, if the hirer dies, and the rent remains due after his death, it conflicts with the rule that debts cannot be established against the deceased after his death on the basis of *ijmāʿ*. This (objection) is not valid against the Shāfiʿites, as the entitlement to the rent becomes due, in their view, by the contract itself, as has preceded earlier.

In Mālik's opinion, if rain-fed land is leased and famine prevents its cultivation or sowing so that nothing grows in it due to the existence of famine, then, the lease is revoked. Similarly, when it is flooded by rain till such time that the season of sowing has lapsed and the lessor is not able to cultivate it. All the other calamities that affect the land do not cause a reduction in the rent. According to him (Mālik), in the case of hiring that relates to a fixed time, with the time being the purpose, like the hiring of camels during the days of *ḥajj*, the disappearance of the hirer will rescind the contract. If time is not of major consequence, the contract is not revoked. All this, according to him, relates to the hiring of corporeal things (*aʿyān*). The hiring related to the raising of obligations, however, is not revoked, in his view, by the loss of the thing possessed by the hirer for the derivation of benefits, as hiring has not taken place for a particular thing in itself, rather the contract has taken place by description as an obligation. The cases in this chapter are many, and its fundamental principles are those that we have mentioned.

31.2.2.2. Chapter 2: The Discussion of *Ḍamān* (Compensation; Damages)

According to the jurists, compensation has two aspects: *taʿaddī* (tort, wrongful act, *delict*) and the protection of the interest (*maṣlaḥa*) or the protection of property. Compensation becomes obligatory upon the hirer by agreement in case of a wrongful act. The disagreement is about the kinds of tort that give rise to this, and about the extent of compensation. Among these is the disagreement of the jurists over the verdict for a person who hires an animal for a particular location and commits a wrongful act by driving it to a location beyond that agreed to in the contract of hire. Al-Shāfiʿī and Aḥmad said that he is obliged to pay the rent that is binding on him for the stipulated distance and in addition a fair rent for the distance wrongfully covered. Mālik said that the owner of the animal has an option whether to charge the rent for the distance wrongfully covered or to charge the value of the animal. Abū Ḥanīfa said that there is no rent due from him for the additional distance, but there is no dispute that if the animal perishes in the wrongful journey he is liable for it.

The basis for al-Shāfiʿī is that he has committed a tort on the benefits and is, therefore, obliged to pay fair rent—the rule being the (same as that for) torts in all other benefits. Mālik held that when he (wrongfully) deviated the animal from its proper path he transgressed against the animal itself and thus became a usurper (*ghāṣib*), but this is weak. Abū Ḥanīfa's opinion is absolutely remote from what is required by legal principles. The closest to them, in this case, is the opinion of al-Shāfiʿī. According to Mālik, if the animal should stumble owing to the wrongful act of the owner of the animal, he will be liable for what may happen to the load; similarly, if the ropes are worn. The cases under this category are many.

The jurists who differed about compensation, without there being a wrongful act, did so on account of the interest (*maṣlaḥa*) of the artisans. There is no disagreement, according to them, that the worker is not liable when what he is hired to work on is destroyed, unless he commits a wrongful act. The exceptions are the cases of the carrier of food and the miller, and Mālik holds them liable for what is destroyed in their possession, unless evidence is adduced that the destruction was caused by factors beyond their control. They disagreed about the liability of artisans charged with destruction of articles delivered to them. Mālik, Ibn Abī Laylā and Abū Yūsuf said that they are liable for what is destroyed in their possession. Abū Ḥanīfa said that one who works without wages as well as a personal employee (*ajīr khāṣṣ*), does not compensate, while one who works independently (*ajīr mushtarak*) and for (piece) wages does. There are two opinions from al-Shafiʿī about the independent worker.

The *ajīr khāṣṣ*, according to them, is one who works on the premises of the hirer, and it is said that he is one who does not serve the public, which is Mālik's opinion about the employee and who, according to him, is not liable. The net result of Mālik's opinion is that an independent artisan is liable, irrespective of whether he works for wages. The fixation of liability for the artisans was upheld by ʿAlī and ʿUmar, though ʿUmar differed with ʿAlī on this.

The reliance of those who do not uphold the liability of the artisans is that the artisan is similar to the custodian, the partner, the agent, and the hirer of cattle. Those who hold them liable have no evidence, except from one aspect of *maṣlaḥa* and *sadd al-dharīʿa*. Those who made a distinction between working for wages and not working for wages did so because the worker without wages takes possession of the articles for the benefit of his employer only and, thus, resembles the custodian. If he takes possession for wages, then, the benefit accrues to both of them and the benefit of one in possession dominates. The basic principle is derived from *qarḍ* and *ʿāriya*, according to al-Shāfiʿī. Similarly, in the case of one who did not take due care, there is no (justification in) *sadd al-dharīʿa* in holding him liable. The worker, according to Mālik, as we have said, does not compensate, except that he (Mālik) determined the liability of the carrier of food, and whoever is similar to him through *istiḥsān*; similarly, the miller. All those beside them do not compensate without transgression. The owner of a public bath does not compensate, according to him; this is what is well known from him, but it is said that he does. Ashhab adopted a distinct opinion and held the artisans liable as long as evidence was furnished about the destruction of property in their possession, without there being a tort on their part or negligence, but this is absurd. There is no dispute that the artisans are not liable, unless they have taken possession in their own establishments.

Mālik's disciples differed when the evidence relating to the destruction of the article was established and the liability was discharged, as to whether the artisans were entitled to wages, especially when the destruction was after the completion of the whole work or part of it. Ibn al-Qāsim said that there were no wages for them, while Ibn al-Mawwāz held that they were entitled to wages. The reason for the opinion of Ibn al-Mawwāz was that if the calamity struck a worker his work should not go waste. The reason for Ibn al-Qāsim's view was that the wages are due in lieu of work, and the case resembles destruction because of the negligence of the worker. The opinion of Ibn al-Mawwāz is based upon a better analogy, while the opinion of Ibn al-Qāsim is more inclined toward collective *maṣlaḥa*, as he was of the view that they should share the loss. Within this category is their disagreement over the liability of the owner of a ship. Mālik said that there is no liability for him. Abū Ḥanīfa said that he is liable, except in the case where damage is caused by natural phenomena, like a storm.

The rule in Mālik's opinion is that the artisans compensate all that is caused at their hands like fire, breakage of the article, or cutting, when they are working in their own shops, even if the owner is standing next to them, except where the risk is inherent in the work. For example, in the piercing of jewels, inscribing of gems, flattening of swords, and like the burning of bread by the baker, and the death of the patient through the doctor's treatment; similarly, the veterinarian unless he is negligent, in which case he compensates. If the doctor, and those in similar professions, is qualified and makes a mistake, there is no liability on him for loss of life and the reparation (*diya*) beyond one-third is to be paid by the *ʿāqila*, while less than one-third is to be paid by him. If he is unqualified, he is to be punished with stripes, imprisoned, and made to pay the *diya* from his wealth. It is, however, said that in this case too liability for *diya* is on the *ʿāqila*.

31.2.2.3. Chapter 3: The *Ḥukm* of Disputes

This chapter covers the discussion of disputes and includes several issues. One of these is their disagreement about the dispute between the artisan and the owner of the manufactured article about the shape of the article. Abū Ḥanīfa said that the prevailing statement is that of the owner of the article. Mālik and Ibn Abī Laylā said that the statement of the artisan prevails. The disagreement arises from the dispute as to who is the plaintiff and who is the defendant.

Another issue is where the artisans claim the delivery of the article and the one placing the order denies this. Mālik is of the view that the statement of the customer prevails and the artisans have to produce evidence, as they (the artisans) are liable for what is in their possession. Ibn al-Mājishūn maintains that the prevalent statement is that of the artisans, if the article was delivered to them without evidence (*bayyina*), but if it was delivered with evidence they shall not be absolved without the production of evidence (about delivery to the owner).

If the artisan and the owner of the article disagree about the payment of wages, the well-known opinion in Mālik's school is that the prevailing statement is that of the artisan along with his oath, if he undertakes to do this. If, however, he prolongs matters (and hesitates to swear an oath), then, the prevailing statement is that of the owner of the article. Similarly, if there is a dispute between the lessor and lessee (about rent). It is said, however, that the prevailing statement is that of the artisan and the lessor even when they choose to prolong matters, which is the (correct) principle.

If the lessor and the lessee, or the worker and the hirer, disagree about the part of the period in which the benefits were to be derived, having agreed that benefits cannot be derived in the entire stipulated period, the well-known opinion in the school (of Mālik) is that the prevailing statement is that of the lessee and the hirer as they are the debtors—the principle being that the prevailing statement is that of the debtor. Ibn al-Mājishūn said that the prevailing statement is that of the lessor and the hirer, if the thing from which benefits are to be derived is in their possession, but where the thing is not in their possession, like the worker, then, the prevailing statement is that of the worker.

Among the well-known issues under this chapter are the disputes of the parties in the hiring of loading animals and riding beasts. In these cases the disputes may be over the extent of the journey or its nature, or about the amount of rent or its nature. If their dispute is about the nature of the journey, or about the nature of the rent, then there should be oath-taking resulting in rescission, as in the case of the disputes of the parties to sale about the price. This is so, according to Ibn al-Qāsim, irrespective of the conclusion of the contract. According to others, the prevailing statement is that of the owner of the animal when the contract was concluded and what he had said was probable. If their dispute is about the extent of the journey and it arises before mounting or after covering a short distance, the (dispute is to be resolved) through oath-taking and rescission. If it occurs after covering a great distance or after completion of the distance claimed by the owner of the animal, the prevailing statement is that of the owner of the animal. This is so when he objected and his statement was likely, however, when he did not object and his statement was possible, then, they resort to oath-taking and rescission of the contract of hire as regards the longer journey claimed. The distance covered in the journey as claimed by the owner of the animal is then to be paid to him. Similarly, when he objected and his statement was not probable. If they disagreed about the amount of wages and agreed about the journey, irrespective of his having been paid, the prevailing statement is that of the person hiring, as he is the *muddaʿa ʿalayh* (defendant).

If they disagreed about both things, the journey and the wages, for example, if the owner of the animal says at Cordova, "I rented it out to you up to Carmona for two *dīnārs*", while the person hiring replies, "On the contrary, it was till Seville for a *dīnār*", then, if the dispute occurs before mounting or after a distance where revocation would not harm them, the dispute is resolved through oath-taking and rescission. If (the dispute arises) after travelling a considerable distance or after completion of the journey, which is claimed by the owner of the animal, and the hirer has not paid anything, then, the prevailing statement is that of the owner of the animal about the extent of the journey, and that of the hirer about the price and he is to be held liable for the wages due from Cordova to Carmona as if the contract of hire was up to Seville. This is so as the statement of the hirer was likely. If what he said was not so, while the statement of the owner of the animal was probable, he is liable for two *dīnārs*, even though the hirer claimed to have paid the wages for the longer journey and the statement of the owner of the animal was credible, the prevailing statement is that of the owner of the animal, who can retain the wages that he took possession of and nothing is to be recovered from him as he is the *muddaʿa ʿalayh* for part of it. If he insists that this is his right and more, his statement is accepted to this extent as he has taken possession of it, but not for the excess, while he is absolved of the distance not covered by him, irrespective of the credibility of his statement. If his statement is not credible, the wages are allocated proportionately to the entire distance acknowledged by the hirer out of which the owner of the animal takes what corresponds with the distance claimed by him. This is sufficient under this chapter.

XXXI
THE BOOK OF *JUᶜL* (WAGES)

Juᶜl is *ijāra* in which the acquisition of benefits is probable, like the stipulation of recovery (of the patient) in the case of the doctor, proficiency in the case of the teacher, and the existence of the runaway slave in the case of the seeker (bounty-hunter). The jurists disagreed over its prohibition or permissibility. Mālik said that it is permitted in minor cases with two conditions. First, that a period should not be determined (for the work). Second, that the wages should be known. Abū Ḥanīfa said that it is not permitted, while there are two opinions from al-Shāfiᶜī.

The reliance of those who permitted it are the words of the Exalted. They said: "We have lost the king's cup, and he who bringeth it shall have a camel-load, and I (said Joseph) am answerable for it".[149] They also relied on the consensus of the majority about its permissibility in the case of the runaway slave and requests and also what has been narrated in the traditions about charging wages for using the *Fātiḥat al-Kitāb* as a charm, the discussion of which has preceded. The reliance of those who prohibit it is upon the existence of risk (*gharar*) in it on the analogy of all other kinds of *ijāra*.

There is no disagreement in Mālik's school that the entitlement to *juᶜl* is not established without the completion of the task and that it is not a binding contract. Mālik and his disciples differed, however, under this category, about the renting of a ship whether it is *juᶜl* or *ijāra*. Mālik's opinion that the owner of a ship has no right to rent unless he reaches the destination, which is also the opinion of Ibn al-Qāsim, is based on the argument that it bears the *ḥukm* of *juᶜl*. Ibn Nāfiᶜ, from among his disciples, said that he is entitled to rent to the extent of the distance covered by him, and he associated its *ḥukm* with that of hire. Aṣbagh said that if he is adamant it is *juᶜl*, otherwise it is *ijāra* and he is entitled to wages in proportion to the destination reached.

The discussion under this topic relates to its permissibility, subject-matter, conditions, and *aḥkām*. The subject-matter consists of acts that the *jāᶜil* (person making the offer of *jiᶜāla*) cannot utilize in part. The partial utilization by the *jāᶜil* of the benefits, which are provided by the person responding to the offer, would mean that all the benefits for which *juᶜl* has been contracted have not been furnished. We have already said about the *ḥukm* of *juᶜl* that if the person does not deliver all the benefits he is not entitled to anything and in such a case utilization by the *jāᶜil* of undetermined work without compensating the other person for his work would be unjust. It is for this reason that the jurists have differed about many issues whether they relate to *juᶜl* or *ijāra*, like the foregoing example of the ship irrespective of *juᶜl* being permitted in it or, for example, *jiᶜāla* for the digging of wells. About planting they said that it resembles *juᶜl* from one aspect and sale from another. According to Mālik, it is the giving out by a person of his land to another so that he may plant in it a known number of fruit trees. If the trees bear fruit the planter is entitled to an agreed upon part of the plantation.

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[149] Qur'ān 12 : 72

XXXII

THE BOOK OF *QIRĀḌ* (SPECULATIVE PARTNERSHIP)

There is no disagreement among the Muslim jurists about the permissibility of *qirāḍ*; it used to exist in (the days of) *jāhiliyya* (the pre-Islamic times), and was acknowledged by Islam. They (the jurists) agreed about its form that it is the giving of wealth by one person to another so that he may trade with it (in return) for a defined ratio of the profit that the worker (*ʿāmil*) earns, that is, a part that is agreed upon by both as a third, fourth, or half. (They also agreed) that it is an exemption from the prohibition of the unknown *ijāra* and that the exemption is provided to make things easy for mankind. There is no liability for the worker for what is lost out of the capital (*raʾs al-māl*), as long as he does not transgress, though they did disagree about what amounts to transgression and what does not. Similarly, they agreed generally about not stipulating conditions that may add to the uncertainty of the profit or to the risk (*gharar*) that is found in it, though they did disagree about the conditions that give rise to such additions. They also agreed that it is valid with *dīnārs* and *dirhams*, but differed about things other than these. On the whole, the discussion is about its description, subject-matter, conditions, and *aḥkām*, and we shall note the well-known issues in these in three chapters.

32.1. Chapter 1: The Subject-Matter

The discussion of its form has preceded and they agreed upon it. On the other hand, they agreed about the permissibility of the subject-matter being *dīnārs* and *dirhams*, but differed about goods (*ʿurūḍ*). The majority of the jurists of different regions maintained that *qirāḍ* is not permitted with goods, but it was allowed by Ibn Abī Laylā. The argument of the majority is that when capital is composed of goods it involves *gharar*, as the person takes over the goods when they have a certain value and returns them when they may have another. Thus, capital and profit may be rendered uncertain.

If the capital is composed of that for which goods are sold (i.e. he gives the worker goods that he sells and the capital is formed by the proceeds plus the value of the service that he has rendered in selling them), Mālik disallowed it and so did al-Shāfiʿī, but Abū Ḥanīfa permitted it. Mālik's argument is that he enters into *qirāḍ* with another on the basis of that with which goods are sold (service for selling) and also on the capital resulting from the sale of goods, and this amounts to *qirāḍ* and the utilization of services. In addition, the thing with which goods are sold (service) is uncertain and it is as if he has contracted *qirāḍ* with him for an indeterminate capital. It also appears that he (Mālik) disallowed *qirāḍ* based on the value of goods because it burdens the *muqāriḍ* with sale and because the capital of *qirāḍ* fluctuates. Similar is the case when he gives him goods on the basis of the price for which he bought them, but he (Mālik) is more inclined toward permission and, perhaps, it was this that was permitted by Ibn Abī Laylā. In fact, this appears to be so from their opinions as they related from him that he allowed a man to give to another a dress to be sold on the condition that whatever the profit it will be shared between them; and this amounts to their considering the capital as the price for which he bought the dress. It also appears that if he renders the price as the capital, the *muqāriḍ* can be accused of (readily) confirming the statement of the *rabb al-māl* due to his eagerness to acquire the *qirāḍ* from him.

Mālik's opinions differ about *qirāḍ* formed on the basis of unminted gold and silver. Ashhab has related its prohibition from him, while Ibn al-Qāsim related its permission and also its prohibition in moulded (gold and silver). Al-Shāfiʿī and al-Kūfī[150] also disallowed this. Those who prohibited *qirāḍ* formed on the basis of precious metals associated it with *ʿurūḍ*, while those who permitted it compared it with *dirhams* and *dīnārs* due to the negligible disparity in their market values. The disciples of Mālik also differed about *qirāḍ* with *fulūs* (copper coins). Ibn al-Qāsim disallowed it, while Ashhab permitted it, as did Muḥammad ibn al-Ḥasan (al-Shaybānī).

The majority of the jurists—including Mālik, al-Shāfiʿī and Abū Ḥanīfa—maintain that if a man has a claim for a debt on another, he is not to contract *qirāḍ* with the debtor (for it) unless he takes possession of the debt (amount). The *ʿilla* (underlying reason) according to Mālik is the fear that the debtor might be in financial straits and the creditor desires to delay recovery so as to increase the amount, thus, it amounts to the taking of *ribā*, which is prohibited. The *ʿilla* according to al-Shāfiʿī and Abū Ḥanīfa is (derived from) the rule that what exists as a liability cannot be transformed into a trust (*amāna*).

They disagreed about the person who asks another to recover his debt from a third person and then to use it as capital of *qirāḍ*. Mālik, and his disciples, did not permit this. He was of the view that it increases the burden on the worker, which is the (added) burden of recovering the loan. This is in accordance with Mālik's principle that the stipulation of an additional benefit in *qirāḍ* renders it *fāsid*. But this was permitted by al-Shāfiʿī and al-Kūfī, who said that he appointed him an agent for recovery and not that he stipulated recovery as a condition for *muṣārafa*. This, then, is the discussion of its subject-matter. Its description is the same as that we have presented earlier.

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[150] The reference is apparently to Abū Ḥanīfa.

32.2. Chapter 2: Issues Pertaining to Conditions

On the whole, conditions that are not permitted according to all (jurists) are those that lead to *gharar* or to greater uncertainty. There is no disagreement among the jurists that if an additional profit is stipulated by one of the parties for himself, beyond that on which *qirāḍ* has been contracted, it is not permitted. This is so as it renders the ratio of profit over which *qirāḍ* has been concluded uncertain. This is a basic principle according to Mālik, which maintains that no sale, hire, loan, (additional) work, or facility be stipulated with *qirāḍ* by one party for the other. This is all that they have agreed upon, though they differed in some details.

Among these is the disagreement when the worker stipulates all the profit for himself. Mālik said it is permitted, while al-Shāfiʿī said it is not. Abū Ḥanīfa said that it amounts to *qarḍ* and not *qirāḍ*. Mālik was of the view that it was a favour granted voluntarily by the *rabb al-māl*, as it is permitted to him to take a small part out of a large amount. Al-Shāfiʿī was of the view that it involved *gharar*, because any loss would be the liability of the *rabb al-māl*, and that is where it is distinguished from *qarḍ*, while there would be nothing for the *rabb al-māl* in case of profit.

Another disagreement arises in the case where the *rabb al-māl* stipulates liability for loss on the worker. Mālik said that such a *qirāḍ* is not permitted and it is *fāsid*. Al-Shāfiʿī held the same opinion. Abū Ḥanīfa and his disciples said that the *qirāḍ* is valid, but the condition is void. Mālik's reliance is on the fact that the stipulation of liability is an addition to the *gharar* in *qirāḍ* and it, therefore, becomes *fāsid*. Abū Ḥanīfa associated it with the *fāsid* condition in sale on the basis of his opinion that sale is valid while the condition is void on the basis of the tradition of Burayra, which has preceded.

They also disagreed over the case of the worker (*muqāraḍ*) for whom the owner of capital (*muqāriḍ*) lays down specific requirements, for example, if he should stipulate for him a particular species of goods (for trade), or a particular kind of sale, or a particular location for trade, or a particular kind of people with whom to trade. Mālik and al-Shāfiʿī said about specification of one kind of goods that this is not permitted, unless this kind of goods does not vary at any time throughout the year. Abū Ḥanīfa said that what is stipulated is binding on him and if he trades in other goods besides those stipulated, he compensates the loss. Mālik and al-Shāfiʿī were both of the view that this amounts to a restriction on the worker due to which there is an increase in *gharar*. Abū Ḥanīfa lessened the risk of *gharar* implicit therein. This happens when he stipulates that he should not purchase a particular category of goods, which is binding upon him because of *ijmāʿ*.

Delayed *qirāḍ* is not permitted according to the majority, but Abū Ḥanīfa permitted it, unless they (the parties) rescind it. Those who did not permit it were of the view that such delay is a restriction on the worker, which leads to additional *gharar*, as the goods may accumulate with him and he may be constrained to sell close to the end of the period, thus exposing himself to harm. Those who permitted a period of delay compared *qirāḍ* to *ijāra*.

Within this category is also their disagreement over the permissibility of the stipulation by the owner of capital of the payment of *zakāt* by the worker out of his share of profits. Mālik stated in *al-Muwaṭṭaʾ* that it is not permitted and Ashhab also related it from him. Ibn al-Qāsim said that this was permitted and he too related it from Mālik. Al-Shāfiʿī has the same opinion as Mālik. The argument of those who did not permit this is that it renders the distribution of the shares of the worker and the *rabb al-māl* uncertain, as it is not known what the amount of wealth will be at the time of the obligation of *zakāt*. Further, it can be compared to the stipulation of the *zakāt* of the principal amount on him, I mean, on the worker, and this is not permitted by agreement. Ibn al-Qāsim's argument is that it reverts to a part whose ratio is known even if the amount is not known, as *zakāt* is a known ratio with respect to the wealth of the remitter. It is as if he (the owner of capital) has stipulated for him (the worker) a third of the profits less a quarter of one-tenth, or half less a quarter of one-tenth, or a fourth less a quarter of one-tenth. This is permitted and it is not like the stipulation of the *zakāt* on the capital, as that is known in amount and not in percentage, in which case it is possible that it would cover the entire profit, thus, rendering the work of the *ʿāmil* futile. Is it possible for the worker to stipulate this for the *rabb al-māl*? In the school (of Mālik) there are two opinions. It is said that a distinction should be made between the worker and the *rabb al-māl*, and it is also said that it is permissible that the worker stipulate this for the *rabb al-māl* and it is not permitted that the *rabb al-māl* should stipulate it for the worker. The opposite, however, is also maintained.

About the stipulation by the worker for the *rabb al-māl* of a specified servant (slave or employee), who would have a share in the profits, they differed. Mālik, al-Shāfiʿī and Abū Ḥanīfa permitted it, while Ashhab, from among the disciples of Mālik, said that it is not permitted. Those who permitted it compared it with the case where a person contracts *qirāḍ* with two persons (in one contract). Those who did not permit it consider it as an addition imposed on the *rabb al-māl* by the worker. If the worker stipulates (the inclusion) of his own servant (slave), then, al-Thawrī says this is not allowed and the servant shall have fair wages for the work he has done. This is so as the share of the worker according to him is uncertain.

32.3. Chapter 3: The Discussion of the *Aḥkām* of *Qirāḍ*

The *aḥkām* consist of those which relate to a valid *qirāḍ* and those which relate to a void *qirāḍ*. In the *aḥkām* of the valid *qirāḍ* are those that are the requirements of the contract, I mean, they are dependent on the requirements of the contract, what is disputed is whether they are dependent. Among them are the *aḥkām* of the contingencies occurring in the contract, which are not the requirements of the same contract, like torts, disputes and so on. We shall mention out of these the attributes that have gained prominence among the jurists of different regions.

We begin, from among these, with the requirements of the contract and say: the jurists are in agreement that the contract of *qirāḍ* is not inherently binding and each party has the right to terminate it as long as the *ʿāmil* has not commenced work through *qirāḍ*. They differed when he has begun work. Mālik said it is binding in such a case, and (he also held that) it is a contract that is inherited. If the worker dies and he has trustworthy sons they would be like their father with respect to the *qirāḍ*. In case they are not trustworthy, it is up to them to bring a trustworthy person. Al-Shāfiʿī and Abū Ḥanīfa said that each one of them possesses the right of termination whenever he likes (even after the worker has begun work), and it is not a contract that is inherited. Mālik considered it binding after the commencement of work, as there is harm in it, and he viewed it as a one of the inheritable contracts, while the other party (of jurists) considered the stages before and after commencement of work as the same.

There is no dispute among them that the *muqāraḍ* takes his share of the profits after the entire capital has been employed. (They also agreed that) if he suffers a loss (initially) and then enters into trade making a profit, the profit makes up for the losses. They disagreed about the person who gives to another capital by way of *qirāḍ*, and some of it is lost before the commencement of work, but he uses it in trade and subsequently makes a profit. The worker (now) desires that the part which remained after loss may be considered as capital (so that the profit may not be considered as compensation for the loss). Does he have a right to do this? Mālik and the majority of the jurists said (yes) if the *rabb al-māl* confirms this. If, however, he (the *rabb al-māl*) gives wealth to someone by way of *qirāḍ* and part of it is lost before the commencement of work and then the worker communicates this to the *rabb al-māl*, who confirms it saying that "the remaining is now with you by way of *qirāḍ* on the same conditions", it is not permitted, unless he separates the two, recovers the capital from him, and terminates the first *qirāḍ*. Ibn Ḥabīb, from among the disciples of Mālik, said that it is binding on him (the *rabb al-māl*) to give his approval and the remaining becomes capital by way of *qirāḍ*. This issue belongs to the *aḥkām* of contingencies, but we have discussed it (here) due to its relationship with the time of the obligation to divide (profits), which is one of the *aḥkām* of the contract.

They differed, into three opinions, over whether the *muqāriḍ* has the right of maintenance from the contributed capital. Al-Shāfiʿī said, in one of his better-known opinions, that there is no maintenance for him, except when the *rabb al-māl* permits this. A group said that he has a right to maintenance. This was the opinion of Ibrāhīm al-Nakhaʿī and al-Ḥasan. It was also one of the opinions of al-Shāfiʿī. Some other jurists said that he has maintenance to the extent of food and clothing during travel, but nothing when he is not travelling. This was the opinion of Mālik, Abū Ḥanīfa, al-Thawrī and the majority of the jurists. Mālik, however, said that this is so when the capital is sufficient to bear the burden. Al-Thawrī said that he may charge expenses while proceeding (on the journey) not on his way back. Al-Layth said that he can charge for lunch, but not for dinner. It is related from al-Shāfiʿī that he may have maintenance during illness; however, his well-known opinion is like that of the majority that there is no maintenance for him during illness.

The argument of those who do not permit this is that it is an additional benefit over *qirāḍ* and, therefore, not permitted, the basis being (the analogy of all) benefits. Those who allowed it argued that it was the rule in earlier times. Those who permit it in settlements compare it to a journey.

The jurists of various regions agreed that it is not permitted to the worker to take his share of the profits except in the presence of the *rabb al-māl*, and the presence of the *rabb al-māl* is a condition for the division of profits and the worker's acquisition of his share. It is not sufficient to divide the shares in the presence of witnesses or otherwise.

32.3.1. *Discussion of the* Aḥkām of *Contingencies*

They disagreed (in the case) where the *muqāraḍ* takes his share (of the profits) in the absence of the *rabb al-māl* and then the capital or part of it is lost. Mālik said that if the *rabb al-māl* had permitted him to do this then he is to be believed in what he claims about the loss. Al-Shāfiʿī, Abū Ḥanīfa and al-Thawrī said that he returns what he has taken, which is added to the capital; the excess (profit), if any, is then divided by them.

They also disagreed when the capital of the *qirāḍ* is lost after the worker has purchased goods with it, but before payment is made to the seller. Mālik said the sale is binding on the worker, while the *rabb al-māl* has an option. If he likes, he can pay for the goods a second time and the *qirāḍ* will continue between them on the conditions they had stipulated; or if he likes he may withdraw from it. Abū Ḥanīfa said that this sale is binding on the *rabb al-māl* as in the case of the agent (*wakīl*). He said, however, that the capital of this *qirād* would be equivalent to the two prices (payments), and the profits would not be divided until this (amount) is acquired, I mean, the price of the goods that was destroyed initially and the price that became obligatory on him after that.

They differed about sale by the worker of some goods of the *qirāḍ* to the *rabb al-māl*. Mālik considered it reprehensible, while Abū Ḥanīfa permitted it without qualification. Al-Shāfiʿī permitted it on the condition that they contract the sale in a manner that would not indicate cheating indulged in by people. Mālik's reason for considering it reprehensible is that he (the worker) would make a concession to him in the goods as he (the *rabb al-māl*) has contracted *qirāḍ* with him. It would be as if the *rabb al-māl* has acquired a benefit from the worker beside the stipulated profit.

I do not know of any disagreement among the *fuqahā*ʾ of different regions when the worker hires (transport) for goods up to a town and the rent absorbs the entire value of the goods leaving an excess, that this would be the liability of the worker and not the *rabb al-māl*, as the *rabb al-māl* has given him his wealth for trade and any loss in the wealth would be on him, so also whatever exceeds the wealth and absorbs it. They disagreed about the worker who borrows money and trades with it along with the wealth of the *qirāḍ*. Mālik said that this is not permitted. Al-Shāfiʿī and Abū Ḥanīfa said that it is permitted and the profit would be shared between them as stipulated. Mālik's argument is that just as it is not permitted to loan out the (wealth of the) *qirāḍ*, it is not permitted to take loans for it.

They differed over whether the worker is permitted to sell on credit, if the *rabb al-māl* has not allowed him to do so. Mālik said that he has no right to do this; if he does it he is liable. This was also the opinion of al-Shāfiʿī. Abū Ḥanīfa said that he has the right to do so. All of them agreed that it is obligatory on the worker to act under the contract of *qirāḍ* as people generally do in the majority of the cases. Thus, those who were of the view that selling on credit is beyond the ambit of what people generally do, did not permit it, while those who consider it within the usual practice permitted it.

Mālik, al-Shāfiʿī, Abū Ḥanīfa and al-Layth disagreed about the worker who mixes up his own wealth with that of the *qirāḍ*, without the permission of the *rabb al-māl*. All of them, except Mālik, said that it amounts to a transgression and he is to be held liable. Mālik said that it is not wrongful. These well-known jurists of different regions did not differ about the worker who gives out the wealth of the *qirāḍ* to another worker (*muqāraḍ*) and held that he is liable in case of loss, but if there is a profit it is shared (first) as stipulated and then the worker who entered the contract as the third person gets his share out of what remains with him. Al-Muzanī relating from al-Shāfiʿī says that he (the third person) gets nothing except fair wages, as he was working under a void agreement.

32.3.2. *Discussion of the Void* Qirāḍ

The *ḥukm* of the void *qirāḍ*, they agreed, is revocation and the return of the wealth to its owner, unless it has been used in the work. They disagreed into different opinions about what is due to the worker for his work, when the capital is consumed in work. First, that it reverts to a "reasonable" *qirād* (for purposes of distribution of profits). This is the narration of Ibn al-Mājishūn from Mālik. It is also his own opinion and that of Ashhab. Second, it reverts entirely to a reasonable contract of hire. This is the opinion of al-Shāfiʿī, Abū Ḥanīfa and ʿAbd al-ʿAzīz ibn Abī Salama one of the disciples of Mālik; it is related by ʿAbd al-Wahhāb that it is also a narration from Mālik. Third, it reverts to a similar *qirāḍ*, unless it is in more than what was agreed upon. He gets less than what was agreed upon or less than what is determined through a similar *qirāḍ*, if it was the *rabb al-māl* who stipulated the conditions for the *muqāraḍ*, but if it was the *muqāraḍ* who stipulated the condition by virtue of which the *qirāḍ* was annulled, then he gets more than a similar *qirāḍ* or he gets the share that was stipulated for him. This opinion is derived from a narration from Mālik. Fourth, it reverts to a similar *qirāḍ* for each benefit that was stipulated by one of the parties for their mutual benefit and which is not specific to one of them, and it reverts to a reasonable *ijāra* for each benefit that was stipulated by a party for himself and that does not relate to *māl* and also in the case of a *qirāḍ* becoming void by virtue of risk and uncertainty. This is the opinion of Muṭarrif ibn Nāfiʿ, Ibn ʿAbd al-Ḥakam and Aṣbagh; it was preferred by Ibn Ḥabīb.

Ibn al-Qāsim's opinions differ about void *qirāḍ*s. In some cases, which form the majority, he said that in it there are fair wages, while in others he said that it becomes a reasonable *qirād*. The jurists differed in the interpretation of his opinions. Among them are those who interpreted the conflict of his opinions to indicate the distinction drawn by Ibn ʿAbd al-Ḥakam and Muṭarrif, which was also preferred by Ibn Ḥabīb and is the preferred view of my grandfather (God bless him). Among them are those who did not derive an underlying reason for his opinions and said that his opinion is that there are fair wages in each void *qirāḍ*, except in those cases where it was explicitly stated that there is reasonable *qirāḍ*, which are seven: *qirāḍ* with goods, with liability, with a period of delay, *qirāḍ* with ambiguity, where he asked him (the worker) to act along with other partners in the wealth, where the parties differed and came with clear claims due to which they were asked to take oaths, and where he was given money to buy on credit but he bought with cash or was asked to buy particular goods or non-existent goods and he acted contrary to what was required. All these issues can be referred to a common underlying cause, otherwise it amounts to a conflict in the opinions of Ibn al-Qāsim.

ʿAbd al-Wahhāb related a distinction drawn by Ibn al-Qāsim that if the (cause of) *fasād* is in the the contract, it reverts to a reasonable *qirāḍ*, but if it is due to an addition stipulated by one party against the other, it reverts to fair wages. It appears, however, that the reverse is correct. The difference between fair wages and reasonable *qirāḍ* is that wages are linked to the liability of the *rabb al-māl* irrespective of the existence of profit, while reasonable *qirāḍ* follows the customary practice of *qirāḍ*; if there is profit in it the worker will get something otherwise there is nothing for him.

32.3.3. ;.*Discussion of Disputes of the Parties to* Qirāḍ

The jurists differ about the dispute of the worker and the *rabb al-māl* over the amount of share for which they contracted *qirāḍ*. Mālik said that the worker's claim should be accepted as he is trusted by virtue of the contract. Likewise, all his claims that appear to be credible. Al-Layth said that it is to be converted to a reasonable *qirāḍ*, which is also the opinion of Mālik when the claim he brings does not arouse suspicion. Abū Ḥanīfa and his disciples said that the acceptable statement is that of the *rabb al-māl*, which was also the opinion of al-Thawrī. Al-Shāfiʿi says that they take oaths and revoke (the contract), and for the worker there are fair wages.

The reason for the disagreement of Mālik and Abū Ḥanīfa is their dispute over the basis for the stipulation of the obligation of oath for the defendant in the text; is it because he is a defendant or because he has a stronger claim. He who said that it is so because he is a defendant gave preference to the statement of the *rabb al-māl*, while he who said that he is one who generally has a stronger claim maintained that the acceptable statement is that of the worker, as he is to be trusted. Al-Shāfiʿī compared their dispute with that of the parties to sale over the price of goods. This suffices under the chapter.

XXXIII

THE BOOK OF *MUSĀQĀH* (CROP SHARING)

The discussion of *musāqāh* deals first with its permissibility; second, with the identification of (the causes of) its vitiation and validity; and third, with its *aḥkām*.

33.1. Chapter 1: Discussion of its Permissibility

The majority of the jurists—Mālik, al-Shāfiʿī, al-Thawr, Abū Yūsuf and Muḥammad ibn al-Ḥasan, the disciples of Abū Ḥanīfa, Aḥmad, and Dāwūd—are in favour of its permissibility. It is, for them, an exemption based on *sunna* from the prohibition of the sale of uncreated things and from uncertain *ijāra*. Abū Ḥanīfa said that *musāqāh* is not permitted at all.

The reliance of the majority for its permissibility is the established tradition of Ibn ʿUmar "that the Messenger of Allāh (God's peace and blessings be upon him) gave to the Jews of Khaybar the palm-groves and land of Khaybar on the condition that they would work on it with their wealth, and for the Messenger of Allāh (God's peace and blessings be upon him) would be a share of its produce". This is recorded by al-Bukhārī and Muslim. In some of its narrations it says "the Prophet (God's peace and blessings be upon him) transacted *musāqāh* with them on the basis of half the produce of land and fruit". (Their reliance is also on) what has been related by Mālik from the *mursal* of Saʿīd ibn al-Musayyib that the Messenger of Allāh (God's peace and blessings be upon him) said to the Jews of Khaybar on the day Khaybar was occupied: "I allow you to settle where Allāh has settled you on the condition that the dates (*tamr*) are to be shared between us". He said that the Messenger of Allāh used to send ʿAbd Allāh ibn Rawāḥa, who used to estimate the division between him and them and then say: "If you like, this is for you and if you like, this is for me". So also his *mursal* from Sulaymān ibn Yasār to the same effect.

The reliance of Abū Ḥanīfa, and of those who held a similar opinion, is upon the clash of this tradition with the principles, along with the fact that it comprises a *ḥukm* specific to the Jews. Further, the permission for the Jews to stay could be interpreted to mean that they were (now) slaves or it could be interpreted to mean that they were *dhimmīs*. (They said that) even if we concede that they were *dhimmīs*, it still clashes with the principles, because it amounts to the sale of uncreated things, and it belongs to (the category of) *muzābana*, which is the sale of dates for dates with an increase, as division by estimate is an estimated sale. They adduced the evidence that it is a sale that opposes principles on the basis of what has been related in the tradition of ʿAbd Allāh ibn Rawāḥa, who used to say to them at the time of estimating the division: "If you like, this is for you, but you guarantee the share of the Muslims, and if you like, it is for me and I guarantee your share". This (they said) is *ḥarām* by consensus (*ijmā*ʾ). Perhaps, they said that the prohibition of *mukhābara* is related to the occurrence of this transaction at Khaybar, while the majority are of the opinion that *mukhābara* is the renting of land with part of its produce. They said that the indication of the abrogation of this tradition, or that it is specific to the Jews is in the authentic tradition of Rāfiʾ, and others, about the "prohibition of the renting of land for what is produced in it". This is so as *musāqāh* implies its legality. Further, it is specific (to the Jews) in some of the narrations of the tradition of *musāqāh*. The addition, therefore, has not been reported by Mālik or by al-Shāfiʿī, I mean, the report that "the Prophet (God's peace and blessings be upon him) transacted *musāqāh* with them on the basis of half the produce of land and its fruit". It is, however, an authentic addition as confirmed by the Ahl al-Ẓāhir.

33.2. Chapter 2: Discussion of the Validity (*Ṣiḥḥa*) of *Musāqāh*

The examination of its validity is the examination of its integral elements, its time, and its conditions stipulated within the elements. It has four elements: the subject-matter specific to it; the part (of the produce) for which it is transacted; the nature of the work that is agreed to; and the period for which it is permitted and agreed upon.

33.2.1. Element 1: The Subject-Matter of *Musāqāh*

They disagreed about the subject-matter of *musāqāh*. Dāwūd said that *musāqāh* is valid only in date-palms, while al-Shāfiʿī said it is valid in date-palms and grape-vines alone. Mālik said that it is valid in deep-rooted trees like pomegranates, figs, olives, and what is similar to them with no stipulation of necessity. It is also valid in others that are not deep-rooted (shrubs) like water melons, if the owner is unable to care for them. Similarly, in crops. It is not permitted in any kind of vegetables, according to all of them, except Ibn Dīnār who permitted it at the time of sprouting before plucking.

The reliance of those who restricted it to date-palms is that it is an exemption; it is, therefore, necessary that it should not be extended beyond the subject-matter mentioned in the *sunna*. Mālik was of the view that it is an exemption in which a general purpose can be found and it must be extended to other things. According to a group of jurists, it is possible to draw analogies from exemptions if underlying causes, more general than the things with which exemptions are linked, can be understood. Another group disallowed *qiyās* on the basis of exemptions. Dāwūd disallows *qiyās* (analogy) in its entirety, therefore *musāqāh* on the basis of his principles is limited. Al-Shāfiʿī permitted it in vineyards due to the fact that the *ḥukm* in *musāqāh* is based on estimate. It is stated in the tradition of ʿAttāb ibn Usayd that the *ḥukm* requires estimation in date-palms and grape-vines, though that was for purposes of *zakāt*. It was as if he compared *musāqāh* to *zakāt*. The tradition that came down from ʿAttāb ibn Usayd was "that the Messenger of Allāh (God's peace and blessings be upon him) sent him and ordered him to estimate the grapes and pay their *zakāt* in raisins, just as the *zakāt* of date-palms is paid in dates". The tradition of ʿAttāb ibn Usayd was rejected by Dāwūd as it is *mursal*, and was related through ʿAbd al-Raḥmān alone, who is not reliable.

When there is with the date-palms uncultivated or crop-bearing land, they differed whether it is permitted to water the land along with the date-palms (in exchange) for a section of the date-palms or for a section of the date-palms and a part of the produce of the land. A group was inclined toward its permissibility, which was the opinion of the disciples of Abū Ḥanīfa and of al-Layth, Aḥmad, al-Thawrī, Ibn Abī Laylā and a group of jurists. Al-Shāfiʿī and the Ahl al-Ẓāhir said that it is not permitted except in the case of *tamr*. Mālik said that if the land is dependent on the fruit, and the fruit is the major part of it, there is no harm in including it in the *musāqāh* irrespective of the stipulation of a share external to it. This share was limited by him to a third or less than it, I mean, that the amount of rent should be a third of the fruit or less than it. He also did not permit that the owner of the land should stipulate that he should cultivate the barren land for himself, as it is an additional stipulation. Al-Shāfiʿī said that this is permissible.

The proof of those who permitted *musāqāh* in both collectively, I mean, for the land for a part of its produce, is the tradition of Ibn ʿUmar that has preceded. The proof of those who did not permit it is what is related of the prohibition about renting land for a part of its produce in the tradition of Rāfiʾ ibn Khadīj. This too has preceded. Aḥmad ibn Ḥanbal said the the text of the tradition of Rāfiʾ is confused and the tradition of Ibn ʿUmar is more authentic. Its restriction by Mālik to a third is weak, and it is *istiḥsān* based on extraneous sources as the sources require that no distinction be made between the permitted and prohibited or between more or less in the same genus.

Among these (issues) is their disagreement about *musāqāh* in vegetables. Mālik, al-Shāfiʿī and his disciples, Muḥammad ibn al-Ḥasan and Al-Layth said that *musāqāh* is not allowed in vegetables. The majority allowed it as the worker, though he does not have to water them, has other tasks to do like grafting and so on. Al-Layth was of the view that watering is the act for which the contract of *musāqāh* is concluded, and because of which the exemption was laid down.

33.2.2. Element 2: The Nature of the Work

The jurists on the whole are in agreement that the obligation of the worker is watering and grafting for fertilization. They differed as to who was responsible for harvesting, the making of fences, cleaning of pools, and the (maintenance and operation of the) irrigating water-wheel. Mālik stated in *al-Muwaṭṭaʿ* that according to the practice in *musāqāh* it is permitted to the owner of the grove to stipulate the building of fences, cleaning of springs, watering and grafting for fertilization, the cutting of palm-boughs, clipping of fruit, and all other similar things for the worker. This is a statement from which it is understood that these things are included in *musāqāh* when stipulated, though it is possible to comprehend their inclusion through the (basic) contract itself. Al-Shāfiʿī said that the building of fences is not his responsibility, as it is not something that affects the fruit harvest, like watering and irrigation. Muḥammad ibn al-Ḥasan said that the cleaning of water-wheels and streams is not his responsibility. Mālik and al-Shāfiʿī maintained that cutting is the responsibility of the worker, though Mālik said that if the worker stipulates it for the *rabb al-māl* it is permitted, while al-Shāfiʿī said that this is not allowed and the *musāqāh* is vitiated if he does. Muḥammad ibn al-Ḥasan said that cutting is shared equally between them. The systematizers among the disciples of Mālik said that the work in a palm-grove is of two types: work that is not effective in the growth of fruit, and work that is effective. The work that is effective in growth of fruit includes the kind that is permanent and continues after the maturity of fruit. It also includes that which does not persist after the fruit. The kind that is not effective in the growth of fruit does not form part of *musāqāh* either through the contract itself or by stipulation, except for minor things. Anything which is effective in the growth of fruit and continues after it is included by stipulation, according to Mālik, and not by the contract itself, like the digging of a well, the making of reservoirs of water, undertaking plantation, making of boxes in which plucked fruit is gathered. Anything which is effective in the growth of fruit and is not permanent is binding through the contract itself. This is like digging, watering, trimming of grape-vines, pruning of trees, fertilization, uprooting, and what resembles these.

They agreed that the worker has no right to whatever is part of the orchard, like animals or slaves. They differed if the worker were to stipulate this in the agreement with the owner. Mālik said that this is permissible in case of those things that were present in the orchard before the (conclusion of) *musāqāh*, but if he stipulates it for those not there it is not permitted. Al-Shāfiʿī said that there is no harm in this even when they are not present in the grove. This was also the opinion of Ibn Nāfiʾ from among the disciples of Mālik. Muḥammad ibn al-Ḥasan said that it is not permitted to the worker to stipulate this for the *rabb al-māl*, but if the *rabb al-māl* stipulates this for the worker it is permitted. The reason for his disapproval of this is the uncertainty that is associated with the share of the *rabb al-māl* because of it. Those who permitted it viewed it as insignificant and minor. It was because of the vacillation of the *ḥukm* between these two principles that Mālik permitted, through *istiḥsān*, the stipulation of slaves who were already working in the grove, but disallowed it in the case of additional slaves as the stipulation of an extra benefit through this is apparent. Muḥammad ibn al-Ḥasan, however, made a distinction in the stipulation of both things for the worker as they belong to the category of work that is obligatory in *musāqāh*, which is working with his hands. The upholders of *musāqāh* are in agreement that if the entire expenditure is borne by the owner of the orchard and the worker is to work with his hands alone, this is not permitted, as it amounts to *ijāra* for uncreated things. These, then, are the attributes of the first element and the distinction between the conditions permitted and those not permitted.

33.2.3. Element 3: The Share Agreed upon

They agreed that *musāqāh* is permitted with whatever they agree upon as the share of the fruit. Mālik allowed that all the fruit be for the worker, as he did in *qirāḍ*. It is said that this is a grant and not *musāqāh*. It is also said that it is not permitted. It is agreed that it is not permitted to stipulate in it any additional benefit, like the stipulation by one of the parties for the other an addition in terms of *dirhams* or *dīnārs*. Nor is it permitted to stipulate anything outside the ambit of *musāqāh*, except for minor things like the building of fences and repairing of water reservoirs. It is also not permitted, according to Mālik, to water two orchards at the same time, each for a different share. He argued on the basis of the act of the Prophet (God's peace and blessings be upon him) in the matter of Khaybar, where he gave out different groves for watering for the same share. In this there is dispute.

Most of the jurists maintained that the division of the fruit between the worker and the owner cannot take place except by measure, just as in *sharika* (partnership), and that it is not permitted to do it by estimate, but a group permitted its division by estimate. The disciples of Mālik differed in this, and the narrations from him also differ. It is said that it is permitted, but it is also said that it is not permitted in usurious fruit and is permitted in others. Again, it is said that it is permitted without qualification, in accordance with the varying needs of the parties. The argument of the majority is that it involves vitiation from the aspect of *muzābana*, and it is related to the sale of fresh dates for *tamr*, and to the sale of food for food with a delay. The argument of those who permitted its division by estimate is its similarity with *ʿariyya*, and with estimation in *zakāt*, which is weak. The strongest evidence on which they relied for this is what is laid down about estimation in the *musāqāh* at Khaybar in the *mursal* tradition of Saʿīd ibn al-Musayyib and ʿAṭāʾ ibn Yasār.

33.2.4. Element 4: The Element of Time

The stipulation of time in *musāqāh* is of two types: time that is a condition for its permissibility, and time that is a condition for the validity of the contract, which determines its duration. With respect to time that is a condition for the permissibility of its contract, the jurists are agreed that it is the time before ripening. They disagreed about its permissibility after ripening. The majority of those who uphold *musāqāh* maintained that it is not permitted after ripening. Saḥnūn from among the disciples of Mālik said that there is no harm in it. The opinion of al-Shāfiʿī differed on this. On one occasion he said that it is not permitted, while on another he said it is. It is reported from him that he said it is not permitted once the fruit comes into existence.

The reliance of the majority is on the argument that there is nothing to do once the fruit has ripened, and there is no necessity for *musāqāh*, as that is the time when it can be sold. They said that it then amounts to *ijāra*, if it does take place. The argument of those who permitted it is that if it is permitted before the existence of fruit, its permission after ripening lies on firmer ground. It is due to this that *musāqāh* is not permitted in vegetables, because it is then saleable, according to them, I mean according to the majority.

The majority maintain that (stipulation of a) time (period) that is a condition for the duration of the *musāqāh* should not be left uncertain, that is, for an undetermined period. A group, and among them are the Ẓahirites, permitted it for an unlimited period. The reliance of the majority is on the argument that it involves *gharar* on the analogy of *ijāra*. The reliance of the Ahl al-Ẓāhir is on what is stated in the *mursal* of Mālik about the saying of the Prophet (God's peace and blessings be upon him): "I allow you to settle where Allāh has settled you".

Mālik disapproved the *musāqāh* that extended over an unspecified number of years, in which the termination of the years is based on periodical cutting not on determined periods. They differed over the stipulation of special terminology for this contract. Ibn al-Qāsim maintained that among the conditions of its validity is that it should not be concluded without the word '*musāqāh*,' and that it is not concluded with the word '*ijāra*', which was the opinion of al-Shāfiᶜī. Others said that it may be concluded by the use of the term *ijāra* and this is similar to the opinion of Saḥnūn.

33.3. Chapter 3: Discussion of the *Aḥkām* of Validity

Musāqāh, according to Mālik, is one of those contracts that become binding merely through words (agreement) not with (the commencement of) work, unlike the case of *qirāḍ* in his view, which is concluded through work not words. It is also, in Mālik's view, an inheritable contract and it is the responsibility of the heirs of the worker, if they are not trustworthy themselves, to bring a trustworthy person to work, who shall be responsible for the work if the heirs refuse to accept his estate. Al-Shāfiᶜī said that if he has not left an estate, the *rabb al-māl* will pay wages to the heirs for the work he had done and the contract will be revoked, but if he has left an estate, *musāqāh* will be binding on him. Al-Shāfiᶜī said that the contract is revoked in the case of inability; however, he did not elaborate. Mālik said that if he is incapacitated and the time of sale is near, the owner does not have the right to make a contract with another person, rather it is obligatory on him to hire someone who will do the work. If he is penniless, the hiring shall be done from the worker's share of fruit.

If the worker is found to be a thief or is dishonest, the contract is not rescinded according to Mālik. It is related from al-Shāfiᶜī that he said that it is binding on him (the owner) to appoint someone else for the work. Al-Shāfiᶜī also said that if the worker runs away before the completion of work, it is for the *qadī* to hire someone who will do his work. It is permitted, according to Mālik, that each one of them stipulates, unlike *qirāḍ*, the payment of *zakāt* and their *niṣāb* (scale for computation), according to him, is like the *niṣāb* of a single person as against his opinion in the case of partners (*shurakā*ʾ). If the *rabb al-māl* and the worker differ about the amount of fruit yielded by the *musāqāh*, then, in Mālik's view, the acceptable statement is that of the worker along with his oath, if he comes forth with a credible claim. Al-Shāfiᶜī said that both take oaths and revoke the contract, and for the worker there are wages similar to those in sale. Mālik made the oath obligatory in the case of the worker as he is a trusted party, and it is a principle with him that oath is obligatory on the stronger claimant.

The details of this chapter are many, but those in which the disagreement of the jurists became well known are the ones we have mentioned.

33.4. Chapter 4: The *Aḥkām* of the Void *Musāqāh*

They agreed that once *musāqāh* has been concluded in a manner that is not lawful, it is revoked, as long as it is not invalidated through (after) work. They disagreed, when it is invalidated through work, about what is obligatory in it. It is said that it reverts to a "reasonable" *ijāra* in each kind of invalidation, which is the analogical opinion of al-Shāfiʿī and is also one of the narrations from Mālik. It is also said that it reverts to a "reasonable" *musāqāh* without qualifications, which is the opinion of Ibn al-Mājishūn as well as his narration from Mālik.

Ibn al-Qāsim held that in some of the cases it reverts to "reasonable" *musāqāh*, while in others it reverts to "reasonable" *ijāra*. His interpretation in these cases, as reported, has differed. It is said that it reverts, in his opinion, to fair wages except in four issues, in which it reverts to a reasonable *musāqāh*. The first is the case where in a grove there were dates that were allowed to be consumed. Second is the case where the worker stipulates that the *rabb al-māl* should work with him. Third is the case of combining *musāqāh* with sale in a single contract. Fourth, when they agree to vary the share, for example, to contract a *musāqāh* in a grove for one-third of the produce for one year and one-half the other year. It is said that his principle in this is that when *fasād* is associated with *musāqāh* due to a void *ijāra* or because of the sale of the fruit prior to ripening, or when an addition is stipulated by one of the parties for the other, it reverts to fair wages. For example, when the owner agrees with the worker that one of them pay to the other, as an addition, *dīnārs* or *dirhams*. If this addition is from the owner of the grove it amounts to a void *ijāra*, and if it is from the worker it amounts to a sale of fruit before it has come into existence. The *fasād* arising due to *gharar*, like the *musāqāh* of different groves, reverts to a "reasonable" *musāqāh*. All this is *istiḥsān* deviating from analogy. In the issue there is a fourth opinion which is that it reverts to "reasonable" *musāqāh* as long as it does not exceed the share that is stipulated, if it is for the worker, or is less than it if stipulated for the owner. This is sufficient for our purposes.

XXXIV

THE BOOK OF *SHARIKA* (PARTNERSHIP)

The study of the *aḥkām* of *sharika* covers its kinds, and the requisite elements of its validity. We shall discuss, out of these, the views that are agreed upon and those in which disagreement became well known, as is our purpose in this book.

Sharika on the whole, according to the jurists of the provinces, is of four kinds: *sharikat al-ᶜinān*, *sharikat al-abdān*, *sharikat al-mufāwaḍa*, and *sharikat al-wujūh*. One of these is agreed upon, which is *sharikat al-ᶜinān*, though some of the jurists did not designate it with this term, and they also differed about some of its conditions, as will be described in what follows. The other three kinds are disputed, and there is disagreement about some of their conditions among those who agreed about them generally.

34.1. Chapter 1: The Discussion of *Sharikat al-ᶜInān*

The elements of this partnership are three: first, its subject-matter from among the varieties of wealth (capital); second, the determination of the ratio of profit with respect to the common capital; and third, the identification of the proportion of work by the partners with respect to the common capital.

34.1.1. Element 1: The Subject-Matter (Capital) of Partnership

Some of the kinds of subject-matter in a partnership are agreed upon while others are disputed. The Muslim jurists agreed that *sharika* is permitted in one kind of corporeal property, that is, *dīnārs* and *dirhams*, which is, in fact, a sale where the two categories (*dirhams* and *dīnārs*) are not being exchanged immediately, and it is a condition in the sale of gold or *dirhams* that the counter-values be present. This condition, however, has been restricted by consensus (*ijmāᵓ*) for purposes of partnership. Similarly, they agreed, as far as I know, that in a partnership (constituted) with goods it is required that the goods be of the same description, while they differed about (partnership constituted with) different kinds of goods or things, as in the case of partnership through *dirhams* proffered by one party and *dīnārs* by the other. They also disputed the case of usurious food (offered in partnership) when it is of the same single species. Three (disputed) issues, therefore, arise here:

34.1.1.1. Issue 1

Partnership with two kinds of goods—or with goods and *dirhams* or *dīnārs*—is permitted by Ibn al-Qāsim. This is also Mālik's opinion, though it is said that he did not approve of it. The reason for such disapproval is the combination in it of partnership and sale. As the goods differ, it is as if each one of them sold a part of his goods for a part of the goods of the other.

Mālik takes into account the value (*qīma*) of the goods when partnership is constituted with them, while al-Shāfiʿī says that partnership cannot be constituted except on the basis of the price (*thaman*) of the goods. Abū Ḥāmid has reported that the preferred opinion of al-Shāfiʿī indicates that partnership is like *qirāḍ*; it is, therefore, not valid except in *dirhams* and *dīnārs*. He said that analogy dictates the substitution of mixing (*khalṭ*) by joint ownership.

34.1.1.2. Issue 2

If the two kinds (of capital) consist of those things in which delay (*nasāʾ*) is not permitted, as in partnership with *dīnārs* contributed by one and *dirhams* by the other, or with different kinds of food, then, the opinion of Mālik differs in this. He permitted it once and disallowed it another time, because a partnership with *dīnārs* contributed by one and *dirhams* by the other involves partnership and monetary exchange (*ṣarf*) at the same time, just as the exchange of two kinds of food in partnership results in the lack of immediate exchange. Ibn al-Qāsim, therefore, disallowed it. Those who did not take these reasons into consideration, permitted it.

34.1.1.3. Issue 3

Ibn al-Qāsim permitted partnership constituted with one kind of food, on the analogy of its unanimous permissibility in one kind of gold or silver. Mālik disallowed it in his well-known opinion, due to the implicit lack of immediate exchange. He argued on the basis of the unanimous principle that analogy is inoperative in a case of exemption. It is also said that the reason for Mālik's disapproval lies in the fact that partnership requires equality in value, and sale requires the similarity of measure. Thus, a partnership in food of the same species requires a similarity in value and in measure, which rarely occur. Mālik disapproved of this saying that this is the very similarity in value and measure that is rarely possible. He disapproved of it and that is where their disagreement lies: in the species of the subject-matter of partnership.

They disagreed whether it is a condition for the capital of the partnership that it must be mixed either physically or legally, that is, for example, that both (capitals) be in one box with both (partners) having access to it. Al-Shāfiʿī said that partnership is not permitted unless the two capitals are mixed to such an extent that the capital of one is not distinguishable from that of the other.

Abū Ḥanīfa said that partnership is valid even if each one of them retains his capital in his possession. Abū Ḥanīfa was satisfied with the conclusion of the partnership through words (offer and acceptance), while Mālik stipulated in addition to this the joint ability to employ the wealth. Al-Shāfiᶜī added *ikhtilāṭ* (actual mixing) to these two conditions. The point being that with *ikhtilāṭ* the participation of the partners is fuller and more effective, as each one of them will be as honest with the other as he is to himself. This, then, is the discussion pertaining to the (first) element and its conditions.

34.1.2. Element 2: Division of Profits

They agreed over the validity of the partnership when the parties stipulated that the profits were to be in proportion to the capital (contributed) by each party, so that if original capital was contributed equally the profits would be divided among them equally. The jurists disagreed over whether it was permitted to share the profits equally when the capital contributed was unequal. Mālik and al-Shāfiᶜī said that this is not permitted, while the jurists of Iraq said that it is allowed.

The reliance of those who disallowed this was on the fact that sharing of profits is to be compared with the sharing of losses. Just as the stipulation by one of them for bearing a part of the loss would not be allowed, the stipulation of profit, out of proportion with his capital, would not be permitted. Perhaps, they compared the profits here with the rent of landed property owned jointly by two persons, that is, the *manfaᶜa* is shared by them in the ratio of co-ownership. The basis for the jurists of Iraq is the similarity of partnership with *qirāḍ*. As it is permitted to the worker in *qirāḍ* to share profits as stipulated by the parties, when the worker is not contributing anything but only his work, it is more appropriate in partnership to give the worker a part of the wealth when the partnership consists of capital as well as work from both. The (surplus) part of the profit would be in return for the surplus work he does as compared to his partner. Human beings differ with respect to work just as they differ in other things.

34.1.3. Element 3: Work

According to Mālik, work, as we have said, is to be in proportion to capital, and is not to be taken into account independently. According to Abū Ḥanīfa, it is to be considered along with capital. I believe there are among the jurists those who do not permit partnership unless the capitals of the partners is equal, keeping in view the work. They are of the view that work is usually equal, therefore, if the capital between them is not equal it amounts to injustice done to one of them in work. It is for this reason that Ibn al-Mundhir has said that the jurists unanimously agreed on the permissibility of the partnership in which each party contributes the same as his partner, and in the same kind, that is, *dirhams* or *dīnārs*, after which they mix them till they become a single indistinguishable capital, which they can both use to buy and sell any kind of goods as they deem fit, and whatever excess it yields is shared between them equally as is the loss. (He adds that) this is the case if each one should trade in the presence of his partner. The stipulation of this condition by him indicates that there is a dispute about it. It is well known that, according to the majority, it is not a condition that each one should trade in the presence of his partner.

34.2. Chapter 2: The *Mufāwaḍa* Partnership

They disagreed about *sharikat al-mufāwaḍa*. Mālik and Abū Ḥanīfa agreed, on the whole, about its permissibility, though they disagreed about some of the conditions. Al-Shāfiʿī said it is not permitted. The meaning of *sharikat al-mufāwaḍa* is that each partner delegates to the other to undertake transactions in his wealth, both in his presence and absence, and this takes place, according to them (Mālik and Abū Ḥanīfa), in all of their possessions.

The reliance of al-Shāfiʿī is on the argument that the term *sharika* is applied to the mixing of wealth, while the profits are an outcome, and it is not permitted that the outcome be common except by the joining of the sources. If each one of them stipulates, out of his own wealth, a share of the profits for the other, it amounts to *gharar*, which is not permitted, and it is an attribute of the *mufāwaḍa* partnership. Mālik is of the view that each partner has bought a part of the other's wealth with a part of his own wealth, after which each one of them has appointed the other as an agent to supervise the wealth that is under his control. Al-Shāfiʿī maintains that partnership is not a combination of agency and sale. Abū Ḥanīfa, on the other hand, is true here to his principle, which does not permit in *sharikat al-ʿinān* anything except cash.

Mālik and Abū Ḥanīfa differ over some of the conditions of this partnership, as Abū Ḥanīfa holds equality of capital to be a condition in this partnership, while Mālik said that this is not necessary on the analogy of *sharikat al-ʿinān*. Abū Ḥanīfa said that whatever any of them earns is considered a part (income) of the partnership. His argument is that the term *mufāwaḍa* requires these two things, that is, the equality of wealth and the totality of their possessions.

34.3. Chapter 3: *Sharikat al-Abdān*

Sharikat al-abdān is permitted, on the whole, by the Ḥanafites and the Mālikites. Al-Shāfiʿī disallowed it. The argument of the Shafiʿites is that partnership is specific to wealth and not work as it is variable, which amounts to *gharar* according to them, because the work of each is unknown to his partner. The argument of the Mālikites is (based on) the participation of warriors in booty and they become entitled to this due to work on the basis of the report that Ibn Masʿūd participated with Saʿd on the Day (battle) of Badr. Saʿd secured two mares, while Ibn Masʿūd did not get anything. This (partnership) was not denied by the Prophet (God's peace and blessings be upon him). Also, *muḍāraba* is agreed to on the basis of work, it is, therefore, valid that partnership be constituted on the same basis. Al-Shāfiʿī advances the argument that *muḍāraba* is an exemption and an analogy cannot be constructed on it; similarly, it is possible that the *ḥukm* of *ghanīma* lies outside the pale of *sharika*. Among its conditions, according to Mālik, is the similarity of trades and the location. Abū Ḥanīfa, however, said that it is permitted with a dissimilarity in trades. Thus, a tanner and a bleacher can become partners, according to him, but they cannot according to Mālik. The basis for Mālik is the increase in *gharar*, which arises due to a difference in trade or location. The reliance of Abū Ḥanīfa is on the permissibility of partnership in work.

34.4. Chapter 4: *Sharikat al-Wujūh*

Sharikat al-wujūh, according to Mālik and al-Shāfiʿī, is void. Abū Ḥanīfa said that it is permitted. This is a partnership based on the joining of liabilities (credit), without contributing work or wealth. The argument of Mālik and al-Shāfiʿī is that partnership is related to wealth or work, and both are lacking in this issue besides the presence of *gharar*, because each has delegated (authority) to his partner without qualification of a particular skill or work. Abū Ḥanīfa believes that it is a kind of work and, therefore, it is valid to contract partnership with it.

34.5. Chapter 5: Discussion of the *Aḥkām* of the Valid Partnership

It is a revocable contract, not a binding one, that is, it is the right of (any) one of the partners to withdraw from the partnership whenever he likes. It is a contract that is not inheritable. The maintenance and clothing of the partners is from the wealth of the partnership if they have almost similar obligations and when they do not exceed what is reasonable for them for maintenance. It is permitted to each partner to invest in goods, borrow, and make deposits whenever it is necessary, but it is not permitted that he gives gifts from the wealth of the partnership, nor is he to make a transaction that requires their joint participation. He is liable, however, for negligence or a wrongful act. For example, in the case where he gives away the wealth of the partnership without witnesses and the possessor denies his claim. He has to compensate as he has been negligent in not taking witnesses. He has the right to accept a defective thing in purchase. The acknowledgement by one of the partners of a financial claim for the other is not valid. *Iqāla* and *tawliya* on his part are valid. One of the partners (alone) is not liable for the losses in trade that has been undertaken by agreement. It is not permitted to a partner in *mufāwaḍa* to enter into a transaction of loan without the permission of his partner. Each partner stands in the position of his partner with respect to rights and liabilities (that is, liability is joint). The details under this topic are too many.

XXXV

THE BOOK OF *SHUFᶜA* (PRE-EMPTION)

The examination of *shufᶜa* is initially taken up in two parts. The first part is about the validity of this *ḥukm* and its elements. The second is about its *aḥkām*.

35.1. Part 1: The Legal Validity of *Shufᶜa* and its Elements

The Muslims agreed about the obligation of the *ḥukm* of pre-emption on the basis of what was stipulated for it in established traditions, except those who do not consider the sale of a jointly owned piece of land as valid. It has four elements: the pre-emptor (*shafīᶜ*), the buyer (*mashfūᶜ ᶜalayh*), the property (*mashfūᶜ fīh*), and the mode of acquisition through *shufᶜa*.

35.1.1. Element 1: The Pre-emptor

Mālik, al-Shāfiᶜī, and the Ahl al-Madīna maintained that there is no right of pre-emption for anyone except the joint owner, as long as partition has not taken place. The Ahl al-ᶜIrāq maintained that pre-emption has an order of priority. The first priority is for the co-owner, before partition, followed by the joint owner after partition, as long as a joint ownership exists in the (common) street (drive way) or in the courtyard. The next order of priority is for the adjacent neighbour. The Ahl al-Madīna, however, said that there is no right of pre-emption for the adjacent neighbour or even for the co-owner after partition.

The reliance of the Ahl al-Madīna is on the *mursal* report of Mālik from Ibn Shihāb from Abū Salama ibn ᶜAbd al-Raḥmān and Saᶜīd ibn al-Musayyib that "the Messenger of Allāh (God's peace and blessings be upon him) issued a verdict in the case of co-owners before partition. However, when boundaries have been demarcated between them (their properties), they have no (mutual) right of pre-emption". They also rely on the tradition of Jābir that "the Messenger of Allāh (God's peace and blessings be upon him) issued a verdict for pre-emption before partition. However, when the boundaries are demarcated there is no (right of) *shufᶜa*". This is recorded by Muslim, al-Tirmidhī and Abū Dāwūd. Aḥmad ibn Ḥanbal used to say that the tradition of Maᶜmar from al-Zuhrī from Abū Salama ibn ᶜAbd al-Raḥmān is the most authentic out of those narrated about *shufᶜa*. Ibn Maᶜīn used to say that the *mursal* of Mālik is dear to me as Mālik reported it from Ibn Shihāb as *mawqūf*,[151] but some people considered this dispute over Ibn Shihāb in his *isnād* as weakening this *isnād*. It is related from Mālik, in sources other than *al-Muwaṭṭaʾ*, from Ibn Shihāb from Abū Hurayra.

The point of their argument in this tradition lies in the fact that if the boundaries are drawn there is no right of pre-emption. Thus, if there is no right of pre-emption in the case of a co-owner after partition, it is more appropriate that it should not be obligatory in the case of a neighbour. Further, the co-owner after partition is also a neighbour once partition takes place.

The reliance of the Ahl al-ʿIrāq is on the tradition of Abū Rāfiʿ from the Prophet (God's peace and blessings be upon him) that he said, "The (immediate) neighbour has a prior right to that which is adjacent to him". This is a tradition that is related both by al-Bukhārī and Muslim. Al-Tirmidhī and Abū Dāwūd have recorded a tradition of the Prophet (God's peace and blessings be upon him) in which he said, "The neighbour of a house has a prior right to the house of his neighbour". It has been declared authentic by al-Tirmidhī.

They also maintain as a rational argument that as the aim of pre-emption is the repelling of harm inherent in co-ownership, and in so far as this meaning exists in the case of the neighbour it is necessary that the right should vest in him too. The Ahl al-Madīna would say that the harm involved in co-ownership is greater than that sustained by the neighbour. On the whole, the argument of the Mālikites, as a matter of principle, is that none be deprived of ownership except by his consent, and that he who buys a thing should not lose it without his consent, unless an evidence indicates such an exemption. The traditions are in conflict on this topic and it is, therefore, necessary to have recourse to that for which the principles bear evidence. For both opinions we find support from earlier authorities from among the *Tābiʿūn* in Iraq and the Companions among the Ahl al-Madīna.

35.1.2. Element 2: The Property (*mashfūʿ fīh*)[152]

The Muslim jurists agreed that *shufʿa* applies in real estate, properties such as houses and land, but they differed about other properties. The summary of views in Mālik's school is that it applies to three kinds (of property). The first is the primary property, namely, real estate such as houses, shops, and orchards. The second is what is attached to real estate, and is fixed, neither transferable nor movable, like springs and areas surrounding palm-groves, as they subsist in a state to which *shufᶜa* is applicable. This means that the original property, like land, be jointly owned by him (the pre-emptor) and his partner without partition. The third is what relates to these things, like fruit, about which there are different narrations from Mālik. There are also different narrations from Mālik about the leasing of land for cultivation and the contract of *kitāba* in the case of the *mukātab* slave. Narrations from him differ about public baths and grinding-mills. There is no *shufaᶜ* in all other things besides these, including goods and animals, according to him, and the same is the case with driveways and courtyards of a house.

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[151] That is, the words are those of Ibn Shihāb al-Zuhrī about the Prophet's acts, and are not the Prophet's own words.

[152] It may be observed here that the Author did not follow the order laid down in his introduction of the topic.

The narrations from him (Mālik) differ about the cases of rented houses, of *musāqā*, and debt, whether the debtor (or the tenant) has a prior right; similarly, in the case of *kitāba* (whether the *mukātib* has a prior right). ᶜUmar ibn ᶜAbd al-ᶜAzīz was in favour of this and it is related that "the Messenger of Allāh (God's peace and blessings be upon him) decided in favour of (the right of) *shufᶜa* in the case of debt". This was the opinion of Ashhab from among the disciples of Mālik, while Ibn al-Qāsim said that there is no *shufᶜa* in the case of debt. These two jurists did not differ about its obligation in the case of *kitāba*, due to the significance of manumission.

The jurists of the provinces deny the application of *shufᶜa* in things other than real estate. On the other hand, it is related from a group that there is *shufᶜa* in everything except those weighed and measured. Abū Ḥanīfa did not permit *shufᶜa* in springs or in male animals, but he did permit it in courtyards and driveways. Al-Shāfiᶜī agreed with Mālik on courtyards, springs, and driveways, but everyone opposed him in the case of fruit.

The reliance of the majority in restricting *shufᶜa* to real estate is what is related in the confirmed tradition of the Prophet (God's peace and blessings be upon him), "*Shufᶜa* is valid in what has not been partitioned, but once boundaries have been drawn and driveways made, there is no *shufᶜa*". It is as if he said that *shufᶜa* is valid in that in which partition is possible, as long as it has not been partitioned. This amounts to a proof through the indirect indication of the text (*dalīl al-khiṭāb*). The jurists of the provinces unanimously agreed on this, despite their disagreement over the extent of its validity as evidence. The reliance of those who permitted it in all things is what has been recorded by al-Tirmidhī as a narration from Ibn ᶜAbbās "that the Messenger of Allāh (God's peace and blessings be upon him) said, 'The co-owner is a *shafīᶜ* (pre-emptor) and *shufᶜa* is valid in everything". This is so, as the implication of harm in co-ownership and in the case of a neighbour exists in each thing,[153] though it is more apparent in real estate. On observing this, Mālik deemed what resembles landed property to fall in the same category.

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[153] It is unlikely that the concept of neighbourhood implies harm. The reference here is to sharing property with a stranger to whom the co-owner may sell without the approval of his partner

Abū Ḥanīfa argued for the prohibition of *shufʿa* in springs on the basis of the report that "there is no *shufʿa* in springs". Mālik interpreted this tradition to mean the springs in the deserts that are used to revive barren lands (*mawāt*), not those that are in privately owned land.

35.1.3. Element 3: The Buyer (*Mashfūʿ ʿAlayh*)

They agreed about the *mashfūʿ ʿalayh* that he is one to whom the property is transferred through purchase from a co-owner of an unpartitioned property or from a neighbour, according to those who view the validity of *shufʿa* for a neighbour. They disagreed about the person to whom the property is transferred without purchase. The well-known opinion of Mālik is that *shufʿa* arises when the transfer of ownership is for compensation as in sale, settlement, dower (*mahr*), *arsh* (damages) for torts and so on. This was also the opinion of al-Shāfiʿī. There is a second opinion from him (Mālik) that it is valid in each transfer of ownership whether it is for compensation or is without compensation, as in a non-charitable gift, except in the cases of inheritance as there is no *shufʿa* in that by unanimous agreement.

Shufʿa in the opinion of the Ḥanafites is only valid in the case of sale. Their reliance is on the apparent meaning of the traditions, the general import of which is that it arises from sale; in fact, it is so explicitly stated in all (the traditions) and not only in some. He (the co-owner) is not to sell till his co-owner permits him. The Mālikites are of the opinion that anything transferred for compensation is within the meaning of sale, and the underlying reason of the second narration (from Mālik) is merely the consequential harm. There is no *shufʿa* in a gift seeking spiritual reward (*thawāb*), according to Abū Ḥanīfa and according to al-Shāfiʿī; for Abū Ḥanīfa, it is because *shufʿa* is valid in sales only, and for al-Shāfiʿī because a reward-seeking gift is void in his opinion. There is no dispute about it in Mālik's view or that of his disciples, that is that *shufʿa* is valid in it.

The jurists agreed that in the case of a sale with an option, where the option is stipulated for the seller, *shufʿa* does not arise until the sale becomes binding. They disagreed when the option is (stipulated) for the buyer. Al-Shāfiʿī and the Kūfīs said that *shufʿa* is valid as he has severed the land from his ownership and alienated it. It is said that *shufʿa* is not valid against him as he is not liable. This is the opinion of a group among the disciples of Mālik. They disagreed about *shufʿa* in the case of *musāqāh*, where it is the exchange of land for land. There are three narrations from Mālik about it: permission, prohibition, and the third is that it is not valid when it involves co-sharers and valid when strangers are involved.

35.1.4. Element 4: Acquisition through Pre-emption

The discussion under this element relates to the amount with which the pre-emptor acquires the property, how much he acquires, and when. They agreed that in the case of sale he acquires with the sale price if it is immediate. They disagreed when the sale is for a delayed period, whether the pre-emptor acquires it for the price in the same delayed period, or with the sale price on immediate payment, or whether he has an option. Mālik said that he acquires it on the basis of the price of a delayed sale if he is well-to-do or he comes up with a rich guarantor. Al-Shāfiʿī said that the pre-emptor has an option, if he likes he can go through with it immediately or he can delay it to the end of the period. This is like the opinion of the Kūfīs. Al-Thawrī held that he cannot acquire it except by immediate payment, as it has entered the liability of the other person. He said that there are among us some who say that it should stay in the possession of the seller and when the period is over the pre-emptor can acquire it.

Those who maintain the validity of pre-emption in all contracts of exchange other than sale, held that he (the pre-emptor) exercises the right of pre-emption in the value of the share if the compensation is something that cannot be easily estimated, as in the case of something given away in *khulʿ*. If he pays with a thing the value of which can be determined, but it is not *dīnārs* or *dirhams* or on the whole anything that can be measured or weighed, then he acquires it with the value of the thing given in exchange for the share. If the value of the thing is determined by law, he acquires the share with that value, as in the case of *mūḍiḥa* for which he is liable or *munaqqala*, (both injuries), he acquires with the *diya* (reparation) fixed for them.

In answering the question how much he acquires, (the assumption is that) the pre-emptor is one or more than one, and the buyer is also one or more. When the pre-emptor is one and the buyer is one, there is no disagreement that the pre-emptor has either to take the entire property or leave it. When the buyer is one and the pre-emptors are more than one, they disagreed about it on two points. First, about the mode of partitioning the pre-empted property between them and second, when the bases of their ownership are different, are some to be excluded by the others in the pre-emption? For example, if some of them are co-owners in property that they have inherited, on equal or the same basis (like two sisters sharing their assigned portion), while the others did not inherit on the basis of a fixed share, having a single share, or because some of them are residuaries.

35.1.4.1. Issue 1: Mode of distribution of property (among pre-emptors)

Mālik, al-Shāfiʿī, and the majority of the jurists of Medina were of the opinion that the property is to be divided among them according to the proportion of their shares (in the disputed partition). Thus, one whose share in the portion of the wealth is a third acquires a third of the portion with a third of the price, and one whose share is a fourth acquires a fourth. The Kūfīs said that it is to be divided per head in equal shares, irrespective of whether there is one among them who has the largest share and one who has the smallest.

The argument of the Medinites is that *shufʿa* is a right that is to be exercised in accordance with the prevailing ownership. It is, therefore, necessary that it be distributed in accordance with the original property, the origin being rents in jointly rented things and profit in *sharikat al-amwāl*. In addition, *shufʿa* is intended to eliminate harm, and the harm is suffered by each in unequal measures and it affects each in accordance with his share. Thus, it is necessary that their entitlement to the extent of repelling it be in proportion to this ratio. The argument of the Ḥanafites is that the validity of the *shufʿa* arises by ownership itself and the possessors of different shares derive this right equally by mere ownership. Perhaps, they held it similar to co-owners in a slave in unequal shares. If one of them sets his share free, he bears equally the share of those who did not free him.

35.1.4.2. Issue 2: Residuaries

The jurists differed about the effect of co-ownership where some are residuaries while others have a (fixed) share. Mālik said the possessors of a prescribed fixed share (*farḍ*) have a prior right to *shufʿa* when one of them sells to the heirs among their co-owners. The residuaries do not have the right of *shufʿa* in case of sale by one of those with fixed shares, but the sharers have the right of *shufʿa* in sale by the residuaries. For example, if a person dies leaving behind real estate inherited by two daughters and two sons of his (the deceased) uncle. If one of the daughters sells her share, the other daughter, according to Mālik, is the one who exercises the right of pre-emption for the property her sister is selling and not the sons of the uncle. If a son of the uncle sells his share the daughters and the other son (of the uncle) exercise the right. This is also the opinion of Ibn al-Qāsim. The Kūfīs said that the sharers do not participate with the residuaries nor the residuaries with the sharers, but the sharers exercise the right of pre-emption within themselves only. This was also the opinion of Ashhab. Al-Shāfiʿī said in one of his opinions that the sharers participate with the residuaries and the residuaries with the sharers, which is the opinion preferred by al-Muzanī; it was also the opinion of al-Mughīra from among the disciples of Mālik.

The basis of al-Shāfiʿī's opinion is the generality of the decision of the Prophet about the right of *shufʿa* among co-owners where he did not distinguish the sharers from the residuaries. Those who distinguished the sharers from the residuaries were of the view that the co-ownership arose from different causes, that is, between the sharers and the residuaries, and they compared the co-ownership arising from different causes with different partnerships based on differences in capital, which is the sharing of wealth on the basis of capital. Those who allowed the participation of the sharers in the *shufʿa* of the residuaries, but did not allow the participation of the residuaries in the case of the sharers, decided on the basis of *istiḥsān* as a breach from analogy. The reasoning through *istiḥsān* is that the sharers have a priority over the residuaries.

If the buyers are two or more and the pre-emptor desires to exercise the right against one of them and not the other, then, Ibn al-Qāsim is of the opinion that he acquires the whole or relinquishes (his right). Abū Ḥanīfa, his disciples, and al-Shāfiʿī said that he may exercise the right against any of them he pleases. This was also the opinion of Ashhab. If, however, a person buys from two individuals and the pre-emptor desires to exercise the right with respect to one of them and not the other, Abū Ḥanīfa prohibits it, while al-Shāfiʿī permits it. If the pre-emptors are more than one, that is, the co-owners and some of them decide to exercise the right while the rest surrender it, then, the majority are of the opinion that the buyer should ask the co-owner to acquire the whole property or relinquish his right; he does not have the right to pre-empt according to the extent of his share, unless the buyer permits this, thus, he does not have the right to divide the *shufʿa* with respect to the buyer if he does not agree to such division. Aṣbagh, one of the disciples of Mālik, said that if some of them surrender their right out of concern for the buyer, the pre-emptor can only exercise his right to the extent of his share.

There is no disagreement in Mālik's school that when some of the pre-emptors are absent and some are present and those present wish to exercise the right to the extent of their shares, they cannot do so. They have to take the whole or relinquish; when those absent return they have the right to exercise their right or surrender it. They agreed that a condition for acquisition through pre-emption is the existence of co-ownership prior to the sale. They disagreed whether it was a condition that the co-ownership should exist during the sale and should be established before the sale.

35.1.4.3. Issue 3: When the seller is not a co-owner at the time of the sale

This is visualized when a person delays the acquisition of the property through pre-emption due to some reason till he sells his share because of which he was a co-owner. Ashhab relates that the opinion of Mālik differs in this. He said once that he has the right to acquire through *shufʿa*, and said another time that he does not. Ashhab preferred the opinion that he has no right, which is also the opinion of al-Shāfiʿī and the Kūfīs on the basis of *qiyās* as the object of pre-emption is the elimination of harm resulting from co-ownership and this person is no longer a co-owner. Ibn al-Qāsim said that he has the right if he decides to exercise it soon. He is of the opinion that a right acquired by him cannot be negated by the sale of his share by him.

35.1.4.4. Issue 4: Co-ownership prior to sale

This takes the form that a person becomes entitled to a share in a land out of which another share is being sold, but before the actual time of the entitlement, does he have the right to acquire it through pre-emption? A group said that he has this right as it accrues to him through the precedence of the co-ownership to the sale and it does not matter if he is in possession of his share or not. Another group said that he has no right of pre-emption as the right of co-ownership will be established on the day of delivery. They said, "Do you not see that he does not collect the produce from the buyer". Mālik said that if a long time passes there is no *shufʿa*, but if such time has not passed then the right exists. This is based on *istiḥsān*.

With respect to (the time) when he exercises it in order that his right may subsist, there are two cases of persons having the right of pre-emption, one of them absent and the other present. The jurists are in agreement, about the person absent, that his right subsists as long he is not aware of the sale by his co-sharer. They disagreed when he is absent, but aware of the sale. Some said that his right of pre-emption is annulled, while others said that it is not, which is Mālik's opinion. His proof is what is related from the Prophet (God's peace and blessings be upon him) in the tradition of Jābir, that he said, "The neighbour has a greater right to the property adjacent to him", or he said, "(he) has a stronger right in his *shufʿa*, which is to be delayed if he is absent". Further, the person absent is restrained from acquisition through *shufʿa* and his excuse is justified. The basis for the (argument of the) other group is that his silence after awareness of the sale is circumstantial proof of his consent to the relinquishment of his right.

The jurists disagreed about the time of validity of *shufʿa* in the case of one present. Al-Shāfiʿī and Abū Ḥanīfa said that it is valid immediately, as he knows and is able to make the demand. If he knows and is able to make the demand, but still does not, his *shufʿa* is invalidated; Abū Ḥanīfa, however, said that if he takes witnesses about his intention to acquire, the right is not annulled even if it is delayed. The right is not immediate according to Mālik, but has an extended duration. His opinion differed about the limit of such a duration. He said once that it is unlimited and is not terminated at all, unless the buyer adds to the building or makes substantial changes while he is present, knowing and silent. On another occasion, he limited this time-period to one year, which is the better-known opinion, but it is said that he allowed it for more than a year. It is sometimes related from him that the right of *shufʿa* remains valid up to five years. Al-Shāfiʿī argued on the basis of what is related from the Prophet (God's peace and blessings be upon him), "*Shufʿa* is like the unwinding of the *ʿiqāl*". It is also related from al-Shāfiʿī that its duration is three days.

Those who do not annul the right of pre-emption on the basis of silence argue that silence does not annul the right of a Muslim, unless his behaviour indicates its relinquishment. This, it appears, is similar to the principles of al-Shāfiʿī for, according to him, no express statement can be attributed to one who is silent even when the accompanying circumstances indicate his consent. I believe, however, that in this case he relied on the traditions.

This, then, is the discussion about the elements of *shufʿa* and its validating conditions; what now remains is the discussion of the *aḥkām*.

35.2. Part 2: The Discussion of the *Aḥkām* of

These *aḥkām* are numerous, but we shall discuss only those in which the disagreement of the jurists of the provinces became well known. Among these is their disagreement over the inheritance of the right of pre-emption. The Kūfīs maintained that it cannot be inherited, just as it cannot be sold. Mālik, al-Shāfiʿī, and the jurists of Hijāz held that it is inheritable on the analogy of all kinds of wealth. The discussion of the reason for disagreement on these issues has preceded in the discussion of the reason for the return (of the *mabīʿ*) due to defects.

They also disagreed about the contractual obligation[154] with respect to the pre-emptor; does it lie on the buyer or the seller? Mālik and al-Shāfiʿī said that it is on the buyer, while Ibn Abī Laylā said it is on the seller. The reliance of Mālik is on the argument that the right of pre-emption for the co-owner arose after the acquisition of ownership by the buyer, and after such acquisition became effective. Therefore, it is necessary that the contractual obligation should be on him (the buyer). The reliance of the other party is on the fact that the right of pre-emption arose out of the sale itself and the imposition of *shufʿa* on the sale amounts to its revocation, and its conclusion in favour of the possessor of the right of *shufʿa*.

They agreed that *iqāla* (negotiated rescission) does not annul the right of pre-emption, on the view that it is a sale and also on the view that it is revocation, I mean, *iqāla*. The disciples of Mālik disagreed as to who was liable for the contractual obligation in the case of *iqāla*. Ibn al-Qāsim said it is the buyer, while Ashhab said that he (the pre-emptor) has an option.

In the case where the buyer undertakes construction or plantation or what resembles it, in the land before the demand of the pre-emptor and the pre-emptor makes his demand later, Mālik said that there is no *shufʿa*, unless the buyer is given the value of what he has constructed or planted. Al-Shāfiʿī and Abū Ḥanīfa said that he is a trespasser and the pre-emptor has the right to give him the value of his construction demolished or to take it from him after this reduction. The reason for their disagreement is the vacillation of the act of the buyer, who is aware of the entitlement of the *shufʿa*, between the likelihood that it is the invalid act of the usurper and between the act of the buyer who is facing a claim of restitution. He has constructed and planted in the land and his position vacillates between the two. Those who considered the case of restitution as predominant said that he should not take their value, but those whose views were dominated by the likelihood of trespass said that the pre-emptor has a right to acquire it after demolition or by reducing the price accordingly (down to the demolished value of the structure).

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[154] That is, who is to satisfy the claim of the pre-emptor.

When the buyer and the pre-emptor differ about the price (paid by the buyer for the share in the property), the buyer saying that he bought the land for a certain sum, and the pre-emptor saying that he bought it for less, without any of them having evidence, the majority of the jurists say that the admissible statement is that of the buyer, as the pre-emptor is the claimant and the buyer is the defendant. Some of the later jurists opposed this saying that the acceptable statement is that of the pre-emptor, as the buyer has acknowledged the validity of the *shufʿa* and has made a claim for a certain sum as price, which the other has not acknowledged.

Mālik's disciples differed over this issue. Ibn al-Qāsim said that the acceptable statement is that of the buyer, along with his oath, when he makes a credible claim. If he brings up an incredible claim, then, the acceptable statement is that of the pre-emptor. Ashhab said that if he brings up a credible claim, the statement of the buyer is accepted without an oath, and in the case of an incredible claim he has to swear an oath. It is related from Mālik that he said that if the buyer is a person of authority, who is known to increase the amount of the price, his (the pre-emptor's) statement is accepted without oath. It is said that if the buyer comes up with an exaggerated claim the pre-emptor is asked to have recourse to value; the same is the case, as far as I think, when each one of them comes up with an exaggerated claim.

They disagreed when each one of them comes up with evidence that is equally reliable about *ʿadāla* (moral probity). Ibn al-Qāsim said that both are to be set aside and they revert to the original basis where the acceptable statement is that of the buyer along with his oath. Ashhab said that the acceptable evidence is that of the buyer as it is based on better knowledge.

XXXVI

THE BOOK OF *QISMA* (DIVISION; PARTITION)

The source for this law are the words of the Exalted, "And when kinsfolk and orphans and the needy are present at the division (of the heritage) bestow on them therefrom and speak kindly unto them",[155] and "Whether it be little or much—a legal share".[156] (Its source is) also the words of the Messenger of Allāh (God's peace and blessings be upon him), "Any house that was partitioned in the days of *jāhiliyya* is to be retained on that division and any house established after Islam that has not been partitioned will be partitioned according to Islam".

The discussion in this book is about the *qāsim*, the *maqsūm ʿalayh*, and about *qisma*. The discussion of *qisma* is undertaken in several chapters. The first chapter is about the kinds of *qisma*. The second is about the identification of the subject-matter of each of its kinds, that is, things amenable to partition and those that are not; the method of *qisma* in them, and their conditions, I mean, of the things amenable to *qisma*. The third is about the identification of the *aḥkām*.

36.1. Chapter 1: The Kinds of *Qisma*

The discussion of *qisma* is first divided into two parts: division of inherited wealth, and the benefits of such wealth.

36.1.1. Part 1: Division of Inherited Wealth

The division of property that is neither weighed nor measured is classified, on the whole, into three types: division through lots after valuation and equalization of (shares); division by consent after valuation and equalization; and division by consent without valuation and equalization. With respect to those that are measured and weighed, their division is by measure and weight. Property, on the other hand, is divisible into three types. First is that which is fixed and immovable, that is, houses and real estate. The second is movable (property) and is divided into two kinds: that which is not measured or weighed, and consists of animals and some types of goods; and that which is measured and weighed. Thus, in this chapter there are three sections: first, about landed property; second, about non-measurable goods; and third about things measured and weighed.

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[155] Qurʾān 4:8
[156] Qurʾān 4:7

36.1.1.1. *Section 1: Landed Property*

The division of landed property is permissible through consent and (partition into) lots on the basis of value. The jurists are all in general agreement over this, though they differed about the subject-matter and the conditions. Partition can either be of one property alone or of many. There is no disagreement about its division, and when there is one property it can be partitioned into sections with similar attributes with no decrease in the utility of each section due to partition. The sharers are to be forced to accept this. When the property can be divided only into sections having no utility, Mālik and his disciples differ. Mālik said that it is (still) to be divided among them when the sharers demand it, even if the portion allotted to each has no utility, like (land covering) the area of the human foot. This opinion was upheld only by Ibn Kināna, from among his disciples, and it is also the opinion of Abū Ḥanīfa and al-Shāfiʿī. Their reliance in this is upon the words of the Exalted, "Whether it be little or much—a legal share".[157]

Ibn al-Qāsim said that it is not to be divided unless each one of them gets as a share that from which he can benefit, without incurring any harm in its utilization as a result of the partition. He did not, however, take into account the effect on its price. Ibn al-Mājishūn said that it is to be divided if each one of them gets what he can utilize, though it may not be a benefit of the same category as that which could be derived through co-ownership, and it may even be less. Muṭarrif, out of the disciples of Mālik, said that unless each one of them gets as a share that which he can utilize it is not to be divided, but if the shares of some of them can be utilized while those of the others cannot, it is to be divided and they are to be forced to accept it whether the demand is made by the owner of the larger or the smaller share. It is said, however, that they are to be forced if the demand is made by the owner of the smaller share and not if it is made by the owner of the larger share. The opposite is also maintained by some, but that is weak.

They differed, under this topic, when the utility of the property partitioned is converted to a different benefit, like that of a public bath. Mālik said that it is to be partitioned if one of the co-owners demands this, which was also the opinion of Ashhab. Ibn al-Qāsim said that it is not to be divided, which is also the opinion of al-Shāfiʿī. The reliance of those who prohibited this is on the words of the Prophet (God's peace and blessings be upon him), "No harm (is to be borne) and none is (allowed) to harm". The reliance of those who upheld partitioning is on the words of the Exalted, "Whether it be little or much—a legal share".[158] Among the proofs for those who do not uphold division is the tradition of Jābir from his father, "There is to be no *taʿḍiya* (dismemberment) of the heirs, (divide) only that which bears partitioning". *Taʿḍiya* is disunion, which means here that there is to be no partition.

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[157] Qurʾān 4:7

If the properties are more than one, then, they can either be homogeneous or be different. When they are homogeneous, the jurists of the different regions differ about them. Mālik said that if they are homogeneous, they are to be divided by valuation, equalization, and by drawing lots. Abū Ḥanīfa and al-Shāfiʿī said that each property is to be partitioned separately. The reliance of Mālik is on the belief that it involves the least amount of harm for the co-owners in the partition. The reliance of the other party is on the fact that each property is to be identified separately as it may (later) involve *shufʿa* (pre-emption).

The disciples of Mālik differ, into three opinions, when differing properties have similar market values, even when they are in different locations. If the properties are different, for example, when some are houses, some orchards, and others land, there is no dispute that they are not to be combined for distribution by lots. A condition for the partition of fruit-bearing orchards is that they are not to be partitioned, by agreement in the school, when the fruit has begun to ripen, as this would amount to the sale of food for food on the trees, which is *muzābana*. There is disagreement in the Mālik's school about their partition before the ripening of fruit. Ibn al-Qāsim does not permit this before pollination in any circumstances. He is cautious about it as it leads to the sale of food for food with an excess. It is thought for this reason that Mālik did not allow the sale, delayed or immediate, of food that had not ripened with food. If it is after pollination, it is not permitted, according to him, except on the condition that one of them stipulates for the other that whatever fruit is obtained through his share is also to be divided and they are to be partners in that which does not come out of his share. The *ʿilla*, according to him, in this is that a buyer can stipulate the inclusion of fruit after pollination, but it is not permitted before it. It is as if one of them has purchased the share of his co-owner from all the fruit that is reaped by him through partition with his share in the fruit reaped by his co-owner, when he had stipulated (the inclusion) fruit.

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[158] Qurʾān

The method of partition by lots is that the inheritance be divided, verified, and adjusted to whole numbers if there is a fraction in the shares, so that the shares are reduced to wholes, then, each location and each kind of plantation should be valued, and thereafter adjusted on the basis of the smallest share with respect to value. It is possible that a section in one location is equal to three in another on the basis of the value of the land and the location. Once they are divided and adjusted in this way, the names of the co-owners be written on slips along with the different sections. The person whose name comes out matching a section takes it. It is suggested that names be dropped into the various sides, and the person whose name is found in a section takes it. If his share exceeds this, it is done again for him till his entitlement is completed.

This is the position on drawing lots in inherited property. The jurists introduced the drawing of lots in partition for the satisfaction of the persons participating in the partition, and it is present in the *sharʿ* in different contexts. Among them are the words of the Exalted, "And then [he] drew lots and was of those rejected",[159] and "Thou wast not present with them when they threw their pens (to know) which of them should be the guardian of Mary".[160] Related to this is also the established tradition in which it is reported "that a man, close to his death, freed six unnamed slaves and the Messenger of Allāh (God's peace and blessings be upon him), drew lots among them, thus freeing a third of the slaves". Division through agreement, irrespective of whether it is after valuation and adjustment or without it, is permitted in similar and differing properties as it is a kind of sale, but whatever is prohibited in sale is prohibited here.

36.1.1.2. *Section 2: Division of Goods*

The jurists agreed about animals and goods that division is allowed in none of them due to the *fasād* (corruption) involved. They differed, however, when the co-owners covet one particular thing and are not willing to utilize it jointly, with one of them proposing to sell it out. Mālik and his disciples said that he is to be compelled to agree. If one of them wishes to acquire it on the basis of the value assigned to it he may do so. The Ẓāhirites said that he is not to be compelled, as the principles require that none is to be dispossessed of his property except on the basis of an evidence from the Qurʾān, *sunna*, or *ijmāʿ*. Mālik's argument is that with no compulsion the other party may be harmed. This is based on *qiyās* that is *mursal* (that is, related *maṣlaḥa mursala*), which, as we have said on more than one occasion, none besides Mālik, from among the jurists of different regions, upholds, but it becomes necessary in certain things.

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[159] Qurʾān 37:141

[160] Qurʾān 3:44

When the goods have more than one species, the jurists agree about their division through consent. They disagree about dividing the variety of goods through adjustment and drawing lots. Mālik and his disciples permitted it in a single category, but ʿAbd al-ʿAzīz ibn Abī Salama and Ibn al-Mājishūn disallowed it. Mālik's disciples, however, differed about the distinction of the single category in which the drawing of lots is permitted from that in which it is not permitted. Ashhab held it to be that in which a part cannot be taken as (delayed) payment for another part. Ibn al-Qāsim's opinion wavered. On one occasion he permitted division through drawing of lots in a thing in which a part can be used to pay for another part, considering division less involved than *salam*, but on another occasion he disallowed division in a thing in which *salam* is disallowed. It is said, though, that he considered division as less involved than *salam* in such a case (with respect to permissibility). His decisions in cases because of which it is thought that division in his view is more serious than *salam* (advance payment) may be interpreted on the basis of his second principle. Ibn Ḥabīb, on the other hand, held that similar goods like silk and silk fabrics, cotton and cotton fabrics may be combined as one category for the purpose of division. Ashhab permitted the combination of two kinds for division for drawing lots with the consent (of the parties). This is weak, however, as the involved *gharar* is not acceptable (even) on the basis of consent.

36.1.1.3. *Section 3: Rules Pertaining to Things Measured and Weighed*

Drawing of lots is not permitted, by agreement, for dividing things measured and weighed, except what is related from al-Lakhmī. Things measured can be one heap, two, or more. If they are of the same kind, their division can take place through equal measure or weight when one of the co-owners demands this. There is no disagreement about the permissibility of their division on the basis of consent even with apparent excess (in some), irrespective of whether they are usurious or non-usurious, that is, those in which *tafāḍul* is not permitted. This is permitted with an accepted measure or even with a different measure, but it is not permitted through estimate, without a measure or weight. If the division is through examination, it is said that this is not allowed in things measured, but is permitted in those weighed. The disagreement here is the same as that related to sale through examination.

If the division is not in heaps of one kind, but there are two (kinds), then, if these are things in which excess *tafāḍul* is not allowed, they cannot be divided by way of combining; (they can only be divided) through a determined measure for those measured, and a determined weight for those weighed. If they are divided by way of an undetermined measure it will not be known how much has been received of one quantity when they vary (in value) with respect to a determined measure. All this is according to the opinion of Mālik, as the principle underlying it is that excess is prohibited in similar things when their utility is similar, as in wheat and barley.

In case the commodities are those in which excess is allowed, their division is permitted by way of adjustment, through combining, even when they are two different kinds, with the existence of apparent excess that is customary through the use of determined measure or weight. Such permission in the school is granted in the case where there is consent. The obligation arising from the *ḥukm* is that each heap is to be divided separately. When each pile is divided separately, the division is allowed with a determined or an undetermined measure.

All this is the *ḥukm* of the division that takes place in inherited wealth.

36.1.2. Part 2: Division of Benefits

The division of benefits is not permitted, according to the opinion of Ibn al-Qāsim, through the drawing of lots, and the person who refuses to accept it is not to be compelled. This is in view of the fact that division of benefits is not to be undertaken through drawing lots. Abū Ḥanīfa and his disciples were of the opinion that the parties are to be compelled in the division of benefits. The division of benefits, according to all (jurists), is through the joint sharing of the usufruct, which takes place over time or by (the use of) things. The division of benefits over time takes place when each person has the chance to use the thing for an equal duration. In its division through the utilization of things, the *ʿayn* is allocated to both and is used for a fixed duration, the *ʿayn* still being retained in joint ownership.

In (Mālik's) school there is disagreement about division of benefits over time, regarding the duration for which the division is permitted for certain things as compared to others for purposes of yield or utilization, like the service of a slave or the riding of an animal or the cultivation of land. The disagreement was also influenced by things movable and immovable. It is not permitted in those which are movable, according to Mālik and his disciples, for a lengthy duration, but is allowed for short durations; and this is for purposes of revenue and utilization. With respect to immovables, it is permitted for long durations and distant periods, for yield and utilization. They differed about the short duration. It is said that it is for a day or so, and it is also said that this is not permitted in the case of a slave or a riding animal. With respect to (personal) service, it is said that this is permitted for a period of five days, and it is said for a month or a little more than that.

About the usufruct of things, like one of them using a house for a duration and the other for a similar duration, it is said that it is permitted for residence in a house and the cultivation of land, but it is not permitted for earning revenue through renting, except for short durations. It is also said that it is permitted on the analogy of things used on the basis of time. Similar is the opinion about the service of a slave or animal where the discussion takes place on the basis of the division of time.

This, then, is the discussion about the division of inherited wealth, benefits, and the validating and invalidating conditions. What remains in this book is the discussion of the *aḥkām*.

36.2. Chapter 2: The Discussion of the *Aḥkām*

Qisma is one of the binding contracts, which the parties to the division cannot revoke nor can they withdraw from, except in the case of a contingency. Such contingencies are three: cheating, existence of a defect, and the right of a third party (*istiḥqāq*). Revocation is not allowed in cases of cheating, unless it has occurred in the drawing of lots, by agreement of the school. An exception, however, is made by those who make an analogy from its effectiveness (that is, of cheating) in sale and, therefore, hold it necessary even in division.

With respect to return due to defect, in Ibn al-Qāsim's view, the defect may be found in a major part of an individual's share or in a small part. When it is found in most of the share, it is possible that the share of his co-sharer has been consumed or not consumed. If it has been consumed, the finder of the defect returns part of his share to the co-ownership and acquires from his co-owner half the value of his share, as it existed on the day of possession. If the (co-owner's) share is not consumed, the division is revoked and the co-ownership is restored to its original position. If the defect was in a small part of the share, this small part alone is returned to the co-ownership, irrespective of whether the share of the co-owner is consumed. He has recourse to his co-owner for half the value of the excess and does not claim anything for what is in his possession, even if it is defective. Ashhab said: the thing which precludes return has preceded in the Book of Sales.[161] ᶜAbd al-ᶜAzīz ibn al-Mājishūn said that the existence of a defect revokes the division based on the drawing of lots, but not that which is through consent, as the one based on consent amounts to sale, while that based on the drawing of lots is the separation of rights; if it is revoked due to cheating it must be revoked and returned for defects.

The *ḥukm* of third-party rights (*istiḥqāq*), according to Ibn al-Qāsim, is the same as the *ḥukm* for the existence of defects, in case the claimed part is the major portion and the share of the co-sharer has not expired; he again becomes a co-sharer for whatever is in his possession. If the share has expired, he has recourse to half the value of whatever is left in his possession. If the claim is very small, he has recourse to half its value. Muḥammad said that if a claim has been made on what is in the possession of one of them, division is annulled in the case of drawing of lots, as it has become obvious that the division was not fair, as was the case in the opinion of Ibn al-Mājishūn in defects.

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[161] This is how it appears in the text. Perhaps, it should read: "What Ashhab said, about the factor that precludes return, has preceded in the Book of Sales".

When a claim is made on wealth, like the claim of a debt on the estate (inheritance) after division, or the claim of a bequest (*waṣiyya*), or the claim of an heir, Mālik's disciples differ. If a debt is claimed, it is said in the well-known view of the school, which was held by Ibn al-Qāsim, that the division is cancelled unless the heirs agree to pay the debt themselves, irrespective of whether their shares are still in their possession, or destroyed by a natural calamity. It is said that the division is cancelled with respect to the shares that are still in their possession and have not been destroyed by a natural calamity; there is no recourse for the debt to the person whose share has been destroyed by a natural calamity, nor does he have a recourse to the other heirs for what is left in their possession after payment of the debt. It is also said that the division is cancelled, as it must be, as a right of Allāh, on the basis of the words of the Exalted, "[A]fter any legacy he may have bequeathed, or debt (may have been paid)".[162] Again, it is said that the division is cancelled, except with respect to one who has been paid a debt that he (the deceased) had intended to pay. This is the *ḥukm* for the claim upon the heirs by the legatee (*mūṣā lahu*).

The division is not cancelled because of the claim of the heir on the co-ownership after the division, but before the expiry of the share of each one of them, and he takes his share from each, if it is something that is measured or weighed; if it is an animal or goods, the division is set aside. Does each one of them compensate that which perishes in his possession, without any fault of his? It is said that he does and it is also said that he is not liable.

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[162] Qurʾān 4:11

XXXVII

THE BOOK OF *RAHN*[163] (SECURITY FOR A DEBT; PLEDGE; MORTGAGE)

The source for this book are the words of the Exalted, "If ye be on a journey and cannot find a scribe, then a pledge in hand (shall suffice)".[164] The discussion in this book is about the elements (*arkān*), conditions and *aḥkām.*

37.1. Chapter 1: The Elements (*Arkān*)

The *arkān* deal with the *rāhin* (pledgor, mortgagor) and the *marhūn* (the pledged property), the *murtahin* (pledgee, mortgagee), the thing in return for which the pledge is made, and the nature of the contract of *rahn* (pledge, or mortgage).

37.1.1. Element 1: The Pledgor (*Rāhin*)

There is no dispute that one of the attributes (of the legal capacity) of the pledgor must be that he is not interdicted by those having the authority to interdict. The *waṣī* (executor) pledges on behalf of one under his authority, when it is judicious in case of necessity, according to Mālik. Al-Shāfiʿī said that he pledges for his obvious interest (*maṣlaḥa*). The *mukātab* and the *maʾdhūn* (authorized) slaves can also pledge, in the opinion of Mālik. Saḥnūn said that if he pledges borrowed wealth, it is not permitted. Mālik and al-Shāfiʿī agreed about the insolvent person (*muflis*) that his pledge is not permitted. Abū Ḥanīfa said that it is. Mālik's opinion differed about a person whose liabilities had surpassed his assets, as to whether his pledge was allowed, that is, whether it was binding. The well-known opinion narrated from him is that it is allowed, that is, before he becomes insolvent. The disagreement refers to the question whether an insolvent is interdicted. Any person who is qualified to be a pledgor is also qualified to be a pledgee (*murtahin*).

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[163] The term *rahn* has generally been translated into English as pledge or mortgage, by modern writers, both Muslim and Western. The *rahn* transaction is somewhat different from pledge or mortgage. The contract of *rahn* as explained by the author here is merely a security for a debt that exists, for whatever reason, before the *rahn* is transacted; the pledge is made when the payment of the loan becomes due. It does not involve pledging, pawning, or mortgaging where something is submitted as a collateral and some value, money or other, is raised as a loan to be returned later. Such a contract would amount to a sale, according to Muslim jurists, which is revocable at the termination of the agreed period, with the buyer having the right to dispose of the property during this period. This kind of contract (pledge or mortgage) would, perhaps, be permissible under Ḥauafite law (e.g. *bayʿ al-wafāʾ*), but certainly not according to the description of *rahn* by the author. It appears, however, that Mālik did permit this transaction. Please note his opinion as against that of al-Shāfiʿī discussed at the end of the third element.

[164] Qurʾān 2:283

37.1.2. Element 2: The Pledge (*Rahn*)

The Shafiᶜites said that it is valid with three conditions. First, that it should be an *ᶜayn* (corporeal present property) and it is not permitted to pledge a *dayn* (claim for a debt). Second, that the pledgor should not prevent the pledgee from having access to it, as in the case of the *muṣḥaf* (written copy of the Qurʾān). Mālik permits the pledge of the *muṣḥaf* with the condition that the pledgee does not use it. The disagreement is based on the saleability of the *marhūn*. Third, that the pledge should be capable of being sold after the termination of the period (of the pledge). It is permitted, according to Mālik, to pledge things whose sale is not permitted at the time of the pledge, like crops and fruit that have not ripened. These are not to be sold, according to him, for discharging a debt before they have begun to ripen even if the period of the pledge has expired. Two opinions are narrated from al-Shāfiᶜī about fruit that has not begun to ripen. These, in his view, are to be sold at the time of the termination of the period with the condition of immediate picking. Abū Ḥāmid said that the preferred opinion is about its permissibility.

The pledging of things not physically specified is permitted according to Mālik, as in the case of stamped *dīnārs* and *dirhams*. It is also not a condition in *rahn* that the property should be owned by the pledgor, either according to Mālik or according to al-Shāfiᶜī; in fact, it is permitted by them that it be a borrowed thing. They agreed that among its conditions is the acknowledgement by the pledgor of the possession of the pledgee over it. They disagreed when the possession of the pledgee is the result of *ghaṣb* (usurpation) and the pledgor later ratifies it as a pledge. Mālik said that it is permitted to allow the conversion of a liability of usurpation to that of a pledge, and the person from whom the property is usurped may declare the thing usurped to be a pledge in the hands of the usurper before repossessing it. Al-Shāfiᶜī said that this is not permitted and it stays as a liability of the usurper unless he (the pledgor) repossesses it. They disagreed about pledging the *res nullius* (property not owned by anyone), with Abū Ḥanīfa disallowing it and Mālik and al-Shāfiᶜī permitting it. The reason for disagreement being whether it can be owned.

37.1.3. Element 3: The Consideration for the *Rahn*

The principle in Mālik's school is that it is permitted to accept collateral in return for all those things that can serve as a price (*thaman*) in all kinds of sales, except (when the exchange would amount to) *ṣarf* or the advance payment of *salam* that is related to liability. This is so, as a condition of *ṣarf* is (immediate) mutual possession; it is, therefore, not permitted in the contract of *rahn*. Similarly, the advance payment of *salam*, though according to Mālik it differs from *ṣarf* in this regard. Some of the Ẓāhirites said that accepting a pledge is not permitted, except in the specific case of *salam*, that is, as a security for the object of *salam*. They upheld this due to the verse of *rahn*, which was revealed in the context of debts arising from sales, which is *salam* according to them. It was as if they considered this to be a condition for the validity of *rahn* as the verse of *rahn* begins with the words, "O ye who believe!! When ye contract a debt for a fixed term, record it in writing",[165] and this is followed by the directive: "If ye be on a journey and cannot find a scribe, then a pledge in hand (shall suffice)".[166]

Thus, in Mālik's view, it is permitted to accept a pledge in the case of *salam*, loan, usurpation, compensation for destroyed property, damages in torts against property, and in (damages for) intentional injuries in which there is no retaliation (*qawad*), like the (injuries called) *mā'mūma* and *jā'ifa*. Regarding intentional murder and bodily injuries for which retaliation is prescribed, two opinions have been derived for the acceptance of a pledge in place of *diya* (composition, reparation) when the *walī* (one who possesses the right of retaliation) has forgiven (the offender). The first is that it is permitted, which is based on the view that the *walī* has an option between retaliation and *diya* in intentional murder (*ʿamd*). Second, that it is not permitted, which is also based on an opinion that the *walī* has no option, but to retaliate when the offender refuses to pay the *diya*.

It is also permitted to accept a pledge in the case of manslaughter (*qatl al-khaṭa'*) from a member of the the *ʿāqila* after a year. It is permitted in *ʿāriya* (borrowing), for which there is liability for compensation, but is not valid in those with no liability. It is permitted in hire, and in *ju'l* after the completion of work, but not before it. It is permitted in the case of *mahr* (dower). *Rahn* is not permitted in *ḥudūd* or in *qiṣāṣ* (probably, as bail for release) or in *kitāba*, and, on the whole, in those things where surety (*kafāla*) is not permitted.

The Shāfiʿites said that there are three conditions for the thing for which a pledge may be made. First, that it should be a loan (*dayn*), a pledge is not allowed for an *ʿayn*. Second, that it should have accrued, and it is not permitted before accrual, like demanding a pledge for a loan requested;[167] this is permitted by Mālik. Third, that its becoming binding (*luzūm*) should not be something likely to happen, and it should not be binding like the *rahn* in *kitāba*. This view is closer to that of Mālik.

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[165] Qur'ān 2:282

[166] Qur'ān 2:282

[167] This would apply to the raising of loans by offering collateral.

37.2. Chapter 2: The Discussion of Conditions

The conditions of *rahn* expressly stated in the *sharʿ* (law) are of two kinds: conditions of validity, and the conditions of *fasād*. The conditions of validity, expressly stated, for *rahn*, that is, for its being (constituted as) *rahn*, are two. The first, which is agreed upon generally, and disputed from the aspect of its being a condition, is possession. The second is disputed about its stipulation.

They agreed, on the whole, about possession that it is a condition in *rahn* due to the words of the Exalted, "Then a pledge in hand (shall suffice)".[168] They differed whether it is a condition of completion or a condition of validity. The purpose of the distinction is that those who say it is a condition of validity, maintain that until possession is delivered, *rahn* is not binding for the *rāhin* (pledgor). Those who maintain that it is condition of completion consider it binding through the contract itself and compel the pledgor for the delivery of possession, unless the pledgee has delayed the claim to such an extent that the pledgor has become insolvent, has fallen ill, or has died.

Mālik held that it is a condition of completion, while Abū Ḥanīfa, al-Shāfiʿī, and the Ẓāhirites maintained that it is a condition of validity. The reliance of Mālik is upon the analogy of conclusion through offer and acceptance in all the other binding contracts. The reliance of the others is on the words of the Exalted, "Then a pledge in hand (shall suffice)".[169] Some of the Ẓāhirites said that *rahn* is not allowed (in this case) in the absence of a scribe, because of the words of the Exalted, "[A]nd cannot find a scribe, then a pledge in hand shall suffice".[170] The Ẓāhirites do not permit the depositing of a collateral with a trustworthy (third party).

According to Mālik, a condition for the validity of *rahn* is continuous possession of the pledgee. When it reverts to the possession of the pledgor, with the consent of the pledgee, by way of *ʿāriya* or *wadīʾa* (deposit) or some other way, it is no longer remains binding. Al-Shāfiʿī said that continued possession is not a condition of validity. Mālik generalized the condition on the basis of the apparent meaning, interpreting the words of the Exalted, "a pledge in hand", to mean the existence of continued possession, which he deemed a condition. Al-Shāfiʿī said that when possession is found *rahn* is valid and concluded, and it is not altered by loaning or by any other means of disposal, as is the case in sale. It would have been appropriate, however, for those who stipulate possession for the validity of the contract to lay down continuity as a condition, and for those who do not stipulate it as a condition of validity not to impose continuity as a condition.

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[168] Qurʾān 2:283
[169] Qurʾān 2:283
[170] Qurʾān 2:283

They agreed upon its permissibility during a journey, but disagreed about it when the parties are resident. The majority permitted this, but the Ẓāhirites and Mujāhid said that it is not permitted in residence, because of the apparent meaning of the words of the Exalted, "If ye be on a journey and cannot find a scribe . . . ".[171] The majority sought support from what has been laid down that "the Prophet (God's peace and blessings be upon him) made a pledge when he was not travelling". The derivation of the prohibition of *rahn* in a settlement from the verse is based on the indirect indication of the text (*dalīl al-khiṭāb*).

The prohibited condition, proscribed by the text, is the stipulation that he (the pledgor) should redeem the *rahn* at the end of the period, otherwise the collateral is his (the pledgee's). They agreed that this condition makes rescission obligatory and it is the meaning of the words of the Prophet (God's peace and blessings be upon him), "Do not forfeit the pledge".

37.3. **Chapter 3: The Discussion of the *Aḥkām***

This chapter is divided into the identification of the rights and liabilities of the pledgor, the rights and liabilities of the pledgee, and the identification of the *ḥukm* in case of their disputes, which relate either to the contract itself or to contingencies affecting the pledge. From among these, we shall discuss the well-known agreements and disagreements of the jurists of different regions.

The right of the pledgee in the *rahn* is to keep it in his possession till the pledgor pays what is due from him. If he does not redeem it by the end of the period, the pledgee has the right, if the pledgor has not given him the right to sell it, to file a claim with the *sulṭān*, who will sell it and give the pledgee his due. This is also the case when the pledgor is missing. It is also permissible for the pledgor to appoint the pledgee as his agent for the sale of the pledge on the termination of the period. Mālik, however, disapproved of it and preferred that the case be referred to the *sulṭān*, always.

The *rahn* is linked with its consideration (the *marhūn fīh*) as a whole and in parts. This means that if the pledge has been made in consideration of a number of things, and the pledgor has repaid some, the pledge shall remain with the pledgee in its entirety, till he has recovered all that is due. Some held that, on the contrary, the pledge remains with the pledgee in proportion to the remaining dues. The argument of the majority is that the collateral is tied up in its entirety due to a right, and it follows that it should be restrained due to each part, the basis being the seisin of the estate with respect to the heirs till

[171] Qurʾān 2:283

they pay the debt owed by the deceased. The argument of the other party is that all of it is tied up for the entire payment, it is, therefore, necessary that parts of it be tied up for parts of that, the basis being surety (*kafāla*).

One of the well-known issues of this topic is their disagreement about mesne profits that are separable, like the fruit on the mortgaged trees, like revenue, and like offspring. They disagreed whether these are included in the collateral. A group maintained that separable mesne profits are not to be included as part of the pledge, that is, such profits as accrue in the possession of the pledgee. Among those who held this opinion is al-Shāfiᶜī. Others maintained that the entire increase is included in the *rahn*. Those who held this opinion are Abū Ḥanīfa and al-Thawrī. Mālik drew a distinction and said that whatever separable increase is of the same nature and form is included in the *rahn*, like the child of a slave-girl; but that which does not have the same nature or form is not included, irrespective of whether it is produced by it, like the fruit of a tree, or is not produced by it, like the rent of a house or the earning of a slave.

The reliance of those who were of the view that the mesne profits of a *rahn* and its revenue are for the pledgor (*rāhin*) are the words of the Prophet (God's peace and blessings be upon him), "The *rahn* is to be milked and ridden". They said that this cannot be interpreted to give a right to the *rāhin* to ride it and milk it, as this would mean it is not delivered, which is contrary to the existence of the *rahn* in which delivery is a condition. On the other hand, it cannot be interpreted to mean that the pledgee may milk it and ride it. Thus, the only remaining meaning is that the wages for riding it (and for its other produce) are for its owner and the liability of its maintenance is upon him. They also argued on the basis of the general meaning of the words of the Prophet (God's peace and blessings be upon him), "Those who pledged it, for them is its revenue and upon them its liability". They also added that it is an additional development over that which he agreed to pledge, and it should belong to the pledgee only with an additional stipulation.

Abū Ḥanīfa's reliance is on the fact that the *furūᶜ* (offshoots) are dependent upon the *uṣūl* and must, therefore, follow the *ḥukm* of the *aṣl*. It is for this reason that the *ḥukm* of the child of a slave-girl is dependent upon the *ḥukm* of the mother in the contracts of *tadbīr* and *kitāba*. Mālik argued that the child of a slave-girl has the *ḥukm* of the mother in sale, that is, it is dependent upon her, but he distinguished between a child and fruit on the basis of a *sunna*. Thus, fruit does not depend upon the sale of its *aṣl* (the tree) except with a condition, whereas the child of a slave-girl does without a condition.

The majority maintain that the pledgee has no right to benefit in any way from the pledged property. A group, however, said that if the pledge is an animal, the pledgee has the right to milk it or ride it to the extent that he feeds it or spends on it. This is the opinion of Aḥmad and Isḥāq, who argued on the basis of the apparent meaning of what has been related by Abū Hurayra from the Prophet (God's peace and blessings be upon him), who said, "The *rahn* is to be milked and ridden".

Within this topic is their disagreement about the perishing (of the pledge) in the possession of the pledgee, as to who is liable. A group said that a *rahn* is merely an *amāna* (trust) in the hands of the pledgee and the pledgor is liable. The claim of the pledgee, along with his oath, that he was not negligent nor did he transgress is to be accepted. Among those who held this opinion are al-Shāfiʿī, Aḥmad, Abū Thawr, and the majority of the traditionists. Another group said that the *rahn* is the liability of the pledgee and anything befalling it is upon him. Among those who held this opinion are Abū Ḥanīfa and the majority of the Kūfīs. Those who made the pledgee liable are divided into two opinions. Some of them said that the pledge is to be compensated by the lesser of its value or the amount of debt. This was the opinion of Abū Ḥanīfa, Sufyān, and a group. Others said that it is to be compensated by its value, whether less or more, and if there is a surplus over and above the debt, the pledgor takes it from the pledgee. This is the opinion of ʿAlī ibn Abī Ṭālib, ʿAṭāʾ and Isḥāq. One group made a distinction between visible things about which he can be aware, like an animal or real estate, and those that are not apparently visible, like goods. They said that he is liable for that which is concealed from view, but a trustee for that which is visible. Those who held this opinion are Mālik, al-Awzāʿī and ʿUthmān al-Battī, except that Mālik said that if witnesses testify to the perishing of things hidden without any negligence or wastage on his part, he is not liable. Al-Awzāʿī and ʿUthmān al-Battī said that he is liable anyway, irrespective of the availability of evidence. Mālik's opinion is followed by Ibn al-Qāsim, while Ashhab follows the opinion of al-Awzāʿī and ʿUthmān al-Battī.

The reliance of those who rendered it a non-compensatory trust is the tradition of Saʿīd ibn al-Musayyib from Abū Hurayra that the Prophet (God's peace and blessings be upon him) said, "Do not constrain the *rahn*, those who pledged it, for them is its revenue and upon them its liability". That is on him is its fodder and for him its revenue, and upon him is its perishing and injury. They said that the pledgor agreed to its being a trust and, therefore, resembles the depositor, in their view. Al-Muzanī, from among the disciples of al-Shāfiʿī, arguing for him said that Mālik and those who followed him held that the animal and whatever leads to its loss are a trust, it is necessary that it should be so as a whole, while Abū Ḥanīfa maintained that whatever is surplus from the value of the pledge over the debt is a trust.

The meaning of the words of the Prophet, "upon them is its liability", according to Mālik and those who followed him, is its maintenance, and they said that the meaning of the words of the Prophet, "The *rahn* is to be ridden and milked", is that the rent from riding is for the owner, while its maintenance is upon him. Abū Ḥanīfa and his disciples interpreted the words of the Prophet (God's peace and blessings be upon him), "for them its booty and on them its liability", to mean its yield is what is left as surplus over debt, while its liability is what is deficient.

The reliance of those who view that the pledgee is liable for it is (on the argument) that it is an *ʿayn* to which is initially related the right of satisfying a claim, which should be discharged when it perishes; the basis being the perishing of the sold commodity in the possession of the seller when he holds on to it till the price is paid. This is agreed upon by the majority, though according to Mālik, it is like a *rahn*. Perhaps, they argued on the basis of what is related from the Prophet (God's peace and blessings be upon him) "that a man pledged a horse with another, but it perished in his possession. The Prophet (God's peace and blessings be upon him) said to the pledgee, 'Your right is extinguished' ".

The distinction made by Mālik between what is visible and what is not is based on *istiḥsān*. It means that suspicion arises in the case of what is not visible and not in the case of what is visible. They differed about the meaning of *istiḥsān*, which was often used as a basis by Mālik, declaring it as weak and saying that it resembles the *istiḥsān* used by Abū Ḥanīfa. They defined *istiḥsān* as an opinion that is not based on a valid source. The meaning of *istiḥsān*, in Mālik's view, however, is the combining of conflicting evidence (*adilla*). If this is so, it is not a ruling without evidence (*dalīl*).

The majority maintain that the pledgor has no right to sell the pledge or give it away. If he sells it, the pledgee has the right to ratify (grant *ijāza*) or rescind it. Mālik said that if he lets it out on rent and claims that it is for the early satisfaction of his right, his claim is to be accepted with an oath. A group, however, said that its sale is permitted. When the pledge is a male slave or a slave-girl and the pledgor frees him or her, then, according to Mālik, if the pledgor is well off the manumission is accepted as valid and he must make an early settlement of the right of the pledgee, but if he is hard up manumission is disallowed and the slave is to be sold to settle the right of the pledgee from the price. From al-Shāfiʿī, there are three opinions: the rejection of manumission; its ratification; and the third is like the opinion of Mālik.

The jurists disagree about the disagreement of the pledgor and the pledgee over the extent of the claim met by the pledge. Mālik said that the acceptable opinion is that of the pledgee as to the extent of the claim satisfied by the pledge, unless the value of the pledge is not less than his claim; for whatever is surplus over the value of the pledge, the accepted opinion is that of the pledgor. Al-Shāfiʿī, Abū Ḥanīfa, al-Thawrī, and the majority of the jurists of the provinces said that the accepted opinion is that of the pledgor. The argument of the majority is that the pledgor is the defendant (*muddaʿa ʿalayh*), while the pledgee is the claimant. It is, therefore, necessary that the oath be on the pledgor, due to the apparent meaning of the well-known *sunna*. The reliance of Mālik, here, is on the argument that though the pledgee is a claimant in this case there is a ground for the transfer of the oath in his favour, in view of the existence of the pledge which supports him. One of his principles is that the oath is to be taken by the litigant whose claim appears to be stronger. This, however, is not so for the majority, as the pledgor may have offered a collateral whose value is more than the corresponding claim.

When the pledge perishes and they differ about its description, the accepted statement, according to Mālik, is that of the pledgee as he is the defendant and is acknowledging part of what is claimed from him. This is based upon his principles, as the pledgee is also liable for what is concealed from view. According to the principles of al-Shāfiʿī, the oath for the pledgee is inconceivable, unless the pledgor denies the very perishing of the pledge. For Abū Ḥanīfa, the accepted statement is that of the pledgee with respect to the value of the pledge, and he is in no need of a description, whereas for Mālik the oath is about the description and valuation on the basis of the description.

When they differ about both things, I mean, about the description of the pledge and about the extent of the claim, the accepted statement is that of the pledgee about the description, and about the claim it is whatever the deposed description of the pledge supports it to be. This is weak. Does the claim indicate the value of the pledge when they agree about the claim and differ about its value? There are two opinions about it in the school, the more appropriate is to demand a witness; if the (value of the) debt is proved through the pledge, then the (value of the) pledge is to be proved through the debt.

The cases under this topic are many, and what we have mentioned suffices for our purposes.

XXXVIII

THE BOOK OF *ḤAJR* (INTERDICTION)

The discussion in this book is covered in three chapters. The first chapter is about the categories of persons interdicted. The second deals with the question as to when they are released from interdiction, when they are placed under it, and on what conditions they are released. Chapter three is about the identification of the *aḥkām* related to their acts with respect to revocation and ratification.

38.1. Chapter 1: The Categories of Persons Interdicted

The jurists agreed unanimously about the obligation of interdiction in the case of orphans, who have not attained puberty (*ḥulum*), on account of the words of the Exalted, "Prove orphans till they reach the marriageable age; then if ye find them of sound judgment, deliver unto them their fortune; and devour it not by squandering and in haste lest they grow up. Whoso (of the guardians) is rich, let him abstain generously (from taking of the property of orphans); and whoso is poor let him take thereof in reason (for his guardianship). And when ye deliver up their fortune unto orphans, have (the transaction) witnessed in their presence. Allāh sufficeth as a Reckoner".[172]

They disagreed about mature and sane persons with respect to interdiction, when they indulge in the squandering of their wealth. Mālik, al-Shāfiʿī, the jurists of Medina, and many of the jurists of Iraq upheld the permissibility of the initiation of interdiction against them with the order of the ruler. This is done when their prodigality is proved after they are asked to show cause, but have no defence. This is also the opinion of Ibn ʿAbbās and Ibn al-Zubayr. Abū Ḥanīfa and a group from Iraq maintained that interdiction cannot be initiated against majors, which is also the opinion of Ibrāhīm and Ibn Sīrīn. These jurists are divided into two opinions. Among them are those who said that interdiction is not permitted against them, in any circumstances, after they have attained puberty, even if they exhibit prodigality. Others held that if they persist in being prodigal from the age of minority, interdiction is to continue, even when they have displayed discretion (*rushd*) temporarily after puberty, but subsequently revert to their prodigal ways. They do not, however, initiate interdiction against them (once they have displayed *rushd* on attaining majority). Abū Ḥanīfa sets a limit for the removal of (continued) interdiction, even when prodigality is exhibited, as the age of twenty-five years.

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[172] Qurʾān 4:6

The argument of those who initiate the imposition of interdiction on majors, is that interdiction is obligatory in the case of minors due to prodigality, which is usually found in their case; it is, therefore, necessary that *ḥajr* be imposed on those who exhibit the same meaning in their acts, even though they are not minors. They said that it is for this reason that the existence of discretion, along with the attainment of majority, is stipulated for the removal of *ḥajr*. Allāh, the Exalted, says, "[T]hen if ye find them of sound judgment, deliver unto them their fortunes". This indicates that the cause requiring interdiction is prodigality. The reliance of the Ḥanafites is upon the tradition of Ḥibbān ibn Munqidh in which he says that "it was brought to the notice of the Messenger of Allāh (God's peace and blessings be upon him) by a person that he was cheated in sales. The Messenger of Allāh (God's peace and blessings be upon him) decreed, in his case, the stipulation of an option for three days, but did not interdict him". Perhaps, they regarded minority to be the cause of the prohibition of undertaking transactions in wealth, on the evidence of its effectiveness in the discharge of religious obligations.

Minority has been given importance as it is a state in which prodigality is a common feature, just as deficiency of reason is common in it. It is also for this reason that puberty has been fixed as a sign of (attaining mental maturity, making the person subject to) the obligation of legal liability (*taklīf*) and a sign of discretion. Both are found in such a person, that is, reason and discretion. Just as exceptional early mental maturity is not taken into account for the purposes of legal liability, similarly, exceptions of prodigality have not been considered, that is, the existence of prodigality after puberty with respect to interdiction. They said that the words of the Exalted, "Give not unto the foolish (what is in) your (keeping of their) wealth, which Allāh hath given you to maintain; but feed and clothe them from it, and speak kindly unto them",[173] do not contain more than the requirement of keeping their hands away from their wealth, which does not necessitate the revocation and invalidation of their sales.

Those placed under interdiction are six, according to Mālik: the minor, the foolish, the slave, the insolvent, the sick, and the wife. The discussion of each follows in the appropriate place.

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[173] Qurʾān 4:5

38.2. Chapter 2: Removal of Interdiction, Time of Imposition and Conditions of Removal

The discussion in this chapter takes place from two aspects: the time of release of minors from *ḥajr*, and the time of release for the prodigal. We say: minors, on the whole, are of two kinds: males and females. Each one of them either has a father or an executor (*waṣī*), or they may be *muhmal* (neglected), that is, those who have attained majority, but have neither a father nor an executor.

They agreed about male minors having fathers that they do not move out of interdiction, until they have reached the age of legal liability and have attained discretion; though they disagreed as to the nature of discretion. This is on the basis of the words of the Exalted, "Prove orphans till they reach the marriageable age; then if ye find them of sound judgment, deliver unto them their fortune".[174]

They disagreed about the female. The majority maintained that her *ḥukm* is the same as that for the males, that is, (interdiction is lifted with) the commencement of menstruation and the attainment of discretion. Mālik said, in the well-known opinion from him, that she stays under the guardianship of her father till such time that she marries and her marriage is consummated and discretion is found in her. The opinion of the majority is also related from him. The disciples of Mālik have other opinions in this. They said that she is under the guardianship of her father till one year after the consummation of her marriage; some of them said till two years have passed, and it is also said till seven years have passed. Mālik's argument is that discretion is not visible till after their first dealings with men. The opinions of his disciples, however, are weak and conflict with the text and analogy. They did not stipulate discretion, in accordance with the text, nor do their views agree with analogy, as the appearance of discretion is conceivable prior to this fixed period.

If we uphold Mālik's opinion and not that of the majority that the consideration in the case of males having fathers is puberty and the appearance of discretion, then Mālik's opinion differs. One opinion is that when he (the child) attains puberty, but his foolishness cannot be distinguished from his discretion, the child is to be treated as a *safīh* till discretion becomes obvious. This is his well-known opinion. It is also related from him that he is to be considered as having *rushd* till he exhibits foolishness.

The person having an executor (*waṣī*) does not move out of interdiction, according to Mālik's well-known opinion, except by the release from interdiction given to him by his executor, that is, he says about him that he possesses discretion. This is so, without dispute, when he (the executor) has

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[172] Qur'ān 4:6

been appointed by the father, but (it takes place) with the permission of the judge (*qāḍī*) along with that of the executor, when he has been appointed by someone other than the father, about which there is dispute. It is said about the executor appointed by the father that his word (alone) that the child is a *rashīd* is not acceptable till his discretion is made manifest, while it is also said that his (the child's) position *vis-à-vis* the executor is the same as that with the father: he is released from interdiction on the appearance of discretion even when the executor has not taken witnesses to the effect. The *ḥukm* of the person, in this case, whose state is undetermined is the same as that of the person with an undetermined state with respect to the father.

Ibn al-Qāsim, however, holds an opinion that establishment of guardianship (*wilāya*) cannot be considered with the appearance of discretion, nor is it discharged when foolishness is evident. This is also related from Mālik, but that is his opinion in the case of an orphan not a virgin. The difference between the opinions is that those who accept guardianship say that all his acts are to be invalidated, even if discretion had appeared, till such time that he is released from guardianship, but this is a weak opinion, because the effective factor is *rushd* not the order of the judge (*ḥākim*).

In their disagreement over the nature of *rushd* (discretion), Mālik is of the view that it is only (financial), that is, his ability to make profitable investment of wealth and to improve it, while al-Shāfiʿī stipulates along with this sound religious behaviour. The basis for their disagreement is their dispute whether the term *rushd* may apply to the non-righteous.

The position of the virgin with respect to the executor is the same as the position of the male in so far as she does not move out of guardianship except through a release, unless she advances in age without marriage, though this is disputed. It is also said that her position with respect to the executor is the same as that with the father, which is the opinion of Ibn al-Mājishūn. Their disagreement about the appearance of her discretion was not so intense as in the case of the orphan.

The well-known opinion about the neglected male is that his acts are valid when he reaches puberty, irrespective of his attaining majority in a state of *safah*, which may have been continuous, declared, or undeclared. Ibn al-Qāsim, on the other hand, considers each act in itself when it takes place. If it is based on discretion, he permits it, otherwise he rejects it. With respect to the female orphan, who neither has a father nor an executor, there are two opinions about her in the school. First, that her acts are valid when she begins to menstruate. Second, that her acts are rejected, unless she stayed unmarried for a long time, and this is the better-known opinion.

38.3. Chapter 3: Legality of Acts with Respect to Rejection and Ratification

The discussion in this chapter relates to two things. First, what kind of acts of the different categories of persons under interdiction are permitted? If they undertake those acts, what is their *ḥukm* with respect to rejection or ratification? Similarly, what is the *ḥukm* of the acts of those neglected; namely, the children who attain puberty without having a father or an executor? All these individuals, as we have said, are either minors, who have not attained puberty, or are majors under continued interdiction since minority, or are majors under reimposed interdiction.

There is no dispute in the school that acts of charity like *hiba* (gift), *ṣadaqa* (charity), *ʿaṭiyya* (bestowal), and *ʿitq* (manumission) are not permitted to male minors, who have not attained puberty, and to women who have not begun to menstruate, even with the permission of the father or the executor. If something moves out of their hands without (a corresponding) compensation, it is suspended subject to the consideration of the guardian, if they have a guardian. If he finds it to be based on sound discretion, he ratifies it, otherwise he annuls it. If they do not have a guardian, a guardian is to be appointed to examine the action; even when he continues to transact till such time as a guardian is appointed, the ratification and rejection depend upon the guardian.

They disagreed when his (the minor's) act is so appropriate and sound that it should be ratified by the guardian, but the final outcome is contrary to the expectations of the market, or of the (expected) profit in what he sold, or of the discount in what he bought. Does the guardian have a right to cancel it? The well-known opinion is that he has the right to do so, while it is also said that he does not have such a right.

The minor is held liable for damage he may cause to any property not entrusted to him. They disagreed about that which he ruined and broke when it was entrusted to him. The oath he took and subsequently broke during his minority, like setting free slaves is not binding on him after he has attained puberty and discretion. They disagreed about the oath he had sworn during his minority but broke upon attaining majority. The well-known opinion is that it is not binding upon him. Ibn Kināna said that it is. He is not obliged to take an oath for a claim (he denies). They disagreed when he had only one witness, whether he takes an oath with him. The well-known opinion is that he does not, but it is related from Mālik and al-Layth that he does. The position of the virgin, having a father and an executor, is the same as the male, as long as she has not turned into a spinster, in the opinion of those who attach weight to this.

About the *safīh*, who is a major, the majority of the jurists, except Ibn Abī Laylā and Abū Yūsuf, maintain that a person interdicted, if he divorces his wife or transacts *khulʿ* with her, both his divorce and *khulʿ* are void. Ibn Abī Laylā differed in the case of manumission and said that it is to be given effect. The majority said that it is not to be given effect. In the case of his bequest (*waṣiyya*), I am not aware of a disagreement about its execution, but his *hiba*, *ṣadaqa*, *ʿaṭiyya*, *ʿitq*, and other acts recommended by religion are not binding on him, unless he emancipates his *umm al-walad* (female slave bearing his child), for her liberation is binding on him. All this is maintained in the school. Do her (the *umm al-waladʾ's*) possessions go with her? There is disagreement in this. It is said that they do, and it is said that they do not; while a distinction is also made by some between smaller and bigger things. What he (the *maḥjūr*) transacts for a counter-value is also subject to scrutiny by his guardian, if he has one; and one is appointed for him if he does not. If the guardian rejects his sale, but he has consumed the price taken, the rejection cannot be pursued; similarly, when he has destroyed the property bought.

The acts of those under interdiction and those neglected are divided, in Mālik's school, into four kinds: those to be completely rejected, even when discretion was displayed; the opposite of these, that is, all the acts are considered to be based upon discretion, though a degree of prodigality is involved; acts that are all considered to be based upon *safah*, unless discretion is exhibited; and the opposite of these too, that is, the acts are all considered to be based upon *rushd* till *safah* is evident.

Acts that are to be rejected entirely as acts of *safah* are those of the minor who has not attained puberty, though he exhibits some discretion, or those of the virgin having a father and an executor, unless she has turned into a spinster, on the opinion of those who consider *taʿnīs*, and they differed extensively about the age of *taʿnīs* as being below thirty to the age of sixty.

The case where the *ḥukm* assigned is *rushd*, even when some degree of prodigality is visible, is that of the *safīh*, when no guardianship has been established by his father, nor by the *sulṭan*, according to Mālik's well-known opinion. This is opposed by Ibn al-Qāsim, who considers *rushd* itself and not guardianship. This category includes the neglected virgin orphan, in Saḥnūn's opinion.

The person who is assigned the *ḥukm* of *safah* is the male child after the attainment of puberty, during the lifetime of his father, unless *rushd* is exhibited, and the virgin having a father, but not an executor, when she is married and her marriage is consummated, unless *rushd* is exhibited or the determined age is reached, according to those who consider such a limit. Similarly, the female orphan, who does not have an executor, in the opinion of those who consider her acts to be rejected.

The situation in which the *ḥukm* of *rushd* is assigned, till the appearance of *safah*, includes the virgin spinster, according to those who consider *taʿnīs*, and the married female whose marriage stands consummated and the fixed number of years after consummation having passed, according to those who consider such a period. It also covers the son with a father who has attained puberty, but his state of *rushd* is unknown, according to one of two narrations. It also includes the virgin daughter after puberty, on the basis of the narration that does not take into account consummation through marriage.

This, in general, is all that is to be covered in this book, though the cases are many.

XXXIX

THE BOOK OF *TAFLĪṢ* (INSOLVENCY; BANKRUPTCY)

The discussion in this book, in so far as it relates to *taflīs* (insolvency), is about the *aḥkām* of the *muflis* (insolvent).

We say: the term *iflās*, in the law, is applied in two meanings. First, when the debts completely cover the assets of the debtor, and his wealth does not suffice to pay his debts. Second, when he does not have any known wealth at all. In both cases of *iflās*, the jurists have differed about the *aḥkām*.

In the first case, that is, when his insolvency is brought to the notice of the judge (*ḥākim*), as we observed, the jurists differ whether the judge has the right to interdict him from disposing of his wealth, till he sells it for him and divides it among the creditors in proportion to their debts; or whether he is to imprison him, till he pays to them all his wealth in any proportion that they agree, or to those among them who agree. This disagreement can be conceived in the case of one who has wealth that meets the claims of debts, but refuses to satisfy his creditors. Does the judge sell his property for him and distribute it, or is he to imprison him till he distributes it among them with his own hands? The majority maintain that the judge is to sell his property for him and from it (the sale proceeds) he is to satisfy his creditors or creditor, in case he is well off, or he issues the verdict of insolvency against him, if his wealth does not equal the debts, and interdicts him with respect to transactions in it. This is Mālik's opinion and al-Shāfiʿī's, while the other view was upheld by Abū Ḥanīfa and a group of the jurists of Iraq.

The proof of Mālik and al-Shāfiʿī is the tradition of Muʿādh ibn Jabal "that his debts mounted in the time of the Messenger of Allāh (God's peace and blessings be upon him) and his creditors did not increase before he delivered to them his wealth", and the tradition of Abū Saʿīd al-Khudrī "that in the period of the Prophet a man suffered a loss through a calamity, in fruit that he had bought. His debts increased and the Messenger of Allāh said, 'Give him something as *ṣadaqa*'. People gave him charity, but it was not enough to meet his debts, so the Messenger of Allāh (God's peace and blessings be upon him) said, 'Take what you can find of his wealth and that is all you will have' ". (They also relied on) the tradition about the verdict of ʿUmar in the case of an insolvent whom he had imprisoned. He said, "O Men! Verily al-Usyaf, Usyaf Juhayna, has been content with not meeting his debts and trusts, and has been postponing. He raised loans and refused to meet them and they are now double that of his wealth, so he who has a claim for a debt against him should come to us". They also relied on a rational argument that if a person suffering from a fatal-illness is interdicted for the interests of the heirs, it is more appropriate that a debtor should be interdicted in the interests of the creditors. This opinion is more agreeable, as it is more just; Allāh knows best.

The proof of the other party, who uphold the view that the debtor should be imprisoned till he pays what is due from him or dies in that condition so that the judge may then sell his property and divide it among the creditors, is a tradition from Jābir when his father died as a *shahīd* (martyr) at Uḥud while he was under debt. When the creditors made a demand on him, Jābir says, "I went up to the Messenger of Allāh (God's peace and blessings be upon him) and related the matter to him. He asked them if they would accept my palm-grove and discharge the claim against my father, but they refused. The Messenger of Allāh, therefore, did not give them my palm-grove and said, 'I will come over to your place tomorrow'. He came over in the morning and went around the grove praying for abundance in its fruit". He (Jābir) says, "When I (finally) cut the fruit, I paid off their claim and (yet) something was left over". (They also rely upon) what was related about the death of Usayd ibn al-Ḥudayr when he was under a debt of ten thousand *dirhams*. "ʿUmar ibn al-Khaṭṭāb summoned his creditors and presented his land to them for a period of four years in exchange for their claims upon him". They said that in all these traditions there is nothing that indicates the sale of the corpus (principal property) in satisfaction of debts. They maintained that the imprisonment of the debtor is indicated by the words of the Prophet (God's peace and blessings be upon him), "Undue postponement by one with means makes legal (an action against) his integrity and (also legitimizes his) punishment". They said that punishment here means his imprisonment. Perhaps they held similar the retrieval of his permission to the restitution of the principal property.

If we were to say that the insolvent should be interdicted, the discussion then relates to the questions: For what types of activities is he to be interdicted? For what kind of debts is there to be an apportionment (*muḥaṣṣa*) of shares? What types of property are to be apportioned? How is (all) this to be carried out?

There are two kinds of status for the insolvent (*muflis*): his status at the time of insolvency, before interdiction; and his status after interdiction. With respect to his status before interdiction, he is not permitted to do away with anything without (a corresponding) compensation, if it is not something that is binding upon him or is an act common in practice. The exemption in the case of things not binding upon him is made because he is to do that which is binding upon him by law, even if there is no compensation, like the maintenance of his needy parents and of his children. And the stipulation of not being customary was added as he is entitled to a reasonable consumption of his property without compensation, like sacrifice and expenditure on the ʿīd (celebration) and payment of small charity. Similarly, practice permits his expenditure in cases where there is (a kind of) compensation, like marriage and his expenditure on his wife. His sale and purchase are also permitted as long as it does not involve the making of favours. Likewise, is his acknowledgement of a debt in cases that do not arouse suspicion. Mālik's opinion differed about the satisfaction of some of his creditors to the exclusion of others and also about (the redemption of) his pledges.

Those, among the majority, who upheld interdiction said that before the verdict of interdiction, he is just like ordinary people. The majority upheld this opinion as in principle all acts are valid till the imposition of interdiction. Mālik, on the other hand, took into account the actual fact of debts exceeding his assets, but he did not do so in each case as he permitted his sale and purchase when it did not involve favouritism, while he does not permit this for one who is interdicted.

In Mālik's view, his status after interdiction does not permit him to sell or purchase, nor to acquire or donate. His acknowledgement of a liability for a debt is not valid, either for a relative or for someone distant, unless one of them, it is said, has supporting evidence, or, it is also said, someone is known to have made a demand from him. They differed in the school about his acknowledgement of determined property as (belonging to) the capital of *qirāḍ* or a deposit, into three opinions: validity; rejection; and the third is to make a distinction whether there exists, for the capital of *qirāḍ* or deposit, (supporting) evidence. It is said that if it exists (that is, evidence), his claim is to be accepted as truthful, otherwise not.

They disagreed under this topic whether the debts of the insolvent with different (repayment) periods become immediate. Mālik maintained that insolvency, in this case, resembles death (and, therefore, such debts become immediate), while the others held a contrary opinion, though the majority held that deferred debts become immediate on death. Ibn Shihāb said that there has been a practice (*sunna*) that the debt becomes due as soon as he dies. The evidence is that Allāh, the Exalted, has not permitted (the distribution of) inheritance except after the satisfaction of debts. The heirs are in one of two positions. They may not wish to delay (the satisfaction of) their rights in the estate till the expiry of the period of the debt, thus making the prompt satisfaction of the debt necessary, or they may consent to the delay of (the distribution) of the estate till the debts become due, with the debts being the liability of the estate and not that of the heirs as against the situation before death, when they were a liability of the deceased, which is appropriate with respect to the rights of the creditors. Some, for this reason, maintained that if the creditors consent to the carrying of the liability by the heirs, the debts will remain postponed till their respective periods. Among those who held this opinion is Ibn Sīrīn, while Abū ʿUbayd, from among the jurists of the provinces, preferred it. Insolvency, however, does not resemble death completely, though in both the capacity to bear liabilities is gone, because the revival of the capacity of the insolvent, unlike that of the deceased, is to be hoped for.

The discussion of the property of the insolvent to which the creditors have recourse depends on the species and quantity. If the corpus of the thing itself, because of which the creditor has a claim against the insolvent, has expired, the debt exists as a liability of the insolvent. If, however, the thing exists and has not expired, but the creditor did not take possession of the price (*thaman*), the jurists of the provinces differ about it into four opinions. The first is that the owner of the goods has a prior right to it, unless he relinquishes it and participates in the liquidation. This was the opinion of al-Shāfiʿī, Aḥmad, and Abū Thawr. The second opinion takes into account the value of the goods as it was on the day of the verdict of insolvency. If it was less than the price, the owner is given a choice between taking them and participating with the creditors in liquidation. If it is more than or equal to the price, he takes the goods. This was Mālik's opinion and that of his disciples. The third opinion considers the average of the value of the goods in both kinds of insolvency (before and after the verdict); if the value equals the price or is less than it, they are delivered to him, that is, the seller, but if it is more, he is paid the price and the remaining is to be included in the liquidation. This opinion was held by a group of traditionists. The fourth opinion is that he shares it along with the creditors in all circumstances. This was Abū Ḥanīfa's opinion and that of the Kūfan jurists.

The basis in this issue is the confirmed tradition from Abū Hurayra that the Messenger of Allāh said, "If a person becomes insolvent, and another man finds his property among his wealth, he has a prior right to it to the exclusion of others". This tradition has been recorded by Mālik, al-Bukhārī, and Muslim, in similar words; the words quoted here are from Mālik. Among them (the jurists) were those who interpreted it in its general meaning. These were the jurists who hold the first opinion. Some restricted it by means of analogy, saying that the underlying meaning is the support for the owner of the goods due to the existence of his goods. The most he can do is to take the price for which he sold it. To participate with the creditors and be paid more than the price is not permitted according to the principles of the law, particularly when the creditors have the right to purchase the goods for the price, as is stated by Mālik. The jurists of Kūfa, on the other hand, rejected this tradition as a whole, as it is their method to reject traditions with single *isnād* (*kahbar al-wāḥid*) when they oppose universally transmitted sources (*mutawātir*), the individual narration being *ẓannī* (probable) while the universally transmitted sources are definitive (*qaṭʿī*), as did ʿUmar when he said in the tradition of Fāṭima bint Qays, "We cannot forgo the Book of Allāh and the *sunna* of our Prophet for the narration of a woman". It is related from ʿAlī that he gave a verdict in favour of the insolvent in the case of goods, which is the opinion of Ibn Sīrīn and Ibrāhīm from among the *Tābiʿūn*. Perhaps they argued that the tradition of Abū Hurayra was disputed, as al-Ẓuhrī related from Abū Bakr ibn ʿAbd al-Raḥmān from Abū Hurayra that the Messenger of Allāh said, "If a man dies or becomes insolvent and if one of the creditors finds his specific goods among his property, it is to be shared among the creditors". This tradition is superior as it corresponds with the established sources of the law. They said that there is a way of reconciliation between the two traditions if interpreted for purposes of deposits and borrowed items (*ʿāriya*). The majority, however, turned down such an interpretation on the basis of that in some versions narrated from Abū Hurayra the term sale is used.

All the above, according to all jurists, relates to the case when the buyer (the insolvent) has taken possession of the goods. The jurists, those of Hijāz and Iraq, are in agreement about the case prior to possession that the owner of the goods has a prior right to them as the liability (for loss) is his. The supporters of this opinion differed when the seller takes possession of part of the price. Mālik said that if he likes he can return what he took and take all the goods, or if he likes he can participate with the creditors in the liquidation of what is left of his goods. Al-Shāfiʿī said that he takes what is left of the goods in proportion to the remaining price. A group of jurists—Dāwūd, Isḥāq, and Aḥmad—said that if he has taken possession of part of the price, he is to share it with the creditors. Their proof is what is related by Mālik from Ibn Shihāb from Abū Bakr ibn ʿAbd al-Raḥmān that the Messenger of Allāh (God's peace and blessings be upon him) said, "If a man sells goods and the person he sold to becomes insolvent when the seller has not taken possession of anything, he has a prior right to the goods on finding them. If the purchaser dies, then the owner of the goods shares with the creditors". Though this tradition is recorded as a *mursal*[175] by Mālik, its (full) chain has been provided by ʿAbd al-Razzāq, and it has been related through al-Zuhrī from Abū Hurayra in a version with an additional text, which is, "If he takes possession of something of his price, it is to be shared with the creditors". It is recorded by Abū ʿUbayd in his book on *fiqh*.

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[175] In the *isnād* of which the name of the Companion has been dropped.

Al-Shāfiʿī's argument is that the goods as a whole or a part of them take the same *ḥukm*. They did not disagree when the buyer consumes (or destroys) part of the goods, the seller has a prior right to the quantity that he finds, except for ʿAṭā who said that if the buyer has consumed some of them, the seller shares with the creditors.

Al-Shāfiʿī and Mālik differed about death, whether the *ḥukm* for it is the same as the *ḥukm* of insolvency. Mālik said the (seller) in the case of death shares with the creditors but not so in insolvency. Al-Shāfiʿī said the situation in both cases is the same. Mālik's reliance is on what is related by Ibn Shihāb from Abū Bakr, which is explicit in this context and also on the rational argument that differentiates between liability in insolvency and death, as the insolvent may gain wealth and the creditors would be able to claim what is left of their dues against him, which is not conceivable in case of death. Al-Shāfiʿī's reliance is on what is related by Ibn Abī Dhiʾb through his *sanad* from Abū Hurayra, who said, "The Messenger of Allāh (God's peace and blessings be upon him) said, 'If a man dies or becomes insolvent, then the owner of the goods has a prior right' ". Thus, he treated, in this tradition, death and insolvency as the same. He (al-Shāfiʿī) said that the tradition of Ibn Abī Dhiʾb is superior to that of Ibn Shihāb as the tradition of Ibn Shihāb is *mursal* while this is *musnad*, and also by way of reason it is wealth in which the owner cannot transact, except after paying off what is due from him, thus resembling the wealth of the insolvent. Mālik's analogy is stronger than that of al-Shāfiʿī, and his tradition (that related by Ibn Shihāb) is preferred over the tradition of Ibn Abī Dhiʾb as it supports the stronger *qiyās*. This is so as among the conflicting traditions, the one which agrees with *qiyās al-maʿnā* is stronger than the tradition which agrees with *qiyās al-shabah*. The analogy that corresponds with the tradition quoted by al-Shāfiʿī is *qiyās al-shabah*, while that corresponding with Mālik's tradition is *qiyās al-maʿnā*. In addition, the tradition quoted by Mālik, though a *mursal* has been recorded by ʿAbd al-Razzāq (with a complete *sanad*). So the reason for disagreement here is the conflict of traditions in this context, and of analogy. Further, the principle supports Mālik's opinion in the case of death, I mean, that one who sells a thing does not have recourse to it. Thus, Mālik comes out stronger in this issue, although al-Shāfiʿī considers Mālik's opinion here as weak, because of his reliance on a *mursal* tradition, which according to al-Shāfiʿī is not to be acted upon (except those of Saʿīd ibn al-Musayyib).

Mālik and al-Shāfiʿī differ about the person who finds his specific property with the insolvent, who has added something to it; for example, he had (agricultural) land in which he planted or a vacant lot in which he constructed.

Mālik said that an addition leads to loss (of a specific right of the seller in it) and he becomes a co-owner in it with the other creditors. Al-Shāfiʿī maintained that, on the contrary, the seller is to be given a choice between paying the value of what the buyer added and taking back the property or taking the principal property and participating with the creditors in the addition. What constitutes a loss (of a right) and what does not in Mālik's school is stated in their well-known books.

The summary of Mālik's opinions about one creditor having a right prior to that of the other creditors, in cases of death and insolvency, or in insolvency to the exclusion of death, is that things sold on credit, for purposes of insolvency, are divided into three kinds: specific goods, disputed things, specified or not, and work that is not determined. If the goods are in the hands of the seller and he does not deliver them till he (the buyer) becomes insolvent, he has a prior right both in the case of death and of insolvency. In this there is no disagreement. If he had delivered them to the buyer, who then became insolvent while they were in his possession, he has a prior right over the creditors in insolvency, and not in the case of death, but they have a right to buy his goods by paying the price. Al-Shāfiʿī said that they have no such right, while Ashhab said that they do not take it, except with the addition for which they pay the insolvent. Ibn al-Mājishūn said that if they like, the price can be paid by them or out of the wealth of the insolvent. Ibn Kināna said that it has to be paid by them. He (the seller) has a prior right to the thing itself in case of death, if it is in the hands of the insolvent, but they disagreed when the buyer gives it back to the seller and then he becomes insolvent or dies, and it still exists identified in the hands of the seller. It is said that he has a prior right to it as in the case of goods in insolvency, but not in the case of death. This is Ibn al-Qāsim's opinion. It is also said that he has no right to it and it is to be shared by the creditors. This is Ashhab's opinion. Both opinions spring from the disagreement about the determination of the *ʿayn*. If it is not determined, it belongs to the common sharing by the creditors.

With respect to work that has not been specified, if the hirer becomes insolvent before the acquisition of the services of the worker, the worker has a prior right to his services both in the case of death and of insolvency, as in the case of goods that are in the hands of the seller at the time of insolvency. If he becomes insolvent after he had fully secured the services of the worker, the worker participates in the liquidation for the creditors for his wages that he (the insolvent) stipulated for him, in the case of insolvency as well as in death, on the basis of the preferred opinion, unless he has in his hands the goods upon which work was to be done, for he then has a prior right to them in both insolvency and death. This is so as they are like a pledge with him. If he delivers them, he shares with the creditors, unless he has produced something out of them to which he then has a prior right in insolvency, but not in death. It is the same with him (Mālik) in the case of insolvency related to one renting animals, if he rents out he has a right to the goods loaded on them in both death and insolvency. Similarly, for one renting out a boat. All this, for Mālik, has a similarity with *rahn* (pledge).

On the whole, there is no disagreement in his (Mālik's) school that the seller has a prior right to what is in his hands in case of insolvency as well as death, and a prior right to his goods existing out of his possession in the case of insolvency, but not in death, and he participates with the creditors in the liquidation if his goods are lost. The case of the worker, according to Mālik's disciples, may resemble that of the seller of a benefit, and may sometime resemble that of the seller of the corpus. They once compared *manfaʿa* (utility) to the work done on the goods, not taken possession of by the buyer, saying that he has a prior right both in the case of insolvency as well as death. On another occasion they compared it to the goods left in his possession that have not expired, saying that he has a prior right to it in insolvency and not death. On yet another occasion they compared it to the case of death where it (the goods) has expired, saying that he participates with the creditors. An example of this is the case of the person hired for watering a palm-grove. He watered it till the fruit grew, but then the hirer became insolvent. It is in this case that they expressed their three opinions.

The comparison of the sale of benefits, under this topic, with the sale of the corpus itself is something that is original, as far as I think, to Mālik's school as compared to the jurists of the provinces. It is, however, weak as *qiyās al-shabah* derived from a distinctive factor in the sources is considered weak. It is for the same reason that analogy constructed upon cases of exemptions is considered weak by some. Yet *qiyās al-ʿilla* is more legitimate here and is stronger. Perhaps the Mālikites claim the existence of this meaning in analogy, but (further discussion of) all this is not suitable for a precis like this.

To this topic also belongs their disagreement about the insolvent slave authorized (*maʾdhūn*) to trade. Is the debt (created by him) to be met from the sale of his person? Mālik and the jurists of Hijāz maintained that the claim for the debt is to be satisfied from what he possesses, and not through his sale. Then, if he should be freed, the remaining is to be claimed. A group was of the view that he is to be sold, while another group held that the creditors are to be granted an option of selling him or making him work for what remains of the debt. This was the opinion of Shurayḥ. A group said that what he owes is the liability of his master, even if he did not stipulate this. Those who did not favour his sale said that he transacted with people on the basis of what he possessed and, therefore, resembles a freeman. Those who upheld his sale compared his acts with the offences he commits. Those who maintained a recourse to his master, for whatever debt he owes, held his wealth to be similar to the wealth of his master, as he has a right to whatever he holds. The reason for disagreement here is the conflict in analogies of *shabah* in this issue.

A relevant question here is the issue of a slave and his master when they become insolvent at the same time; from whom should the claim be made first? Is it to be commenced with the debt of the slave or with the debt of the master? The majority said that it is (to commence) with the debt of the slave, as those who granted credit to the slave did so on seeing the wealth possessed by him; whereas those who gave credit to the master did not rely on the wealth of the slave. Those who uphold commencement with the master argued that the wealth of the slave is in fact that of the master. The reason for the disagreement is the vacillation of the slave's wealth between taking the *ḥukm* of a stranger's wealth or the *ḥukm* of the master's wealth.

It is maintained in the school with respect to the amount of wealth that is to be left with the insolvent that it should be a sum with which he, his family, and his minor children can survive for some days. It is stated in *al-Wāḍiḥa* and *al-ᶜUtbiyya*: (that it should be sufficient for) a month or so, and (an amount sufficient for) clothing, in conformity with his status, is (also) to be left for him. Mālik suspended judgment about his (the insolvent's) wife's clothing due to the question whether her clothing is incumbent with compensation or without compensation. Saḥnūn said that the cost of her clothing is not to be left for him. Ibn Rāfiᶜ related from Mālik that nothing is to be left with him (for clothes) except what will cover his modesty, which was also the opinion of Ibn Kināna. They disagreed about *sharīᶜa* books into two opinions based on whether it is *makrūh* (disagreeable) to sell books of *fiqh*.

For the identification of debts, because of which liquidation for distribution among the creditors is undertaken, as against those for which there is no liquidation in Mālik's opinion, they (the debts) are divided first into two kinds. First, those that are due in return for a counter-value. Second, those that are due without any counter-value. Those due for a counter-value are divided into debts in which the counter-value has been taken possession of, and those in which the counter-value has not been possessed. With respect to debts in which the counter-value has been possessed, whether it is wealth or damages for an offence, there is no disagreement that liquidation for the creditors is obligatory due to them.

Those (debts) that are for a counter-value, which is not possessed, are divided into five kinds. First, when it is not possible to pay the counter-value in any circumstances, as in the case of maintenance of wives, that is, carried over from an earlier period. Second, when the payment of a counter-value is not possible, but something in return is, from which it can be recovered. For example, a person hires a house for cash, when the customary practice is to pay cash for it, and he (the hirer) subsequently becomes insolvent before he has resided in the house or after he has resided in it for a short while, but prior to the payment of rent. Third, when it is possible to pay the counter-value and it is binding, like the payment of the capital of *salam*, but the *muslam ilayh* becomes insolvent before the payment of the capital. Fourth, when it is possible to pay the counter-value, but is not binding, like goods, if they are bought and the buyer becomes insolvent before the seller has delivered them. Fifth, when there is no requirement of immediate delivery of the counter-value, for example, a man makes an agreement to make an advance payment to another (*salam*) in *dīnārs* for goods deliverable after a period, but the *muslim* becomes insolvent before he has made the payment and prior to the termination of the period.

The debts in which the payment of the counter-value is not possible in any circumstances, there is no liquidation in them, except in the case of dowers of wives if the husband becomes insolvent prior to consummation. About those in which the payment of the counter-value is not possible, but it is possible to deliver something in return from which it can be recovered, like the hirer becoming insolvent prior to the payment of rent (in *dīnārs*), it is said that the person letting out on hire can participate in the liquidation for the entire rent after giving possession of the house to the creditors, while it is also said that he has no more than participation for the period of residence and he takes possession of his house; if the person did not reside at all he gets nothing and just takes possession of his house.

In the case where it is possible for him to pay the counter-value and it is binding on him, which happens when the counter-value is an *ʿayn*, it is said that the creditors participate with him in its liquidation and he delivers it, while it is said that he has a prior right to it and on that basis he is not obliged to deliver the counter-value. In the case where it is possible to deliver the counter-value, but is not binding, he has an option to participate or to keep it, this also happens when the counter-value is an *ʿayn*. In the case where there is no requirement for immediate delivery of the counter-value, like the insolvency of the *muslim* before he has paid the capital and prior to the termination of the period of the *salam*, if the *muslam ilayh* consents to make prompt delivery and to participate with the creditors for the capital of *salam*, it is permitted if the creditors also agree. If one of the creditors refuses, the creditors participate in the liquidation of the capital that is due to him, as far as the debtor has wealth, and also in the goods that are due from him if the period is over for they belong to the insolvent; if they wish to sell them for cash and then share in the liquidation they have a right to do so.

In the case of the obligatory rights arising without a counter-value, those among them that are not obligatory under the law, but are so by contract (voluntary commitment), like gifts and charities, there is no liquidation because of them. Regarding the rights obligatory under the law, like the maintenance of parents and children, there are two opinions. First, that liquidation is not obligatory due to them, which is the opinion of Ibn al-Qāsim. Second, they render liquidation obligatory if they have been made binding by the order of the *sulṭān*, which is Ashhab's opinion.

The fifth point in the discussion is the mode of liquidation. The *ḥukm* in this is that the wealth of the debtor be liquidated in accordance with the species of the creditors' claims, irrespective of the fact that the wealth of the creditors was composed of a single or of different species, for what is required must be of the same species as that of the debt, unless they agree to accept it in another permissible thing.

Within this topic, they disagreed about unexpected contingencies, like the destruction of the interdicted wealth, after interdiction and prior to possession by the creditors, as to who is liable for (the loss from) the calamity. Ashhab said that the liability is on the insolvent. Ibn al-Mājishūn said that the liability is on the creditors, if it (the liquidation) was suspended by the sulṭān. Ibn al-Qāsim said the portion that needed to be sold is the liability of the debtor, as it was being sold through his ownership, while that which did not require sale is the liability of the creditors, for example, when the wealth constitutes an *ᶜayn* and the debt constitutes an *ᶜayn*. All of them related their opinions from Mālik. Aṣbagh distinguished between death and insolvency, saying that in case of a calamity after death, the liability is on the creditors, while in insolvency it is on the insolvent.

All this is the discussion about the insolvent, who has wealth to meet his debts. About the insolvent who does not have any wealth at all, the jurists are agreed that the absence of wealth is effective in the discharge (postponement) of debts till the time of his sufficiency, except what is related from ᶜUmar ibn ᶜAbd al-ᶜAzīz that they have the right to hire his services. Aḥmad, among the jurists of the provinces, held this opinion.

All of them agree that when the debtor feigns insolvency, the truth of which is not known, he is to be imprisoned till his veracity is established or his insolvency is acknowledged by the creditors, in which case he is released. It is related from Abū Ḥanīfa that the creditors have the right to follow him around wherever he goes. All of them agreed about the validity of imprisonment in the case of debts, though no authentic tradition is available for it, but it is something necessary for securing the people's rights from each other. This is evidence for those who uphold the principle of *maṣlaḥa*, which has been called *al-qiyās al-mursal*. It is related that the Prophet (God's peace and blessings be upon him) imprisoned someone on suspicion. It has been recorded, as far as I recall, by Abū Dāwūd. Those interdicted, according to Mālik, are the prodigal, the insolvents, slaves, the (seriously) ill, and the wife if she made a bequest for more than one-third, as the husband has a right in (her) wealth, but the majority have opposed him in this.

This suffices in pursuance of our purposes in this book.

XL

THE BOOK OF *ṢULḤ* (SETTLEMENT; NEGOTIATION)

The source for this book are the words of the Exalted: "*Ṣulḥ* (Peace) is better",[176] and what has been related from the Prophet (God's peace and blessings be upon him) as *marfūᶜ*[177] and *mawqūf*[178] up to ᶜUmar: "Making a settlement between Muslims is permitted, except the settlement that legalizes a prohibited thing or prohibits a legal thing." The Muslim jurists agreed over its permissibility (validity) in the case of acknowledgement (or confession), but they disagreed about its permissibility in the case of denial. Mālik and Abū Ḥanīfa said that it is permissible even in the case of denial, while al-Shāfiᶜī said that it is not permitted in case of denial as it amounts to the (endorsement of the) unjust devouring of wealth without compensation. The Mālikites say that it does carry compensation, and leads to the suspension of litigation and the removal of the obligation for an oath from the person (denying).

There is no dispute in Mālik's school that for the settlement, which occurs in the case of acknowledgement, the same conditions that are required in sale are to be observed. It is invalidated by the same factors that invalidate sale, from among the kinds of *fasād* specific to sales, and it becomes valid with the same conditions of validity. The examples for this are a person (who first) makes a claim on another for *dirhams* and then settles with him after he has acknowledged the claim in *dīnārs* with a delay as well as whatever resembles it from among sales invalidated due to the implication of *ribā* or *gharar*.

The well-known narration from Mālik and his disciples about settlement in the case of denial is that the conditions of validity of sales are observed in it (otherwise settlement is not valid). For example, a person makes a claim against another in *dirhams* and upon his denial settles with him in *dīnārs* with a delay. This is not permitted according to Mālik and his disciples. Aṣbagh said it is permitted, as the reprehensible act in it is only from one party, the claimant, as he admits the taking of *dīnārs* with a delay in place of *dirhams* that were permissible for him. He maintains about the person paying that it is a gift from him.

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[176] Qurᵓān 4:128

[177] Attributed to and raised up (in the chain) to the Prophet.

[178] This means that the *isnād*, through which a *ḥadīth* is related, stops at the Companion.

If there is a commission of a reprehensible act from both sides, as for example each one of them claims *dirhams* or *dīnārs* from the other and each denies it, but subsequently settle that each will delay whatever the other party claims for a period, then, this is *makrūh*, according to them. The abomination is due to the fear that each one of them may be truthful and each has delayed his claim in exchange for delay by the other, thus, entering the (prohibited) transaction "you delay for me and I will delay it for you". The reason for its permissibility, on the other hand, is the claim by each one of them that what he had done was a gift from him and there was nothing due from him. Such sales, it is said, are permissible if they occur. Ibn al-Mājishūn said that they are to be rescinded if they occur, immediately after the contract, but if prolonged for a long time they take effect.

The settlement that incorporates what is not permissible in sales is, in Mālik's school, divided into three kinds: settlement that is rescinded by agreement (of the jurists); settlement that is rescinded with some disagreement; and settlement that is not rescinded if prolonged, there being a disagreement when it is not prolonged.

XLI
THE BOOK OF *KAFĀLA* (SURETY)

The jurists disagreed about the kinds of *kafāla*, its duration, the *ḥukm* that is binding due to it, its conditions, the description of its obligations, and (the description of) its subject-matter. It has different names: *kafāla, ḥamāla, ḍamāna,* and *zaʿāma.*

It has two kinds: *ḥamāla biʾl-nafs* (bail, surety for the person), and *ḥamāla biʾl-māl* (surety for wealth, property). *Ḥamāla biʾl-māl*, is established through *sunna* and is agreed upon among the first generation and also among the jurists of the provinces. It is related from a group that it is not binding due to its resemblance with *ʿidda*, but this is an isolated opinion. The *sunna* on which the majority relied in this respect were the words of the Prophet, "The *zaʿīm* is liable (for the loss)". The majority of the jurists agree about the legality of *ḥamāla biʾl-nafs*, which is also known as *ḍamān al-wajh*[179] when it occurs due to a financial claim. It is related from al-Shāfiʿī, in his latest opinion, that it is not permitted, which was also the view of Dāwūd.

Their proof is the words of the Exalted, "Allāh forbid that we should seize save him with whom we have found our property".[180] They also argued that *kafāla biʾl-nafs* resembles (that is, amounts to) a surety for *ḥudūd* (penalties). The proof of those who permitted it is the general (unrestricted) implication of the words of the Prophet (God's peace and blessings be upon him), "The *zaʿīm* is liable (for the loss)". They also argued that an interest (*maṣlaḥa*) is secured through it, and that its validity is said to have been held by the first generation.

About its binding effect, the majority, who uphold surety of the person, agree that if the principal dies within the jurisdiction where surety is furnished the surety for his person is not liable, yet it is narrated that some have upheld the obligation for loss. Ibn al-Qāsim distinguished between the cases when the principal dies being present (in the jurisdiction) and when he is absent (from this area). He said that if he dies when present, the surety is not liable at all. If he dies in absence, the case is to be examined further. When the distance between the two towns is such that it is possible for the surety to deliver the person, in the stipulated period like two or three days, if he (the surety) is negligent, he is liable otherwise not.

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[179] *Wajh* literally means 'face'. It is used figuratively to denote the person as it is the most respected part of the individual. Thus, it signifies his credit worthiness.

[180] Qurʾān 12:79

They disagreed about the *ḥukm* of the surety for the person in the absence of the principal, maintaining three opinions. First, that it is binding on him to deliver him, otherwise he bears the loss. This is the opinion of Mālik, his disciples, and the jurists of Medina. The second opinion is that the surety is to be imprisoned *till* he arranges to *deliver* him or *till the death* of the principal becomes known. This is Abū Ḥanīfa's opinion and that of the jurists of Iraq. The third opinion is that he has no option but to deliver the principal, if he knows his whereabouts. This implies that he is not to bear the burden of delivering the principal, except with the condition of knowing his whereabouts and having the ability to deliver him. If the claimant alleges that the surety knows his whereabouts, when the surety denies this, the burden of proof is on the claimant. They said that the surety is not to be imprisoned, unless the whereabouts of the principal are known, in which case he is to be compelled to deliver him. This opinion is related by Abū ᶜUbayd al-Qāsim ibn Sallām, in his book on *fiqh*, attributing it to a number of jurists, and he has preferred it.

Mālik's proof is that since the principal is liable to the owner of the right (the aggrieved person), the surety is, therefore, to be liable for the loss when he disappears. Perhaps they (Mālik and his supporters) argued on the basis of what is related from Ibn ᶜAbbās, "A man asked his debtor to pay him his money or provide him with a surety. He was unable to do either till the matter was brought up for arbitration to the Prophet (God's peace and blessings be upon him). The Prophet (God's peace and blessings be upon him) stood surety for him and then paid the amount due". They said that this indicates liability in *ḥamāla* without any restrictions.

The jurists of Iraq said that it is obligatory on him to deliver the principal, as that for which he stood surety was his person and he is under no obligation to convert this into a financial liability, unless he had committed himself to do so, as the Prophet (God's peace and blessings be upon him) has said, "The Believers (should) abide by their conditions". It is, thus, obligatory on him to deliver him (the principal) or to be imprisoned in return, just as when he stands surety for property, he delivers it or is imprisoned for it; the situation is similar in the case of surety of the person. The reliance of the other party (jurists) is on the fact that it is binding upon him to deliver him, if delivering him is possible for him, for he will be imprisoned if he does not do so. If it is known that delivering him is not possible, such delivery is not obligatory on him, just as if the principal were to die, it would not be obligatory on him to deliver him. They said that it is more likely for one who stands surety for the person and incurs financial liability to be a victim of deception rather than being the deceiver himself. If, however, he has stipulated surety of the person and not a financial liability, having expressly said so, then Mālik says that he is not liable financially; and there is no dispute in this, as far as I know, for that would amount to an obligation contrary to what he had stipulated. This is all about the *ḥukm* of surety for the person.

The jurists are in agreement about the *ḥukm* of surety for property that in the absence or disappearance of the principal the surety is liable. They disagree over the case in which the surety and the principal are present and both are financially stable. Al-Shāfiʿī, Abū Ḥanīfa and his two disciples, al-Thawrī, al-Awzāʿī, Aḥmad and Isḥāq said that it is up to the claimant to hold either the surety or the principal liable. Mālik said, in one of his opinions, that he has no right to hold the surety liable in the presence of the principal; and he has another opinion like that of the majority. Abū Thawr said that surety for the person and surety for property are the same and one who stands surety for property on behalf of an individual is liable for it; the principal is absolved and it is not permitted that a single claim be split into two. This was also the opinion of Ibn Abī Laylā and Ibn Shubrama. The proof of those who maintain that the claimant is allowed to claim from the surety, whether the principal is absent or present, is rich or in financial straits, is the tradition of Qabīṣa ibn al-Mukhāraqī, who said, "I stood surety (for someone) and came up to the Prophet (God's peace and blessings be upon him) to ask him about it. He said, 'We shall take it out of the camels of the *ṣadaqa* on your behalf. It is not allowed except in three cases . . .' and he mentioned the case of a man who stands surety for someone till he pays it off. The point of the argument in this is that the Prophet (God's peace and blessings be upon him) permitted the demand (from the *ṣadaqa*) without taking into account the situation of the principal.

The subject-matter of *kafāla* is wealth, according to the majority of the jurists, due to the words of the Prophet (God's peace and blessings be upon him), "The surety is liable (as a debtor)", that is, surety for property as well as surety for the person. This is so irrespective of whether the wealth is claimed due to property or arises due to the *ḥudūd*, like the payment due in case of manslaughter (*qatl khaṭaʾ*) or composition in intentional murder or theft, in which the liability is not for amputation, being the case of theft of a lesser value than the *niṣāb*, or for something else. The permission for bail in *ḥudūd* and *qiṣāṣ* is related from Abū Ḥanīfa, or in *qiṣāṣ* to the exclusion of the *ḥudūd*. This is also the opinion of ʿUthmān al-Battī, that is, about surety for the person.

The jurists agreed that the time of obligation of the insured amount, that is, of asking him to produce a surety, arises after the establishment of the right against the principal, either by acknowledgement or by evidence. With respect to the time of obligation in bail, they disagreed whether it is binding before the establishment of the right. A group said that it is binding prior to the establishment of the right for any plausible reason. This is the opinion of Shurayḥ, the *qāḍī* and of al-Shaᶜbī; it was also upheld by Saḥnūn from among the disciples of Mālik. A group said that it is obligatory at the time of the establishment of the charge, but they differed as to when exactly and for what duration, it is binding. A group said that if he comes up with a strong defence, like a witness, it is necessary that he be asked to provide a bail till his claim is clarified otherwise granting of bail is not binding, unless he mentions evidence to be found in the (same) province, in which case he is granted bail for five days to a week. This is the opinion of Ibn al-Qāsim; from among the disciples of Mālik.

The jurists of Iraq said that bail is not to be accepted prior to the establishment of the charge against him unless he claims the existence of evidence within the province, as in the opinion of Ibn al-Qāsim; however, they limited the duration to three days saying that if he comes up with a good defence it is necessary that bail be granted to him till such time that his claim is accepted or dismissed. They denied any distinction between the person who claims the existence of evidence that is available and between the person who claims it about missing evidence. They said that bail is not to be accepted for anyone except in the case of evidence that will lead to the truth of his claim or its falsity. The reason for this disagreement is the disparity of fairness between the two litigants. If he is not asked to provide bail on the mere lodging of the complaint, there is no guarantee that he will not disappear thus causing hardship for the claimant and if he is asked to provide bail there is no guarantee that the complaint will be be found to be false causing a hardship for the defendant. It is for this reason that they made a distinction between a claim for evidence that is available and that in which it is missing.

It is related from ᶜArāk ibn Mālik, who said, "A group of Bedouins with some saddle-beasts came in. Two men had accompanied them (on the way) staying the night with them. On waking up in the morning, they found a number of camels missing. The Messenger of Allāh (God's peace and blessings be upon him) said to one of the (two) men, 'Go and find them' and he confined the other person. He, then, came back with what was missing. The Messenger of Allāh (God's peace and blessings be upon him) said to one of the men, 'Pray for my forgiveness'. The man said, 'May Allāh forgive you' . He replied, 'And you, may Allāh forgive you and make you strive in His way' ". This tradition has been recorded by Abū ᶜUbayd in his book on *fiqh*. He said, "It does not appeal to me, as confinement is not necessary by the mere lodging of a complaint. It is, it seems to me, from the category of surety for a claim that is not due when there is doubt due to their staying with them (for that reason)".

There is very little disagreement over the categories of principals. They disagreed about the surety for the deceased who was under debt and did not leave enough for its satisfaction. Mālik and al-Shāfiʿī permitted it, but Abū Ḥanīfa said it is not allowed. Abū Ḥanīfa argued that surety is not to be associated with someone not present, which is unlike the case of the insolvent. Those who were of the view that surety is necessary argued on the basis of the report that the Prophet (God's peace and blessings be upon him) in the early period of Islam did not perform (pray) the funeral service of the deceased who had left a debt, till an undertaking was given. According to the majority the surety of one imprisoned or absent is valid, it is not valid according to Abū Ḥanīfa.

Under the conditions of *kafāla*, Abū Ḥanīfa and al-Shāfiʿī stipulate the consent of the principal in order for the surety to have a recourse to him for demanding a refund for what he had paid on his behalf. Mālik does not stipulate this. According to al-Shāfiʿī, surety for an unknown person (or a thing) is not allowed nor for a claim that is not yet due. All this, however, is binding and permitted according to Mālik and his disciples. In response to the question in what things *ḥamāla* is permitted, as against that in which it is not, Mālik and his disciples said that it is permitted in everything that can be established as a liability, except *kitāba*, that in which delay is not allowed and that in which the dues accrue in parts like the maintenance of wives and what resembles it.

XLII

THE BOOK OF *ḤAWĀLA* (TRANSFER OF DEBT; ENDORSEMENT)

Ḥawāla is a valid transaction, exempted from (the prohibition of) exchange of a debt for a debt, due to the words of the Prophet (God's peace and blessings be upon him), "Procrastination by the wealthy is unjust, and when one of you is transferred (the claim for his debt) to a wealthy person he should accept (the transfer)". The discussion here relates to an examination of its conditions and its *ḥukm*.

Related to the conditions is their dispute about the consent of the *muḥāl* (original creditor) and the *muḥāl ʿalayh* (transferee). Among the (disputing) jurists is one who took into account the consent of the creditor, but not the endorsee, and he is Mālik. Among them is he who stipulated the consent of both at the same time; and then there is one who did not take into account the consent of the transferor, but considered the consent of the transferee, which is the opposite of Mālik's opinion. This was Dāwūd's opinion.

Those who considered it as a bilateral transaction, took into account the consent of both, but those who considered the transferee in the same position as the transferor (debtor or *muḥīl*) did not take into account his consent, just as they did not take into account (the consent of) the transferor along with the creditor, if he should demand from him his due before its transfer to anyone. The proof in Dāwūd's view is the apparent meaning of the words of the Prophet (God's peace and blessings be upon him), "When one of you is transferred (the claim) for his (debt) to a wealthy person, let him follow (agree)". The command here indicates obligation (*wujūb*) (for the other two), while the transferee has been left in his original position, which is the stipulation of his consent.

Among the conditions, which they generally agreed upon, is that what is due from the transferee should be the same as that due from the transferor, both in amount and description. There are those among them (the jurists), however, who permitted it (*ḥawāla*) in gold and *dirhams* alone and disallowed it in food. Those who prohibit it (in food) are of the view that it amounts to the sale of food before taking possession, as the transferor here sells the food that was due to him from his debtor (before receiving it) for the food due to his creditor from him. Mālik allowed this when the two kinds of food are both loans (with a period), when the debt of the creditor is immediate. If, however, one of them is (the debt of) *salam*, it is not allowed, unless the two debts are immediate. According to Ibn al-Qāsim, and others from among Mālik's school, this is permitted if the debt of the transferee is immediate. Al-Shāfiʿī did not make these distinctions as it is like sale through the liability of the debtor. Mālik made an exemption in the case of *qarḍ*, as the sale of a *qarḍ* is permitted, according to him, prior to possession. Abū Ḥanīfa, on the other hand, permitted *ḥawāla* in food, comparing it to *dirhams* (money), and rendered it as exempt from the *general* principles as in the exemption of *ḥawāla* in *dirhams*. The issue turns on whether analogy can be constructed upon what is exempt from the principles. The issue is well known in *uṣūl al-fiqh*.

Ḥawāla has three conditions according to Mālik. First that the debt of the creditor (*muḥāl*) should be due immediately; if it is not due immediately, it amounts to the exchange of a debt for a debt. Second, that the debt being transferred should be similar to the debt to which it is transferred in amount and description. If they differ in either (way), it amounts to sale, not *ḥawāla*, for it has then moved out of the category of an exemption to the category of sale; when it moves to the category of sale, it becomes an exchange of a debt for a debt. The third condition is that the debt should not be in food related to *salam*, (either both) or one of them, and according to the opinion of Ibn al-Qāsim the delay of a transferred debt is not permitted. When both debts belong to *salam*, *ḥawāla* of one for the other is not permitted irrespective of whether the periods have terminated, or whether one of them is terminated and not the other, as it amounts to the sale of food prior to possession, as we indicated. Ashhab, however, says that if their capitals are equal, *ḥawāla* is permitted and it amounts to *tawliya* (friendly sale), but Ibn al-Qāsim does not uphold this, as in the case when they are unequal.

The creditor occupies the position of the debtor (transferor) in the debt to which his claim has been transferred, along with his position in his claim because of which it has been transferred. This is for purposes of what he desires to take as a counter-value for it, or to sell it for something else, I mean, it is not permitted to him to take other than what was permitted to him with respect to the transferor and what was permitted to the transferor with respect to the transferee. An example of this is when his claim for food, due to him from a *qarḍ*, is transferred to food due from *salam*—or for food due from *salam* to food due from *qarḍ*; it is not permitted to him to sell it to another before taking possession of it. If his claim is transferred to a claim for *qarḍ* due to a claim from *salam*, he descends into the position of the debtor in so far as it was not permitted to him to sell anything that was due from his debtor before taking possession of it, as it is food related to sale. If his claim has been transferred to food due on account of *salam* for food due on account of *qarḍ* he moves into the position of the transferee with respect to the transferor, I mean, just as it was not permitted to him to sell food that was still with his debtor, the transferor, prior to taking possession, similarly, it is not permitted to him to sell the food to which his claim has been transferred, even when it was from *qarḍ*. All this is held in Mālik's school and the evidence for these distinctions is rather weak.

The majority of the jurists maintain, about its *aḥkām*, that *ḥawāla* is the opposite of *ḥamāla*, to the extent that when the transferee becomes insolvent, the creditor has no recourse to the *muḥīl* for anything. Mālik and his disciples maintain that this is so unless the debtor has deceived him (by transferring his claim) to someone destitute. Abū Ḥanīfa said that the creditor has recourse to the debtor if the transferee dies an insolvent or denies the *ḥawāla*, even when he does not have proof. This was also the opinion of Shurayḥ, ʿUthmān al-Battī and a group of jurists. The reason for their disagreement is the similarity of *ḥawāla* with *ḥamāla*.

XLIII

THE BOOK OF *WAKĀLA* (AGENCY)

In this book there are three chapters. The first chapter is about the elements of agency, which covers the study of the subject-matter and the principal. The second is about the *aḥkām* of agency. The third is about the differences (which may arise) between the principal and the agent.

43.1. Chapter 1: The Elements of Agency

This relates to the study of the subject-matter of agency, the principal, and the agent.

43.1.1. Element 1: The Principal (*Muwakkil*)

They agreed about the constitution of agency by someone absent, the sick, and a woman, who exercises authority over their own affairs. They disagreed about the constitution of agency by a male who is present and has full capacity. Mālik said that agency by a male who is present and has full capacity is valid. This was also al-Shāfiʿī's opinion. Abū Ḥanīfa said agency by a person with full capacity who is (himself) present is not permitted, nor is agency constituted by a woman, unless she is an outgoing person.

Those who were of the view that in principle the acts of a person are no substitute for those of another, unless required by necessity—upon which there is consensus (*ijmāʿ*)—held that representation of someone, about whose representation there is disagreement, is not permitted. Those who maintained that this is originally permitted said that agency is permitted in each legal transaction, except in those things about which there is agreement that agency in them is not valid, like the *ʿibādāt* (ritual worship) and whatever resembles them.

43.1.2. Element 2: The Agent (*Wakīl*)

The condition for the agent is that he should not be legally prohibited from disposal of the thing for which he has been constituted an agent. Thus, it is not permitted to appoint as agent a minor or an insane person; likewise, appointment of a woman is not valid according to Mālik and al-Shāfiʿī for the contract of marriage. Al-Shāfiʿī added that it is neither valid directly nor indirectly, that is, when she appoints someone who would conclude the contract of marriage. According to Mālik, it is permitted through a male (with full capacity).

43.1.3. Element 3: The Subject-Matter of Agency

The condition for the subject-matter of agency is that it should be suited to delegation, like sale, *ḥawāla*, compensation (*ḍamān*), all other contracts and revocations, partnership, agency, *ṣarf*, *jiʾāla*, *musāqah*, divorce, marriage, *khulʿ*, and composition (*ṣulḥ*). It is not permitted in physical (acts of) worship, but is allowed in worship involving finances, like *ṣadaqa*, *zakāt*, and *ḥajj*. It is permitted, according to Mālik, in litigation involving acknowledgement and denial. Al-Shāfiʿī said, in one of his opinions, that it is not permitted in acknowledgement, which he compared with testimony and oath. *Wakāla* is permitted, according to Mālik, for securing satisfaction in penalties, while al-Shāfiʿī allows it in the presence of the principal in one of his opinions. Those who said that *wakāla* is valid in acknowledgement differed about absolute *wakāla* in litigation whether it includes acknowledgement. Mālik said it is not included, while Abū Ḥanīfa said it is.

43.1.4. Element 4: The Contract of

Wakāla may become a binding contract through offer and acceptance, like the rest of the contracts; however, it is not a binding contract but is a permissible (terminable) contract in the light of what we are going to explain in the chapter on the *aḥkām* of this contract. It (*wakāla*) is of two types according to Mālik: general and special. General agency is constituted, according to him, through a general delegation in which nothing specific is mentioned, but if it is it would not convey generality and delegation in his view. Al-Shāfiʿī said that general agency is not valid as it involves *gharar*, but whatever is specifically mentioned and distinguished is valid. This is better analogy as the basis in it is prohibition, except that on which there is consensus.

43.2. Chapter 2: The *Aḥkām* of Agency

Among the *aḥkām* are those related to the contract and those related to the acts of the agent. The contract, as we have said, is not a binding contract. It is for the agent to terminate the agency whenever he likes, according to all, but Abū Ḥanīfa stipulates in this the presence of the principal. It is for the principal to remove him (the agent) whenever he likes, except when it is a *wakāla* for litigation, they said. Aṣbagh said that he may do this except when the final verdict is about to be issued. The agent may not dismiss himself in a situation where it is not permitted to the principal to dismiss him. The presence of the contestant is not necessary for the conclusion of this contract, according to Mālik and al-Shāfiʿī, but Abū Ḥanīfa said that it is a condition. Similarly, the presence of the principal for the confirmation of agency before the judge is not a condition according to Mālik. Al-Shāfiʿī said that it is.

Mālik's disciples differed, into two opinions, on whether *wakāla* is terminated by the death of the principal. If we say that it is terminated by (his) death as it is by dismissal, then, at what time does the agent stand dismissed and the agency terminated, according to the school, with respect to the rights of the person who deals with him? There are three opinions. First, it is revoked with respect to everyone through death and dismissal. Second, it is terminated with respect to each depending on (the communication of) knowledge (of death or dismissal). Thus, for the person who has come to know about it, it is terminated as far as he is concerned, but it is not if he does not know. Third, it is terminated with respect to the person who deals with the agent, by knowledge reaching the agent, even if he does not know about it himself. It is not terminated with respect to the agent, by virtue of the knowledge of the person who deals with him, as long as the agent does not come to know, but he who delivers something to him after knowledge of dismissal is liable for it as he has delivered it to one whom he knows not to be the agent.

The *aḥkām* for the agent include widely known issues. The first arises when he has been constituted an agent for sale—is it permitted to him to buy for himself? Mālik said it is permitted, but it is also related that he said it is not. Al-Shāfiʿī said it is not permitted. Mālik holds the father and the executor to be in the same position (neither should buy for himself a property belonging to the child under his guardianship). An issue arises when he is appointed through an absolute agency. According to Mālik, it is not permitted to him to sell, except at the current rate and for the currency prevalent in the land. It is not allowed if he sells on credit, or for currency other than that used in the land, or at a rate that is not current. The same is the ruling, according to him, in the case of purchase.

Abū Ḥanīfa made a distinction between sale and purchase of a specified commodity. He said that it is permitted in sale that he sell at a rate that is not current, and also on credit. He did not permit it, however, when he is made an agent for the purchase of a particular slave, that he buy at a rate other than the one current or on credit. It appears that Abū Ḥanīfa made a special distinction in the case of agency for the sale of a particular thing; his argument is that just as a man may sell a thing at a rate lower than the current rate and on credit for a good reason that he recognizes in it all, the same should be the *ḥukm* for the agent, as he has occupied his position. The opinion of the majority, however, is clearer.

The agent must compensate any damage caused by his transgression, according to those who consider it a transgression. When the agent purchases a thing, intending the purchase for the principal, the ownership is transferred to the principal instantly. Abū Ḥanīfa said that it is transferred to the agent first and then to the principal. If the agent pays a debt on behalf of the principal and has not taken evidence, the agent is liable when the creditor denies settlement.

43.3. Chapter 3: The Disputes of the Principal and the Agent

The disagreement of the agent with the principal can arise in the case of loss of the property remaining with the agent, or about its return to the principal, or about the price at which he has sold or purchased when he was ordered to sell at a fixed price, or it could be about the commodity (*mathmūn*) itself, or it could be about the identification of the person whom he had instructed to make payment, or it could be due to a claim from a tort.

When they disagree about the loss of property, with the agent saying that he has lost it, and the principal saying it is not lost, the acceptable statement is that of the agent if he had taken possession of it without evidence. If the property was acquired from one of the debtors of the principal and the debtor did not take witnesses, he will not be absolved through the acknowledgement of the agent, according to Mālik, and will be held liable once again. Does the debtor in this case have recourse to the agent? There is disagreement over it. If, however, it was acquired with evidence, he is absolved and the agent is not liable for any of it.

When they disagree about delivery—the agent saying "I have delivered it to you" and the principal says, "No!"—it is said that the acceptable statement is that of the agent, and it is said that the acceptable statement is that of the principal, while it is also said that if the two statements were widely different, the acceptable statement is that of the agent. In the case of their disagreement about the price at which he was ordered to sell, Ibn al-Qāsim said that if the goods are not lost, the acceptable opinion is that of the buyer, but if they are lost the statement is that of the principal. It is also said that both take oaths, then the sale is revoked and they withdraw—on the basis of value when the goods are lost. If their disagreement is about the price at which he was ordered to sell, then, according to Ibn al-Qāsim, the acceptable statement is that of the principal, as he considered the payment of the price equivalent to the loss of goods in purchase.

When they disagree about the person to whom payment was to be made, there are two opinions in the school. The well-known opinion is that the acceptable statement is that of the person ordering, while it is said that the acceptable statement is that of the person ordered. When the agent has committed an act that amounts to a tort, claiming that the principal asked him to do it, the well-known opinion is that the acceptable statement is that of the principal, while it is also said that the acceptable statement is that of the agent that the principal ordered him to do it, because he is a trusted agent.

XLIV

THE BOOK OF *LUQṬA* (FOUND PROPERTY)

The discussion of *luqṭa* is undertaken in two chapters. The first is about its elements and the second about its *aḥkām*.

44.1. Chapter 1: The Elements of *Luqṭa*

It has three elements: *iltiqāṭ* (taking into custody), *multaqiṭ* (the finder) and *luqṭa* (found property).

The jurists disagreed whether taking into custody was to be preferred over relinquishment. Abū Ḥanīfa said that it is better to possess it, as it is obligatory on a Muslim to preserve the property of his brother Muslim. This was also the opinion of al-Shāfiʿī. Mālik and a group of jurists maintained the abomination of taking into custody, which is attributed to Ibn ʿUmar and Ibn ʿAbbās and is also Aḥmad's opinion. This is based on two factors. First, on the report that the Prophet (God's peace and blessings be upon him) said, "(Taking the) stray animals of a believer is (to lead to) burning in fire". Second, the fear of failure to announce it and declare publicly that it is in his keeping, as well as the fear of transgression. Those who preferred taking into custody interpreted the tradition saying, "He meant the intention to benefit from it and not for purposes of public notification". A group of jurists said that, on the contrary, taking (such things) into custody is obligatory.

It is said that this disagreement arises when the property is found in the territory of trustworthy people and the ruler is just. They said that even when the property is found among an unreliable people, but the ruler is just, taking into custody is obligatory. If the property is among reliable people and the ruler is an oppressor, it is better not to take into custody. If it is found among a people who are unreliable and the ruler is unjust, he (the finder) has an option in accordance with what he feels to be more likely of the two probabilities for the safety of the found property.

All this is about property found outside of the *ḥajj* season. The jurists agreed that it is not permitted to take custody of property found in the vicinity of the *ḥajj* area due to its prohibition by the Prophet. The taking into custody of found property in Mecca is also not allowed, except by the proclaimer (crier), because of the occurrence of a text about this. Two versions are reported in this. First, that it is not to be taken to someone other than the crier. The second is that it is not to be taken by anyone except the crier. Mālik said that these two kinds of found property are to be proclaimed publicly.

The *multaqiṭ* (the finder) can be any free Muslim major, as this is a case of *wilāya* (guardianship). From al-Shāfiʿī there is a disputed opinion about the permissibility of custody by a non-believer. Abū Ḥāmid said that the preferred opinion is its permissibility in the *dār al-Islām*. He said, "About the legal capacity of the slave and the *fāsiq* there are two opinions from him, the reason for prohibition is the absence of the capacity of *wilāya* and the reason for permissibility is the generality of the traditions of *luqṭa*".

Luqṭa, in general terms is the property of any Muslim that is exposed to loss, whether it is in inhabited or in a waste area; inanimate objects and animals are the same for this purpose, by agreement (of the jurists), except camels. The basis for found property is the tradition, which is agreed upon for authenticity, of Yazīd ibn Khālid al-Juhanī, who said, "A man came to the Messenger of Allāh (God's peace and blessings be upon him) and asked him about found property. He said, 'Make known its tying ropes and strings and continue to do so for one year, either the owner comes or you may do what you like with it'. Yazīd asked, 'If it should be stray sheep, O Messenger of Allāh?' He replied, 'They are either for you or your brother or for the wolves'. He said, 'Stray camels?' He replied, 'What have you to do with them? They have their own water skins and their shoes! (Leave them alone) to go around drinking from pools and eating tree-leaves till their owner meets with them' ". This tradition includes the identification of what is to be taken into custody and what is not and the identification of the way of dealing with what is taken into custody for a year and after it and how the claimant is to establish a right to it. They agreed that camels are not to be taken into custody and they agreed about sheep (*ghanam*) that they are taken into custody. They wavered about cows. The textual report from al-Shāfiʿī is that they are like camels, while that from Mālik is that they are like sheep, though there is disagreement (reported) from him.

44.2. Chapter 2: Public Proclamation

With respect to the *ḥukm* of notification, the jurists agreed about the notification of that which has a value for a year, as long as it was not cattle. They disagreed about its *ḥukm* after (the passing of) one year. The jurists of the provinces—Mālik, al-Thawrī, al-Awzāʿī, Abū Ḥanīfa, al-Shāfiʿī, Aḥmad, Abū ʿUbayd and Abū Thawr—agreed that when the year had passed he (the person taking them into custody) had a right to consume it if he was poor and to give it as charity if he was not so. If the owner turned up, he had the option to ratify the charity and gain its spiritual reward or to hold him liable for it. They disagreed in the case of the rich person, whether he had the right to consume it or give it away after one year. Mālik and al-Shāfiʿī said that he had the right (to do either), while Abū Ḥanīfa said that he has no option but to give it in charity; opinions like his have also been attributed to ʿAlī, Ibn ʿAbbās and to a group of the *Tābiʿūn*. Al-Awzāʿī said that if the wealth is considerable, he remits it to the treasury (*bayt al-māl*). Opinions like those of Mālik and al-Shāfiʿī have been related from ʿUmar, Ibn Masʿūd, Ibn ʿUmar and ʿĀʾisha. All of them, except for the Ahl al-Ẓāhir, agreed that if he consumes it, he has to compensate its owner (if the latter turns up).

Mālik and al-Shāfiʿī argued on the basis of the words of the Prophet, "you may do what you like with it", without distinguishing between the rich and the poor. Among their proofs is what has been related by al-Bukhārī and al-Tirmidhī from Suwayd ibn Ghafla, who said: "I met Aws ibn Kaʿb, who said, 'I found a purse containing a hundred *dīnārs*. So I went up to the Prophet (God's peace and blessings be upon him) who said, "'Proclaim it for a year'". I proclaimed it for a year, but did not find anyone. I then went to him thrice and he said, "'Preserve the purse and its string, in case its owner emerges, otherwise enjoy it'". Al-Tirmidhī and Abū Dāwūd recorded the words, "Spend it".

The reason for disagreement is the conflict between the apparent meaning of the traditions of *luqṭa* and the principle of the *sharʿ*, which is that the wealth of a Muslim is not permissible (*ḥalāl*) for anyone else to use or consume without his voluntary consent. Those who assigned more weight to this principle over the apparent meaning of the tradition—which are the words of the Prophet after notification of a year, "Do what you like with it"—said that its disposal is not permitted except by way of charity alone, on the assumption that if the owner of the *luqṭa* turns up and does not ratify the charity he will indemnify it. Those who assigned more weight to the apparent meaning of the tradition over the principle, considering it an exemption from that principle, said that it is permissible to him after a year and it is then regarded as a part of his wealth; he will not indemnify it even if the owner appears. Those who found a middle course said that he can dispose of it after a year even if it is an *ʿayn*, on the condition of indemnification.

They agreed about the *ḥukm* of delivery of found property, to the person who claims it, that it is not be delivered to him unless he identifies the tokens (ropes and strings). They differed when he identifies these, as to whether he needs additional evidence. Mālik said that he has a right to it by (the description of) the tokens and is not in need of evidence. Abū Ḥanīfa and al-Shāfiʿī said that he is not entitled to it except through evidence.

The reason for disagreement is the conflict between the principle of stipulating evidence for the validity of the claim, on the one hand, and the apparent meaning of the tradition on the other. Those who preferred the principle said that evidence is a must; whereas those who preferred the tradition said that he is not in need of evidence. The stipulation of evidence by al-Shāfiʿī and Abū Ḥanīfa is due to their interpretation of the words of the Prophet (God's peace and blessings be upon him), "Know (or keep) the ropes and strings, either the owner appears or you may do what you like with them". They said that these are simply distinctive signs of the found property so that it does not get mixed up with others in his custody, or they imply that he asked him to deliver it to the owner along with the ropes and strings. (In other words, the purpose of the *multaqiṭ*'s knowing them is not by way of proof to facilitate identification by the claimant). Thus, when ambiguity arises recourse to the original principle is necessary. The principles cannot be challenged by opposing probabilities, unless an addition is authenticated, which we shall mention later.

According to Mālik and his disciples, the owner of the *luqṭa* has to describe, along with the bags and strings, the description of the *dīnārs* and their number. They said that this is present in some of the versions of the tradition, which read, "If the owner appears and describes the bag and the string and their number, then deliver it (the property) to him". They maintained that ignorance as to their number does not go against him if he has correctly described the bag and string; similarly, it does not if he mentions a greater number. They disagreed, into two opinions, when he mentions a lower number, or when he is ignorant of the description (of the *dīnārs*), but describes the bag and the string. If, however, he makes an error in the description (of the bag and string), there is nothing for him. When he makes an error in one of the two tokens mentioned in the text, but is ignorant of the other, it is said that there is nothing for him unless he mentions them together, while it is also said that he delivers it to him after declaring himself absolved; it is said that if he acknowledges ignorance, he is absolved, but when he makes an error, nothing is to be delivered to him. There is disagreement in the school when he mentions the entitling tokens, whether to deliver to him (the found property) with an oath or without an oath. Ibn al-Qāsim said that it is (to be delivered) without an oath, while Ashhab said that it is with an oath.

The jurists agreed about stray *ghanam* that their finder in a deserted spot, away from settlement, is entitled to consume them on the basis of the words of the Prophet, "They are for you, or your brother, or for the wolves". They disagreed whether he is to compensate their owner (if he should appear) for their value. The majority of the jurists said that he is liable for the value, while Mālik said in the best-known opinion of his that he is not liable. The reason for the disagreement, as we have said, is the conflict of the apparent meaning of the tradition with a known principle of the *sharīʿa*, except that Mālik in this case preferred the apparent meaning and pursued the *ḥukm* of the apparent meaning. Similarly, he did not permit disposal of the found property which must be proclaimed (even) after a year, due to the strength of the tradition here. There is another narration from him that he is liable, as in the case of perishable food about which he is afraid that it will be destroyed if left. The conclusion from the opinions of Mālik, according to his disciples, is that it (found property) is of three kinds: a kind that is likely to be secure in the hands of the *multaqiṭ*, but in which there is fear of loss if left, like things (*ʿayn*) and goods; a kind that is not in his custody, but is (also) going to perish if left, like goats in deserted places or food that will decay; and a kind in which there is no fear of loss.

The first kind that is secure in the hands of the possessor and is likely to be lost if abandoned, is divided into three types. First, that which is trivial having no significance and is of negligible value and it is obvious that the owner will not care for it due to its triviality. This is not to be notified, according to him (Mālik) and it belongs to the finder. The basis for this is the report "that the Messenger of Allāh (God's peace and blessings be upon him) passed by dates lying on the road and said, 'Had they not belonged to the *Ṣadaqa*, I would have eaten them'. He did not mention notification in this case". This category consists of things like a walking-stick and a whip, though Ashhab preferred their notification. Second, are those that are trivial, though they have some significance and utility. There is no dispute in the school about their notification. They disagreed about the duration of such notification. It is said that it is made for a year and it is said that it is for some days. Third, is that which is substantial or has value. There is no dispute about the necessity of its notification for a year.

With respect to the second kind, which will not subsist in the hands of the *multaqiṭ* and is bound to perish if left, the finder can consume it whether he is rich or poor. Does he compensate (if the owner claims it)? There are two narrations in this, as we have said, the well known being that there is no liability. They disagreed when he finds that which is likely to be overcome by decay (even) within the town. It is said that there is no liability in this and it is said that there is liability in it. A distinction is also made between giving it as charity—in which case there is no liability—and between consuming it, for which there is liability. In the third kind, which includes camels, (Mālik's) preference in it is that they be left alone due to the relevant text, but if he takes them into custody, notification is obligatory. The preference is relinquishment and it is maintained in the school that this (ruling) is general for all times, while it is said that it applies to times of justice. It is better, however, to take such things into custody in times of injustice.

In the indemnification of that which is notified, the jurists agreed that the person who takes custody in the presence of witnesses does not have to compensate if the thing perishes in his custody. They disagree when he does not take witnesses. Mālik, al-Shāfiʿī, Abū Yūsuf and Muḥammad ibn al-Ḥasan said that there is no liability on him when there is no negligence on his part, even if he did not take witnesses. Abū Ḥanīfa and Zufar said that he is liable if he did not take witnesses. Mālik and al-Shāfiʿī argued that *luqṭa* is a deposit (*wadīʿa*) and the absence of witnesses does not move it from (the category of) trust to liability. They said that it is a deposit on the basis of what is related in the tradition of Sulaymān ibn Bilāl and others, who said that "if the owner comes (deliver it) otherwise let it be a deposit with you". Abū Ḥanīfa and Zufar argued on the basis of the tradition of Muṭarrif ibn al-Shikhīr from ʿIyāḍ ibn Ḥimār, who said, "The Messenger of Allāh (God's peace and blessings be upon him) said, 'He who takes custody of a *luqṭa* must take two reliable (*ʿadl*) witnesses and should not conceal it or cause hardship. If the owner appears he has a right to it, otherwise it is wealth from Allāh and He may give it to whom he wishes".

The conclusion in the school about this is that the finder of a *luqṭa*, according to Mālik, may be motivated to take custody by one of three reasons: first, that he takes it for the purpose of *ightiyāl* (devouring, conversion); second, that he takes it for *iltiqāṭ*; third, that he takes neither for *iltiqāṭ* nor for conversion. If he takes custody by way of *iltiqāṭ*, it is a trust with him and he is obliged for its safe custody and notification. If he returns it after taking custody, then, according to Ibn al-Qāsim, he is liable. Ashhab says that he is not liable if he leaves it at the same spot, but if he leaves it at another spot, he is liable as in the case of a deposit. His statement is acceptable about its loss, without an oath, unless he is suspected. If he takes it with the intention of conversion he is liable, but in this case his intention is known only to him (and to Allāh). The third aspect relates to cases like finding a dress and taking it thinking that it belongs to his own people. In this case, if none of his people recognizes it or claims it, it is for him to return it where he found it without any liability on him, by agreement among Mālik's disciples.

Related to this topic is an issue over which the jurists disagreed. It is the case of a slave who destroys a *luqṭa*. Mālik said that it is related to the property rights over him, either the owner surrenders him in return for it or redeems him by paying its value. This is the case when the loss occurs before the end of the year (*ḥawl*), but if he destroys it after one year it becomes a debt on him and is not related to the property rights over him. Al-Shāfiʿī said that if the owner knows about this, he is liable, but if he does not know about it, it is related to property rights over him (the slave).

They disagreed whether the *multaqiṭ* has recourse to the owner for what he has spent over the *luqṭa*. The majority said that the custodian of the *luqṭa* is providing a voluntary service and thus has no recourse to the owner for anything. The Kūfīs, on the other hand, said that he does not have a recourse for what he incurred, unless it is with the permission of the judge (*ḥākim*). This issue is among the *aḥkām* of *iltiqāṭ*. This exposition is sufficient for our purposes under this topic.

44.3: Chapter 3: The *Laqīṭ* (Foundling)

The discussion is about the *aḥkām* of *iltiqāṭ*, the *multaqiṭ* and about the *laqīṭ* (foundling) and its *aḥkām*. Al-Shāfiʿī said that taking custody of everything exposed to waste, with no one to secure it, is a collective (communal) obligation (*farḍ kifāya*). About the obligation of taking witnesses, out of fear that it may lead to enslavement, there is a dispute. The dispute is based upon the differences about the taking of witnesses in the case of *luqṭa*.

The *laqīṭ* (foundling) is a minor child, who has not attained puberty. When the child is a discriminating minor (*mumayyiz*), there is vacillation about it in al-Shāfiʿī's school. The *multaqiṭ* in this case may be any free, reliable and sane person, who is not a slave or a *mukātab*. A non-believer may only take charge of a non-believer to the exclusion of a Muslim, as he cannot be a guardian over him, but a Muslim can take charge of a non-believer. A foundling is to be retrieved from the custody of a *fāsiq* and a spendthrift. Wealth is not a required condition for taking custody, nor is the (proper) maintenance by the custodian binding on him, if he has spent there is no recourse for him.

With respect to the *aḥkām*, he is assigned the *ḥukm* of a Muslim, if taken into custody within the *dār al-Islām*. A child follows the religion of his father if he is a Muslim in Mālik's view and according to al-Shāfiʿī the child is a Muslim when the religion of either of its parents is Islam. This was also the opinion of Ibn Wahb from among Mālik's disciples.

They disagreed about the status of the foundling. Some said that he is the slave of one who takes him into custody, while it is said that he is free with his *wilāya* belonging to the person who takes custody. It is also said that he is free with the *wilāya* belonging to the Muslims, which is Mālik's opinion and for which the sources bear out unless there be a restricting source like the words of the Prophet (God's peace and blessings be upon him), "A woman inherits from three persons: her foundling, her manumitted slave and her child who is free from blame".

XLV

THE BOOK OF *WADĪ^c^A*
(DEPOSIT; BAILMENT)

Some of the outstanding issues discussed by the jurists of different regions in this book are related to the *aḥkām* of *wadī^c^a*. Among them is their agreement that it is a trust not subject to liability, except what has been related from ^c^Umar ibn al-Khaṭṭāb.

The Mālikites said that the proof of its being a trust is that Allāh has commanded the restoration of trusts without requiring the taking of witnesses. It is, therefore, necessary to accept the claim of the bailee (trustee) about the return of the deposit along with his oath when the bailor (depositor) denies it. They said that unless he has made the deposit in the presence of witnesses, the statement accepted cannot be that of the bailor (depositor). They maintained that if he delivers it to him in the presence of witnesses, it is as if he has trusted him for safe-custody and not for its return, he (the trustee) will, therefore, be believed in his claim of loss rather than in his claim of returning it. This is what is well known from Mālik and his disciples.

It is said, on a report from Ibn al-Qāsim, that the acceptable statement is that of the bailee, even if he (the bailor) has delivered it to him in the presence of witnesses. This was also the opinion of Abū Ḥanīfa and al-Shāfi^c^ī and it is based on *qiyās* (analogy) as a distinction is made between a claim for loss and the claim of restoration, and it is not likely that a trust can be split up (into parts). All this relates to the delivery of the trust (back) to the person who made the deposit.

With respect to the delivery of the trust to a person other than one who made the deposit, he (the trustee) is to procure evidence, which is the same as that required of the guardian of an orphan, according to Mālik, otherwise he is liable. The words of the Exalted require: "And when ye deliver up their fortune unto orphans, have (the transaction) witnessed in their presence". If the person (allegedly) taking possession denies the possession, the trustee is not to be believed without evidence, according to Mālik and his disciples. It is said that the derived opinion in the school is that he is to be believed, and it is the same for Mālik whether or not the owner of the deposit ordered the delivery of the trust to whom it was allegedly delivered. Abū Ḥanīfa said that if he claims to have delivered to one to whom he was ordered to deliver, the acceptable statement is that of the trustee with his oath.

If the person to whom delivery was made acknowledges the deposit (delivery), that is, if he is someone other than the depositor and he claims loss (of the deposit), the trustee has either delivered to him on trust, when he is the agent of the trustee, or on his own responsibility. If the acceptor is a reliable person, the opinion of Ibn al-Qāsim differs. He said once that the person making the delivery is absolved through the acknowledgement of the acceptor, and the liability is on the person giving the order and his agent for possession. He said another time that the person delivering the possession is not absolved except by adducing evidence of delivery or by the possessor coming up with the property.

When he delivers it to him on his responsibility, for example a man says to the trustee, "Deliver it to me as an exchange for goods or something similar". If he retains his credit worthiness the person delivering is absolved, in the opinion of the school without dispute, but when the legal capacity in terms of credit has become defective, there are two opinions in it.

The cause of all this disagreement is that a trust strengthens the claim of the plaintiff so that his statement is accepted along with his oath. Those who considered the *amāna* of the depositor equivalent to the *amāna* of the person for whom the depositor ordered delivery, that is, the agent, said that the acceptable statement is his in his claim as is the case with the claim of the trustee. Those who considered this *amāna* to be weaker said that the person making the delivery is not absolved through the confirmation of the person taking the delivery in a claim for loss.

Those who consider that the person giving the order is in the same position as the one receiving it, said that the acceptable statement is that of the person making the delivery to the *maʾmūr*, just as his statement was accepted with respect to the person giving the order. This is the opinion of Abū Ḥanīfa. Those who consider him (the agent) as weaker than the principal said the trustee is liable unless the person taking possession produces the property.

When he makes a deposit with the condition that he will be liable, the majority maintain that he is not liable, while others hold that he is. On the whole, the jurists collectively maintain that the trustee is not liable, unless he transgresses, and they differed in different cases whether the act amounted to transgression. A well-known issue in this topic is when he utilizes the deposit and then returns something identical, or utilizes it for his expenditure and then restores it. Mālik said that liability is removed from him, in the case of identical property, when he returns it, while Abū Ḥanīfa said that if he returns the property itself before spending it, he does not compensate, but if he returns something identical, he is liable. ʿAbd al-Mālik and al-Shāfiʿi said that he is liable in both cases. Those who portray the act as wrong hold him liable for it just for moving it with the intention of spending it, while those who made an exemption do not hold him liable when he returns something identical.

A point of disagreement is travelling with the deposit. Mālik said that he has no right to travel with it unless he has been given the deposit on a journey. Abū Ḥanīfa said that he may do so if the road is safe and the depositor has not prohibited him from doing so. Another issue is that the trustee does not have the right to entrust the deposit of another to someone else, without an excuse, if he does this he is liable. Abū Ḥanīfa said that if he entrusts it to someone for whom maintenance is obligatory on him, he is not liable as they are the same as his family. According to Mālik, he has a right to entrust what has been entrusted to him to members of his family, those whom he trusts and who are under his authority like his wife, child, *ama*, and those who resemble them.

On the whole, by collective agreement, it is obligatory on him to protect the deposit in accordance with the practice of the people in protecting their properties. They agreed upon what was obviously the right manner of protection, but disagreed about that which was not so obvious, like their disagreement about the person who put the deposit in his pocket and it was lost. The well-known opinion is that he is then liable for it. According to Ibn Wahb, one who was given a deposit in the mosque and he placed it upon his shoes and it was lost, there is no liability for him. They disagree about his liability arising due to forgetfulness, like forgetting where he kept it or forgets who deposited it with him, like two persons claiming the same thing. It is said that they take oaths and it is divided between them. It is also said that he compensates each one of them. When he desires to go on a journey, according to Mālik, he has to deposit it with a trustworthy person in the land and there is no liability for him irrespective of his being able to deposit it with the judge. The disciples of al-Shāfiʿī differed in this. Some of them said if he deposited it with someone other than the *ḥākim*, he is liable.

Acceptance of a deposit, according to Mālik, is not obligatory at all, but there are jurists who hold that it is obligatory when the depositor cannot find anyone else with whom he can make the deposit. There is no compensation for the trustee, according to him (Mālik), for safeguarding the deposit, but whatever he requires with respect to residence or expenditure, it is the responsibility of the depositor.

They disagreed under this topic about a well-known issue regarding the person who is given a deposit and he transgresses in it, using it for trade and making a profit. Is this profit permitted (*ḥalāl*) or prohibited (*ḥarām*)? Mālik, al-Layth, Abū Yūsuf, and a group said that if he returns the property, the profit is proper for him, though he was a usurper besides being a trustee. Abū Ḥanīfa, Zufar, and Muḥammad ibn al-Ḥasan said that he is to pay back the principal and give away the profit as charity. A group said that both the principal and the profit belong to the owner of the deposit. Another group said that he has an option between the principal and the profit. Yet another group said that the sale occurring in this trade is void. They made charity of the profit obligatory in the case of his death. Those who took into consideration the transaction said that the profit is for the person undertaking the transaction, while those who considered the principal said that the profit is for the owner of the capital. It is for this reason that when ʿUmar, may Allāh be pleased with him, ordered his sons, ʿAbd Allāh and ʿUbayd Allāh, to return the money which Abū Muṣā al-Ashʿarī had loaned out of the *bayt al-māl* with which they traded and made a large profit, it was said to him, "If only you had given it as *qirāḍ*". He complied with this, as one part of the profit would go to the worker and the other part to the owner of the capital, and this was fair.

XLVI

THE BOOK OF ᶜ*ĀRIYA* (COMMODITY LOAN)

The discussion of ᶜ*āriya* (commodity loan) relates to its elements and *aḥkām*. It has five elements: *iᶜāra* (lending), *muᶜīr* (lender), *mustaᶜīr* (borrower), *muᶜār* (thing lent), and *ṣīgha* (the form of the contract: offer and acceptance).

Iᶜāra is a benevolent act that is recommended. A group from among the earliest ancestors emphasized it vigorously. It is related from ᶜAbd Allāh ibn ᶜAbbās and ᶜAbd Allāh ibn Masᶜūd, both saying about the words of the Exalted, "yamnaᶜūn al-māᶜūn", that these are utensils in the house that people exchange among themselves like hatchets, buckets, ropes, pots and what is similar to them. There is no other condition for the *muᶜīr* (lender) other than that he should be the owner of the thing lent (ᶜ*āriya*), either its corpus or its usufruct. The preferred view is that it is not proper on the part of the borrower, that is, to lend it.

Commodity loans are granted in houses, land, animals, and in anything that can be identified by its substance as long as it has a permissible utility. It is, therefore, not permitted to allow the lending of slave-girls for sexual gratification, and borrowing of a woman's services are considered abominable, unless the person is a consanguine relation (*maḥram*).

The form (*ṣīgha*) of *iᶜāra* consists of any word that indicates consent. It is a permissible (*jāʾiz*: terminable at will) contract according to al-Shāfiᶜī and Abū Ḥanīfa, that is, it is for the lender to recall his loan whenever he likes. Mālik said in his well-known opinion that he does not have right to withdraw it prior to utilization. If he stipulates a duration, such a duration is binding on him. If he does not stipulate a duration, a duration that is considered reasonable by people for such a loan is binding on him. The reason for this disagreement is its similarity to the binding and permissible contracts.

There are many *aḥkām* related to it. The best known of its problems is whether it is a liability or a trust. Among them (the jurists) were those who said that it is a liability even when evidence can be adduced for its loss. This is the opinion of Ashhab, al-Shāfiᶜī and one of the opinions of Mālik. Among them are those who held the opposite of this, that is, it is not a liability at all. This is Abū Ḥanīfa's opinion. Some said that he is liable for what is concealed from him, when there is no evidence for proving loss, but he is not liable for what is not concealed from him, nor in that for which evidence is adduced showing loss. This is Mālik's opinion, as well as the opinion of Ibn al-Qāsim and of the majority of his (Mālik's) disciples.

The reason for disagreement is the conflict of traditions on the issue. It has been related in a confirmed tradition that the Messenger of Allāh (God's peace and blessings be upon him) said to Ṣafwān ibn Umayyah: "But it is an *ʿāriya*, a liability to be returned". In some versions he said: "But it is an *ʿāriya* to be returned". It is also related from him (God's peace and blessings be upon him) that he said: "There is no liability on the borrower". Those who preferred and accepted this dropped liability from it, while those who adopted the tradition of Ṣafwān ibn Umayyah held him liable. Those who attempted to the reconcile them made a distinction between what is concealed from view and what is visible. The tradition, however, which says that "There is no liability on the borrower", is not widely known (*mashhūr*), while the tradition of Ṣafwān is *saḥīḥ*.

Those who did not favour liability, compared *ʿāriya* to *wadīʿa*, while those who made a distinction said that *wadīʾa* is accepted for the benefit of the person making the deposit; whereas *ʿāriya* is for the benefit of the recipient. They agreed—I mean al-Shāfiʿī, Abū Ḥanīfa and Mālik—about *ijāra* (hire) that it carries no liability (for loss). Al-Shāfiʿī having held that there is no liability in hire, must accept that there should be no liability in *ʿāriya*, especially when it is accepted that the basis of liability is utilization of benefits; because if he was not liable when he took possession for the mutual benefit of both lender and beneficiary, it is appropriate that he should not be liable when he takes possession for his own benefit alone, if the (deletion of the) benefit of the person making the delivery is effective in negating liability.

They disagreed when liability is stipulated as a condition. A group of jurists said that it makes him liable, while another group said that he is not liable and the condition becomes void. It is deduced from Mālik's opinion that if he stipulates liability as a condition on an occasion when liability is not imposed on him, it necessitates the payment of a reasonable rent for the *ʿāriya*, as this condition removes *ʿāriya* from the *ḥukm* of *ʿāriya* and moves it to that of a void *ijāra*, the owner not having consented to loan it with the exclusion of liability. It amounts to an unknown compensation and must, therefore, revert to a known rule.

The opinions of Mālik and al-Shāfiʿī differ when the borrower plants or constructs (in the land) and the term of the loan expires. Mālik said that the owner has an option, he can ask the borrower to uproot his plantation and demolish the construction, or he may give him the value that his work will have after demolition. It makes no difference, according to Mālik, whether the duration is terminated by condition, by custom, or by practice. Al-Shāfiᶜī said that if he did not stipulate uprooting, he cannot demand it; on the contrary, the lender has an option to let it stay after making payment to him or to destroy with damages or to possess with a *badal* (counter-value); whatever the lender chooses to do the borrower will be compelled to comply. If he refuses, he will be required to vacate the property. The borrower, in his view, does not have the right to demolish the addition for sale of the rubble as he opposes demolition; and the borrower's demand to destroy the addition without damages amounts to injustice. Mālik held that the vacation of the place is his responsibility, and that what is customary is to be regarded as a condition.

According to Mālik, if he uses the loaned property in a way that reduces its value, he is liable for the reduction (caused). They disagreed under this topic about a person who asks his neighbour to lend him his wall so that he may insert a beam in it (for his roof) in a way that does not injure the neighbour; and generally, anything by which the borrower benefits and it does not injured the lender (is valid). Mālik and Abū Ḥanīfa said that this is not to be enforced by the court, as *ᶜāriya* is not subject to judicial action, while al-Shāfiᶜī, Aḥmad, Abū Thawr, Dāwūd and a group of the traditionists said that it may be imposed by the court.

The proof of the latter is what has been recorded by Mālik from Ibn Shihāb from al-Aʾraj from Abū Hurayra that the Messenger of Allāh (God's peace and blessings be upon him) said: "None of you should prevent his brother from laying a beam on his wall". Abū Hurayra added: "What is this that I see you opposing it, by Allāh, it will be thrust between your shoulder blades". They also argued on the basis of what has been related by Mālik from ᶜUmar ibn al-Khaṭṭāb that al-Daḥḥāq ibn Qays wanted to run a canal through land. They decided that it should pass through the land of Muḥammad ibn Maslama, so he asked him to let him through, but Muḥammad still refused. Al-Daḥḥāk said to him: "You forbid me when it is beneficial for you too, you can be the first and the last to water from it and it will not harm you. Muḥammad still refused. So al-Daḥḥāk spoke to ᶜUmar ibn al-Khaṭṭāb about it. ᶜUmar summoned Muḥammad ibn Maslama and ordered him to let him through. Muḥammad said: 'No!' ᶜUmar said to him: 'Do not forbid your brother what benefits him and does not harm you'. Muḥammad said: 'No!' ᶜUmar, then, said to him: 'By Allāh we will run it through even if it is over your (dead) body'". Umar asked him to go through with it and al-Daḥḥāk complied. Similar is the tradition of ᶜAmr ibn Yaḥyā al-Māzinī from his father that he said: "In the grove of my grandfather there was the harvest for ᶜAbd al-Raḥmān ibn ᶜAwf, so he decided to move it toward the side of the next grove, but the owner of the grove forbade him. He talked to ᶜUmar ibn al-Khaṭṭāb, who decided in favour of ᶜAbd al-Raḥmān ibn ᶜAwf for moving it".

Al-Shāfiʿī blamed (*ʿadhala*) Mālik for including these traditions in his *al-Muwaṭṭa*ʾ and not using them. The reliance of Mālik and Abū Ḥanīfa is on the words of the Prophet (God's peace and blessings be upon him): "The wealth of a Muslim cannot become lawful (for use), except by his voluntary consent". According to the others the generality of this has been restricted by these traditions, particularly by the tradition of Abū Hurayra. According to Mālik it is to be interpreted as a recommendation (not an obligation) and whenever a tradition is capable of restricting (the general) and it also consists of a recommendation, interpreting it to mean recommendation is better, because assigning the particular meaning to the general is necessary when reconciliation and removal of conflict is not possible. Aṣbagh has related from Ibn al-Qāsim that the ruling of ʿUmar in the case of Muḥammad ibn Maslama about the canal is not to be followed, but his ruling in the case of ʿAbd al-Raḥmān ibn ʿAwf for moving the harvest may be followed. He was of the view that moving of the harvest was more tolerable as compared to making a path that was not there before. This suffices for our purpose.

XLVII

THE BOOK OF *GHAṢB* (USURPATION)

In this book there are two chapters. The first is about liability (*ḍamān*), which has three elements (*arkān*). First, the causes giving rise to liability. Second, things in which liability arises. Third, the obligation. The second chapter is about the unexpected contingencies affecting the usurped property.

47.1. Chapter 1: Liability in Usurpation

47.1.1. Element 1

The cause of liability is the commission of the act of acquiring the usurped property or of causing its destruction or loss, or it is the bringing about of the cause that leads to loss, or it is the establishment of possession over the property.

They disagreed about the cause, the bringing about of which, leads to liability, when loss has occurred through another (direct) cause. Does it lead to liability? This, for example, is like opening the cage of a bird, which flies away after it is opened. Mālik said he is liable irrespective of his shooing it away. Abū Ḥanīfa said that he is not liable in any circumstances. Al-Shāfiʿī made a distinction between whether he shooed it away or he did not. He said that he is liable if he shoos it away, but he is not if he did not. Within this issue is also the digging of a well so that something falls in it and perishes. Mālik and al-Shāfiʿī said that if he dug it in a manner that amounts to a tort, he is liable for what is lost in it, otherwise he is not liable. It appears through the principle of Abū Ḥanīfa, in the case of the bird, that he is not liable.

Is intention stipulated as a condition for the commission of the act? The well-known opinion is that wealth is to be compensated whether destroyed intentionally or by mistake, though they did differ in the subsidiary issues under this topic. Is it also stipulated that his act be voluntary. It is known about al-Shāfiʿī that he stipulated voluntary conduct and, therefore, imposed liability on the coercer, I mean the coercer causing loss.

47.1.2. Element 2

Things in which compensation is obligatory include each thing whose substance he destroys, or perishes in the possession of the usurper due to a natural calamity, or passes into the possession and ownership of another. This, by agreement, is in things that are movable and transformable. They disagreed about things that are immovable and cannot be transformed like real estate. The majority said they are to be compensated in case of usurpation, I mean, when a house is razed its value becomes due. Abū Ḥanīfa said they are not to be compensated. The reason for their disagreement is whether the possession of the usurper over immovables is the same as his possession over movable and transformable things. Those who rendered their *ḥukm* as one said that they are compensated, while those who did not consider it the same said that there is no compensation.

47.1.3. Element 3

This relates to the obligation (*liability*) in usurpation. The obligation of the usurper, when the property exists with him in substance without mesne profits or loss, is its restitution. There is no disagreement in this. When the substance has perished, they agreed that if it is (property that is) measured or weighed, the usurper is liable for identical property, I mean identical to what has perished in description and weight.

They disagreed about chattel (*ʿurūḍ*). Mālik said that the verdict assigned in the case of chattel including animals and other things is to be nothing but the value on the day of destruction. Al-Shāfiʿī, Abū Ḥanīfa and Dāwūd said that the liability in this is for identical property. Recourse to payment of value is made only when the an identical property is non-existent. Mālik's reliance is upon the well-known tradition of Abū Hurayra from the Prophet (God's peace and blessings be upon him), which reads: "If one who sets free a slave in whom he has a share, he is obliged to pay the value of the remainder through fair valuation". The point of the argument in this is that he (the Prophet) did not oblige him for identical property, but for its value.

The reliance of the other group is upon the words of the Exalted, "Whoso of you killeth it of set purpose he shall pay its forfeit in the equivalent (*mithl*) of that which he hath killed, of domestic animals"[181] and also on the argument that it is the utility of a thing that is the desire of one transgressed upon. Among their proofs is what is recorded by Abū Dāwūd of the tradition of Anas and others "that the Messenger of Allāh (God's peace and blessings be upon him) was with some of his wives and one of the Mothers of the Believers sent a maid with a large bowl of hers in which there was food". He said, "She

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[181] Qurʾān 5:95

(one of the wives) struck it with her hand and the bowl broke. The Prophet (God's peace and blessings be upon him) took the two pieces and pressed them against each other and placed all the food in it saying, 'Your mother is jealous, eat! eat!' till such time that her sound dish was brought from her house. The Messenger of Allāh (God's peace and blessings be upon him) kept the bowl till they had finished eating when he delivered the sound dish to the maid. He kept the broken one in his house". In another tradition it is said "that ʿĀʾisha was the one who felt jealous and broke the utensil and it was she who said to the Messenger of Allāh, 'What is the penalty for what I have done?' He said, 'A utensil identical to that utensil and food identical to that food' ".

47.2. Chapter 2: Contingencies

The unexpected happenings affecting the usurped property and causing an increase or loss, are either from creatures or from the Creator. In case of loss occurring through a natural calamity, the owner can either take it back with the loss or hold him liable for the value as on the day of usurpation. It is said that he has a right to take it back and hold the usurper liable for the value of the defect (caused). If the loss is caused through a wrongful act of the usurper, the person wronged has an option, in Mālik's school, to hold him liable for the value as it was on the day of usurpation or to take it with the value of the defect with Ibn al-Qāsim saying that the value of the defective property is what it was on the day of the tort and Saḥnūn saying it is the value of the defect on the day of usurpation. Ashhab held that he has an option to hold him liable for the value or to take it with the defect and there is nothing for him on account of defect caused through a natural calamity. This was also the opinion of Ibn al-Mawwāz.

The reason for this disagreement is that those who considered the usurped property a liability of the usurper on the basis of value as it was on the day of usurpation considered any resulting increase or decrease in it as if it had taken place under valid ownership, thus, holding him liable for revenue, but not for loss whether it was caused by him or was an act of God. This is deduced from the opinion of Abū Ḥanīfa and, generally, from the opinion of those who hold him liable for value on the day of usurpation only. Those who hold the usurped property to be a liability of the usurper and consider it be his as long as he has possession over it, impose upon him the highest value and make him liable for the restitution of revenue and compensation of loss, irrespective of whether it is caused by his act or by an act of God. This is the opinion of al-Shāfiʿī or a deduction from his opinion. Those who distinguish between a damage caused by the usurper and the damage resulting from an act of God, which is Mālik's well known opinion and also of Ibn al-Qāsim—

and his reliance is upon *qiyās al-shabah*—maintain that the wrongful act of the usurper upon the thing usurped is a second usurpation repeated by him, as if he committed a tort upon it when it was in the possession of its owner. This is the point of disagreement under this topic, so let it be known.

If the tort is committed when it is in the possession of the usurper, but is not the act of the usurper, the owner of the property has an option either to hold the usurper liable for the value as it was on the day of usurpation, with the usurper prosecuting the offender, or to let go the usurper and to prosecute the offender under the rules of torts. This is the *ḥukm* of a tort committed on the property in the possession of the usurper.

Torts committed upon things, when the tortfeasor has usurped them, are divided in Mālik's view into two types. First, torts that do away only with a negligible utility, with the major function of the thing subsisting. The liability in this is for compensating the loss with its value on the day of the tort. This is done by valuation in its sound state and its valuation after the tort, the difference being paid. If the tort destroys the major purpose of the thing, the owner has the option to deliver it to the offender and charge its value, or to charge the value of the damage caused by the offender. Al-Shāfiʿī and Abū Ḥanīfa said that he has nothing besides the value of the damage caused. The cause of disagreement is the comparison with the case of the usurper and holding similar the loss of the major function as the loss of the thing itself.

Growth is divided into two types. First, when it is an act of God, like a minor growing into maturity or the weak becoming stronger or the defect being removed. Second, when it is brought into being by the usurper. With respect to the first, it involves no loss. The growth that is brought into being by the usurper, however, is divided, as reported by Ibn al-Qāsim from Mālik, into two types: first, when he adds to it from his own wealth something tangible, like dyeing a dress or decorating a building or what resembles it; second, when his addition costs him no money but only labour, like stitching, weaving, or milling wheat and hay, making flour out of it and making a wooden case from a piece of wood.

In the first case when he adds something tangible costing him some of his wealth, it is divided into two types: first, when the thing can be restored to its original shape like a swamp on which he erected a building or what resembles it; second, when it cannot be restored to its original shape, like a dress he has dyed or flour he has turned into dough. In the first instance, the owner has an option to require the usurper to restore the plot to its original shape and remove what he has accumulated in it of debris and other material, or to give the usurper what would be the value of the debris after reducing the cost of demolition from it, that is, when the usurper is not ready to do this himself or to have it done by someone else, but is going to hire someone to do it. It is said, though, that he is not to reduce the cost of demolition from it. This takes place when such rubble has value, but when it has no value the usurper has no claim upon the owner for it, as it is a right of the owner to require the usurper to restore it to its original shape. If he does not ask him to do this, the usurper has no cause of complaint. In the second instance, he has the option to pay for the value of the dyeing and to take back his dress or to hold him liable for the value of the dress on the day of usurpation. This is not possible in flour that he has converted into dough with fat, or in similar food, where he has no option in so far as it involves *ribā*. It is a loss and the usurper is obliged to return identical food for it, or value when identical food is not available.

The second type in the first main division, that is, when the usurper does not add anything to it beside labour, is also divided into two types. First, when it is minor and the name of the thing does not change to something else as in mending a dress or trailing it. Second, when the labour is considerable and transforms the name of the usurped property, like wood by making it into a box, or wheat by turning it into flour, or yarn through weaving, or silver by moulding it into jewellery or into *dirhams*. In the first case, the usurper has no right to anything and the owner takes the usurped item with the labour done on it. In the second case, it is a loss and the usurper is obliged to pay the value of the thing as it was on the day of usurpation, or its *mithl* where it is available.

All this is according to the opinion of Ibn al-Qāsim in this context, while Ashhab assigns it entirely to the owner, the basis being the issue of construction. He says that the usurper has no right in that which he cannot separately acquire out of dyeing, darning, spinning, weaving and milling. It is related from Ibn ᶜAbbās that dyeing amounts to loss (of the item) that makes the usurper liable for the value as on the day of usurpation. It is also said that both, the owner and usurper, become joint owners, the former in the value of dyeing and the latter in the value of the dress, that is, when the owner of the dress refuses to pay the value of dyeing or when the usurper refuses to pay the value of the dress. This opinion was rejected by Ibn al-Qāsim in *al-Mudawwana* while discussing the topic of *luqṭa*. He said that joint ownership does not occur, except in cases of manifest doubt. The opinion of al-Shāfiᶜī in the case of dyeing is the same as that of Ibn al-Qāsim, except that he permits joint ownership between them saying that the usurper is to be ordered to bleach the dress if that is possible even if the dress is reduced in value, the owner being liable for the extent of the loss.

The principles of the law (*sharᶜ*) require that the wealth of the usurper should not become permissible due to his usurpation, whether it is a utility or a thing (*ᶜayn*); except when the contender argues on the basis of the words of the Prophet (God's peace and blessings be upon him), "No right ensues from the share (*ʿirq*) of the usurper (*ẓālim*)". This, however, is ambivalent and implies in the first meaning that no benefit is generated between his wealth and the thing that he usurped, I mean, his wealth related to the usurped property. This is the *ḥukm* obligatory in a thing usurped, irrespective of its being altered.

They disagreed in the school about the *ḥukm* of mesne profits into two opinions. First, that the *ḥukm* of the mesne profits is the same as the *ḥukm* of the thing itself. Second, that their *ḥukm* is different from the usurped property. Those who held that their *ḥukm* is the same as that of the usurped property, which is the opinion of Ashhab from among the disciples of Mālik, said that he (the usurper) is liable for the mesne profits from the day of usurpation; or is liable for the highest value they have reached—according to those who maintain that the usurper is to be made liable for the highest value attained and not the value of the usurped property on the day of usurpation. Those who hold that the *ḥukm* of the mesne profits is different from that of the usurped property, differed extensively about their *ḥukm* after agreeing that if they are lost with supporting evidence there is no liability on the usurper. If he merely claims that they are lost, he is not to be believed, when the property is that which is not concealed from his view.

The summary of the opinions of these jurists about the *ḥukm* of mesne profits is that mesne profits are divisible into three kinds. First, that they are mesne profits generated from the usurped property, being of the same species and nature, that is, an offspring. Second, mesne profits that are generated by the thing, but do not have the same form, like fruit and milk of animals. Third, mesne profits that are in the nature of benefits like rents and produce and what resembles them.

There is no dispute, that I know of, about things having the same nature and form that the usurper returns them, as in the case of a child with its abducted mother, even if it is the child of the abductor. They differed about it when the mother dies. Mālik said that he has an option between the child and the value of the mother. Al-Shāfiʿī said that he returns the child and the value of the mother, which is analogy. When the mesne profits generated are of a different nature and form, there are two opinions about it. First, that these mesne profits are for the usurper. Second, that it is binding on him to return it with the usurped property if it exists, or its value if he claims to have lost it, there being no other support for his statement. If the usurped property perishes he has an option to hold him liable for the value, there being nothing for him from the mesne profits, or to take it with the mesne profits, there being no compensation of value.

They disagree about mesne profits that are not born, forming five opinions. First, that he is not liable for its return as a whole without distinction. Second, that he is liable for its return as a whole without distinction. Third, that return is binding on him if he rented it out, but no return is binding on him if he just utilized it or let it stay idle. Fourth, return is binding on him if he rented it or used it, but not if he let it stand idle. Fifth, that there is distinction between animals and real estate, I mean, he returns the benefits derived from real estate, but he does not return the benefits derived from animals. All this relates to what he earns from the usurped property through its substance and with its existence.

In the case of the amount he earns by transacting in it and by converting its substance, like *dīnārs* that he appropriates and trades with making a profit, the profit is for him through the unanimous opinion of the school. A group of jurists, however, said that the profits are also considered usurped. This is the case when he also intended the appropriation of the capital, but when he intended the appropriation of the profits and not the capital, he is liable for the profits without qualification. There is no dispute about this whether he let it stand idle, utilized it, or rented it, or did something with it through which it is reduced.

Abū Ḥanīfa said that in the case of the person who commits a tort against a man's animal, riding it or carrying loads on it, there is no liability for rent on him for riding it or for carrying loads on it, as he is liable for it if it perishes through his tort. This is his opinion in all things that are movable and can be transformed. He maintains that when he became liable for it through his tort, its profit became permissible to him. This is just what the Mālikites maintain in the case of trading with usurped wealth though the difference between them is that whatever is utilized in trade changes its form, but in this case the form did not change.

The reason for their disagreement, whether the usurper is to return the usufruct, is based on their disagreement about the generality of the words of the Prophet (God's peace and blessings be upon him), "Entitlement to revenue is through a corresponding liability (for loss)" and his words, "No right ensues from the investment of the usurper". The words of the Prophet were recorded for a reason. It was the case of a slave where the person using him wished to return the income from his earnings to the buyer. (The question is) when a general tradition relates to a specific cause, is it to be confined to that cause or is to have a general application? There is a well-known dispute about it among the jurists of different regions. Those who confined it in this case to its cause said that (payment of) revenue becomes obligatory as a liability in whatever comes to a person in doubtful circumstances, like buying a thing and deriving revenue from it thus (giving rise to) an entitlement. The revenue of that which comes to him in circumstances that are not doubtful is not permissible to him as he is a usurper and the investment of the usurper does not lead to a right. The application of this tradition extended to capital and profits, I mean, the generality of the tradition, while the other was restricted.

Those who treated the matter in the opposite way and made the words of the Prophet (God's peace and blessings be upon him), "Entitlement to revenue is through corresponding liability (for loss)", applicable to cases having a cause other than its specific cause for which it was prescribed, while they restricted the saying of the Prophet (God's peace and blessings be upon him), "No right ensues from the investment of the usurper", by making it applicable to the corpus and not the usufruct, said that the usurper does not have to return the usufruct. The general rule of analogy, as we have said, requires that benefits and reproduced things should be given the same treatment in assigning liability or in not assigning it. All other opinions that fall in between these two are based on *istiḥsān*.

The jurists agreed unanimously that one who plants date-palms and cultivates crops generally or vegetation in another's land is to be ordered to uproot it due to what is established through the tradition of Mālik through Hishām ibn ᶜUrwa from his father that the Messenger of Allāh (God's peace and blessings be upon him) said: "One who revives barren land, it is for him, but no right ensues from the investment (*ᶜirq*) of the usurper". *ᶜIrq* of the usurper, according to them, is what he plants in another's land. Abū Dāwūd has reported this tradition with the following addition: ᶜUrwa said that the one who related this tradition to me said, "Two men brought their dispute to the Prophet (God's peace and blessings be upon him), one of whom had planted date-palms in the other's land. The Prophet gave his decision returning the land to its owner and ordered the owner of the date-palms to uproot them from it". He said, "I saw them when their roots were being cut with hatchets and they were date-palms fully grown when they were uprooted from it". The exception is what is widely related from Mālik: "In the case of the person who sows crops in another's land when the sowing season has passed, the owner of the land is not to uproot the crops and the cultivator is obliged to pay rent for the land". It is sometimes reported from him and it resembles the opinion of the majority, that anything that is of no use to the usurper, once he uproots and removes it, belongs to the owner who pays the cost of sowing to the cultivator.

A group of jurists distinguished between crops and fruit trees. They said that one sowing in another's land is entitled to maintenance and the cost of sowing. It is the opinion of a large number of the Ahl al-Madīna and was upheld by Abū ᶜUbayd. It is related from Rāfiᶜ ibn Khadīj that the Prophet (God's peace and blessings be upon him) said, "One who sows in other people's land without their consent is entitled to maintenance, but does not get any share of the produce".

The jurists disagreed in regarding what is ruined by domestic and loading animal into four opinions. First, that in the case of the unleashed animal, the owner is liable for what it ruins. Second, that he is not liable. Third, that the liability rests on the owners of animals (let loose by them) at night, but there is no liability on them for what they destroy during the day. Fourth, imposition of liability in the case of those that did not break loose, there being no liability for those that cut loose. Among those who said that there is liability during the night, but none during the day are Mālik and al-Shāfiʿī. Those who said that there is no liability at all are Abū Ḥanīfa and his disciples. Al-Layth upheld unqualified liability, except that he said that the liability extends to the value of the animal. The fourth opinion is related from ʿUmar (God be pleased with him).

The sources of reliance for Mālik and al-Shāfiʿī are two, in this issue. First are the words of the Exalted, "And David and Solomon, when they gave judgment concerning the field, when people's sheep had strayed and browsed therein by night; and We were witnesses to their judgment".[182] *Nafsh*, according to the experts of the language, does not take place except by night. This is a proof according to the opinion of those who view that we are bound by the law of those before us (earlier Scriptures). The second is his (Mālik's) *mursal* report from Ibn Shihāb "that al-Barāʾ ibn ʿĀzib's camel entered someone's grove and caused damage in it. The Messenger of Allāh (God's peace and blessings be upon him) decided that the grove's owners have to guard it during the day, but what the animals destroy during the night their owners have to bear". Abū Ḥanīfa's reliance is on the words of the Prophet (God's peace and blessings be upon him), "Dumb (animals)! Their injuries are waived". Al-Ṭaḥāwī says that the actual opinion of Abū Ḥanīfa is that if they are guarded while loose, there is no liability, but if they are let loose without a guard there is liability. The Mālikites said that their statement is contingent upon the fact that the cattle be in grazing land; if they are in cultivated land that has no pasture in it they (the owners) are liable during the day as well as night. The reliance of those who maintain liability for damage during the day as well night is the evidence of the principles that goes in their favour, that is, it is a tort through things let loose and the principles say that the tortfeasor is liable. The basis for those who distinguish between those that break loose and those that are let loose is obvious, as that which breaks loose cannot be controlled.

The reason for the disagreement in this topic is the conflict of principles with traditions and the conflict of traditions *inter se*, I mean, the principle opposes, "Damage by the dumb (animals) is waived (as a waste)". It also opposes the distinction made in the tradition of al-Barāʾ. Similarly, the distinction in the tradition of al-Barāʾ opposes the words of the Prophet, "Damage by the dumb (animals) is waived (as a waste)".

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[182] Qurʾān 21:78

Among the well-known issues in this topic is their disagreement about the *ḥukm* of injuries to the limbs of animals. It is related from ʿUmar ibn al-Khaṭṭāb that he gave a decision about the eye of an animal awarding a fourth of its price. He wrote to Shurayḥ and ordered him to award damages accordingly. The Kūfīs upheld this and ʿUmar ibn ʿAbd al-ʿAzīz also gave similar decisions. Al-Shāfiʿī and Mālik said that the award of damages for an injury to an animal is binding to the extent of the reduction in its price, on the analogy of torts against property. The Kūfīs relied in this on the opinion of ʿUmar (God be pleased with him) saying that if a Companion expresses an opinion and none of the other Companions opposes him, but his opinion is contrary to analogy, it is obligatory to act upon his opinion as it is known that he adopted the opinion on the basis of *tawqīf*, that is, *naql* or a precedent from the Prophet. The reason for the disagreement is, then, the conflict of analogy with the opinion of a Companion.

Within this topic is their disagreement about killing an (attacking) violent camel and all cases of self-defence and what resembles them. When a person is afraid for his life and kills the assailant, is he to be held liable? Mālik and al-Shāfiʿī say that there is no liability on him if it turns out that he was afraid from him for his life. Abū Ḥanīfa and al-Thawrī said that he pays his value (that is, *diya*) in all circumstances. The reliance of those who do not view liability (in this case) is analogy on the case where a man aims at another intending to kill him and the person defending himself kills the assailant, there being no retaliation against him. If this is the case for retaliatory liability (in killing a human being) (*nafs*) it is appropriate that this be the case for financial liability, as life has a greater priority for protection than wealth. In addition, there is the analogy on the case of the permissibility to kill the animal prohibited for hunting when it attacks. The astute among the disciples of al-Shāfiʿī held on to this. The reliance of Abū Ḥanīfa is that wealth is to be compensated even when damage is by necessity, the principle lies in the case of one under duress through starvation, in need for food belonging to another and there is no special regard for the camel in comparison with a human soul.

Under this topic is also their disagreement about the female victim in rape. Is the coercer to be held liable, along with *ḥadd*, for *ṣadāq* (dower)? Mālik, al-Shāfiʿī and al-Layth said that he is liable to *ḥadd* as well as payment of her dower. Abū Ḥanīfa and al-Thawrī said that he is liable for *ḥadd*, but there is no liability for dower, which is also the opinion of Ibn Shubrama. The reliance of Mālik is on the fact that claims for two kinds of rights are made against him, the right of Allāh and the right of the individual; one does not annul the other. The basis for this is the case of theft (*sariqa*) due to which both liability for property and amputation of the hand is imposed, according to them. Those who do not make the payment of dower obligatory linked it to two principles. First, when two rights gather in one case, the right of Allāh and the right of creatures, the right of creatures is annulled in favour of the right of Allāh. This is the opinion of the Kūfīs, in so far as they do not assimilate two rights in the case of the thief, financial liability and amputation. The second principle is that *ṣadāq* is not a counter-value for sexual gratification, but a type of an *ʿibāda* (worship) when the marriage is in accordance with the *sharīʿa*. This being the case, there is no dower in a *nikāḥ* (copulation) that is contrary to the *sharīʿa*.

Among their well-known issues in *ghaṣb* is the case of the *usṭuwāna* (column) on which the usurper makes a construction the value of which is in multiples of the *usṭuwāna*. Mālik and al-Shāfiʿī said that the usurper is to be ordered to demolish it and the owner takes back his *usṭuwāna* from him. Abū Ḥanīfa said that it is considered lost in exchange for its value, as in Mālik's opinion about the usurper who alters the usurped property by erecting that which has considerable value. According to al-Shāfiʿī, nothing is lost with an addition to it. Here this book ends.

XLVIII

THE BOOK OF *ISTIḤQĀQ* (RESTITUTION; THIRD-PARTY RIGHTS)

The major discussion in this book is about the *aḥkām* of *istiḥqāq*. The summary of the fundamental *aḥkām* of this topic is that a thing in the hands of a person to which entitlement is claimed (by another), by virtue of those things that establish such a claim for the claimant in the law, if it was acquired by this man (the possessor) through purchase, then, the claim is either for a small part, the whole, or for most of it. Further, when the claim is for the whole of it or for a major part, it has either been altered in the hands of the possessor with an addition or a decrease or has not been altered. Again, it may either have been purchased by the person, from whom it is claimed, through a price or with another commodity (*mathmūn*).

If the claim is for a small part, the claimant, according to Mālik, can demand only the value of what he is claiming and he cannot claim the whole of it. If he is entitled to the whole or most of it, and it has not been altered, the claimant takes it from the possessor, who in turn has recourse to the seller for its price, if he had bought it with a price. If he had bought it with another commodity (*mathmūn*), he has recourse to the seller for the commodity itself, if that has not been altered. If it has been altered in a manner that changes its value, he has recourse for its value as it was on the day of the purchase. If the property claimed has been sold, the claimant has a right either to let the sale proceed and take its price or to take the property itself. This is the *ḥukm* of the claimant and the person from whom the claim is made as long as the property has not been altered.

If the thing has been altered, it is either altered through an addition or a decrease. In case it is altered with an increase, the increase may be due to the act of the possessor or due to a natural growth. If the growth is natural, the claimant takes it, like a slave-girl growing healthier or a slave boy attaining maturity. In the growth attributable to the possessor, like constructing further in a house he purchased and which is later claimed, he (the claimant) has an option either to pay for the addition and take his claim or to take the value of the claim from the possessor or to become a joint owner with the claimant owning to the extent of the value of his claim and the possessor to the extent of what he has added. This is the decision of ʿUmar ibn al-Khaṭṭāb. When the addition is due to an act of reproduction on the part of the possessor, for example, he buys an *ama* and has a child from her, and she is then claimed, or marries her off as a free person, but she turns out to be an *ama*, they agreed that the claimant cannot take away the child and disagreed over whether he can charge their value. About the mother it is said that he can take her and it is also said that he charges her value. If the child is born through a *nikāḥ* and the mother is claimed as a slave, there is no disagreement that the claimant takes her and the husband has recourse for the dower to the person who deceived him. If he (the husband) is obliged to pay the value of the child, he cannot have recourse for it to the person who deceived him, as the deception did not relate to the child.

If he (the possessor) was liable for the usufruct of the claimed property through a semblance of ownership (*shubhat al-milk*), there is no disagreement that the usufruct belongs to the possessor. I mean, by liability, that it would have been his loss had it perished in his possession. If he is not deemed liable, for example, when he is an heir and another heir appears and claims part of what is in his hands, he then returns the usufruct. When he is not liable, though he can claim its price, like the case of a slave (he bought) who turns out to be emancipated, so that he may have recourse for the price even if he dies in his possession, there are two opinions in this. First, he is not liable when he cannot find a person to whom he can have recourse (for the price). Second, he is liable if he can find a person to whom he can have recourse for the price.

With respect to the time after which the usufruct is valid for the claimant, it is said that it is the day of decision, and it is said that it is the day of the establishment of the claim, and it is said that it is from the day of its suspension. If we say that the usufruct becomes due to the claimant in any of these three timings, and in case these (the property in question) are trees bearing fruit and the fruit has appeared in the relevant time and has not been picked, it is said that it belongs to the claimant as long as it has not been picked, and it is said that as long as it has not dried up, and it is also said as long as the fruit has not ripened; the possessor has recourse to the claimant for (expenses of) watering and caring. This is the case when he (the possessor) bought them prior to pollination (fertilization). If he bought them after pollination, the fruit is for the claimant, according to Ibn al-Qāsim, if it was cut, and the possessor has recourse for (expenses) of watering and caring. Ashhab said that they are for the claimant unless it has been cut. When a right to land is claimed, the rent is for the claimant if the entitlement is established during the period of sowing, but if the time of sowing has passed the rent is due to the possessor.

When the property is altered with a decrease and it is not caused by the possessor, there is no liability on the possessor. In case he (the possessor) has charged a price for it, for example, a house collapses and he sells the debris, after which the house is claimed by another man, this man has a right to recover the price for which he sold the debris. Al-Qāḍī (Ibn Rushd) said: "I have not come across a disagreement, in this topic, that can be relied upon, in all that I have transmitted from Mālik and his disciples, which are their principles in this subject. But it can be deduced from the principles of others that if the claimed thing was bought with goods and the goods have been lost, he should have recourse (to the seller) for identical goods and not the value. They are the ones who uphold the taking of identical goods in all cases of destruction. It is also deduced from the principles of others that he (the claimant) should have recourse in a similar way to the buyer, whether the claimed right is small or large, as his right does not extend to the rest and no sale has taken place in it (between him and the buyer) nor has consent been given.

The book of *istiḥqāq* is completed, with praise for Allāh.

XLIX

THE BOOK OF *HIBĀT* (GIFTS)

The discussion of *hiba* (gift) covers its elements, its conditions, its kinds, and its *aḥkām*. We shall mention in these genera those issues that are well known.

49.1. Chapter 1: The Elements of *Hiba*

We say: The elements are three: the *wāhib* (donor), *mawhūb lahu* (donee) and *hiba* (gift). They agreed about the donor that his gift is valid if he is the owner of the donated property through a legally valid ownership, is in good health, possesses legal capacity and has a valid power of disposal. They disagreed in the cases of (death) illness, prodigality and insolvency. In the case of fatal illness, the majority said that it is valid up to the extent of a third (of his property) on the basis of its similarity to *waṣīyya* (bequest), that is, the gift in which all conditions are fulfilled. A group of the earlier jurists and one group of the Ẓāhirites said that the gift is to be drawn entirely from his capital if he dies. There is no dispute among them that if he recovers from his illness his gift is valid.

The reliance of the majority is on the tradition of ʿImrān ibn Ḥuṣayn from the Prophet (God's peace and blessings be upon him) "in the case of the person who manumitted six of his slaves close to his death. The Messenger of Allāh (God's peace and blessings be upon him) ordered him so that he emancipated a third of them and kept the remaining enslaved". The reliance of the Ẓāhirites is on *istiṣḥāb al-ḥāl*, that is, the continued application of the consensus (*ijmāʿ*) on this point, which is that as they agreed to the validity of his gift in health the *istiṣḥāb* of the *ḥukm* of consensus is extended to illness, unless evidence from the Book or the explicit *sunna* indicates the contrary. The tradition (above) is applicable, according to them, to cases of *waṣiyya* (bequest).

The illnesses in which gift is restricted (to a third), according to the majority, are cases of serious illnesses. According to Mālik, serious situations are like serious illnesses, such as being between fighting forces, a pregnant (woman) approaching the time of delivery and travelling in a stormy sea, although there is disagreement over this. There is no interdiction in prolonged incurable illnesses, as has preceded in the Book of *Ḥajr* (interdiction). With respect to the mentally weak and insolvents, there is no disagreement among those who uphold their interdiction that their gifts are not to be given effect.

The property that may be donated is anything that legitimately comes into his ownership. They agreed that a man has the right to donate his entire wealth to a stranger, but they disagreed about a person preferring some of his children over others or in donating all his wealth to some of them to the exclusion of others. The majority of the jurists of different regions held this to be abominable for him, but if it takes place, it is valid. The Ẓāhirites said that no preference is permitted, not to speak of his donating all his wealth to some of them. Mālik said that preference is allowed, but he may not donate his entire wealth to some of them to the exclusion of others.

The evidence of the Ẓāhirites is the tradition of al-Nuʿmān ibn Bashīr, which is agreed upon for its soundness, though there is a difference in words (in different versions). The tradition is that he said "that his father, Bashīr, came up to the Messenger of Allāh (God's peace and blessings be upon him) and said, 'I have gifted to this son of mine a slave that I had'. The Messenger of Allāh asked, 'Have you made such a donation to each of your children?' He said, 'No!' The Messenger of Allāh said, 'Then retract it' ". Mālik, al-Bukhārī and Muslim agree upon this version. They said that retraction means cancellation of the *hiba*. In some of the versions of this tradition the Prophet (God's peace and blessings be upon him) is reported to have said, "This is injustice". The reliance of the majority is on the fact that according to a consensus a person has a right to give away all his wealth to a stranger to the exclusion of his children and if that is the case for a stranger it is more appropriate if he gives it away to one child to the exclusion of others. They argued on the basis of Abū Bakr's well-known tradition that "he gifted to ʿĀʾisha twenty *awsuq* of the yield of al-Ghāba wilderness. When he approached death, he said, 'O, my daughter, there is none among mankind I would prefer to see rich after me than you and none whom I would love to see free from poverty after me than you. I gifted to you twenty *awsuq*. If you have harvested and taken possession of it, it is for you, for it is today the wealth of the heirs' ". They said that the tradition (of al-Nuʿmān) indicates merely a recommendation and the evidence of that is the occurrence in some of its versions of the words, " 'Do you not wish that they be equal in loving you and in treating you well?' He said, 'Yes!' He said, 'Then take as witness someone beside me' ". Mālik, on the other hand, was of the view that the prohibition about a man gifting his entire wealth to one of his children is more appropriate when construed as an obligation. He thus considered the meaning of this tradition as a prohibition obligatory against a man favouring one of his children exclusively with all his wealth.

The reason for the disagreement is the conflict of analogy with the words of the reported prohibition, because prohibition, according to most, should be couched in prohibiting terms, just as a command indicates an obligation. Those who upheld a reconciliation between a traditional text and analogy, interpreted the tradition as a recommendation, or restricted it to some forms as is done by Mālik. There is no disagreement among the upholders of analogy (as a principle of law) that it is permitted to restrict the generality of a *sunna* through analogy. Similar is the case in redirecting its apparent meaning, I mean, to interpret the prohibiting term to mean disapproval. As analogy is not permitted by the Ẓāhirites, they relied on the apparent meaning of the tradition upholding the prohibition of favouring some of the children in *hiba*.

They disagreed in this topic about the permissibility of gifting a share in an undivided common property. Mālik, al-Shāfiʿī, Aḥmad and Abū Thawr said it is valid. Abū Ḥanīfa said it is not valid. The reliance of the former group is on the fact that possession in *hiba* is as valid as possession in sale. Abū Ḥanīfa's argument is that possession in it is not valid, unless it is separated as in the case of *rahn*.

There is no disagreement in the school (Mālik's) about the permissibility of donating an undetermined thing or a non-existent thing that is likely to come into existence. On the whole, each thing whose sale is valid in the law (*sharʿ*) with the existence of *gharar* (can be gifted). Al-Shāfiʿī said that all things whose sale is allowed, their donation is allowed, as in the case of a debt, and a thing whose sale is not allowed, its donation is not allowed. According to al-Shāfiʿī, anything whose possession is not allowed, its donation is not allowed, as in debts and *rahn*.

Offer and acceptance is a must in a gift, according to all. Among the conditions for the donee is that he must be one whose acceptance and possession is valid. One of the best known is possession, that is, the jurists disagreed whether possession is a condition for the validity of the contract. Al-Thawrī, al-Shāfiʿī and Abū Ḥanīfa agreed that possession is among the conditions of validity of *hiba* and as long as he (the donee) has not taken possession, it does not become binding on the donor. Mālik said that the contract is concluded with acceptance and he is to compelled to take possession as in sale. If the donee delays the demand for possession till such time that the donor becomes insolvent or falls (seriously) ill, the gift is annulled. He (the donor) has the right to sell it, and if the donee neglects this after knowing it he may only claim the price, but if he claims immediately, he will get the gifted property. Possession, according to Mālik, is a condition of completion of *hiba* and not a condition of its validity, while it is a condition of validity according to al-Shāfiʿī and Abū Ḥanīfa. Aḥmad and Abū Thawr said a gift is valid through the contract and possession is not one of its essential conditions, neither of completion nor of validity, which is also the opinion of the Ẓāhirites. It is, however, related from Aḥmad ibn Ḥanbal that possession is a condition in things measured and weighed.

The reliance of those who stipulate possession as a condition in *hiba* is due to its similarity to sale. The principle in contracts is that possession is not prescribed as a condition for their validity, unless evidence is proffered for the (specific) stipulation of possession. The reliance of those who stipulate possession is on the fact that it is related from Abū Bakr (God be pleased with him) in the tradition of his gift to ᶜĀʾisha that has preceded; which is explicit in the stipulation of possession as a condition for the validity of *hiba*. It is also related from ᶜUmar that he said, "What is the matter with some men who make gifts to their sons and then hold on to them. When the son of one of them dies he says that my wealth is in my hands, I did not give it to anyone. If his (own) son is dead he would say I had given this to my son. He who makes a gift and then does not permit it to the donee, retaining it till such time that he dies so that it is given to the heirs, then, such a gift is void". This is also ᶜAlī's opinion. They said that this amounts to a consensus of the Companions, as no one has related a disagreement on this from them. Mālik relied on both things, that is, analogy and what is related from the Companions, reconciling the two. Thus, in so far as it is a contract like the other contracts, possession is not a condition for its validity and because of the way it is stipulated as a condition by the Companions, for *sadd al-dharīᶜa* mentioned by ᶜUmar, possession is a condition of completion and a right of the donee, but if he delays it till possession is lost through illness or insolvency of the donor, his right is annulled.

The majority of the jurists of different regions maintain that a father may permit for his minor son who is in his guardianship and for a prodigal who is a major what they have gifted, just as he may permit to them what is gifted by others to them. It is sufficient for him in possession to take witnesses for the gift and to proclaim it. This is the case in things other than gold and silver and those which are not determined. The source in this, according to them, is what is related by Mālik from Ibn Shihāb from Saᶜīd ibn al-Musayyib from ᶜUthmān ibn ᶜAffān, who said, "One who makes a gift to his son who is not a major so that he may take possession of the gift, he should make it public and take witnesses over it. This amounts to possession even though he is his guardian". Mālik and his disciples said that it is necessary to take possession in things resided in and worn. If it is a house meant for residence he (the donor) should move out of it. Similarly, in things worn, if he wears it the gift is annulled.

In the case of goods, they held the same opinion as the other jurists, that is, it is sufficient to proclaim them and to have it witnessed. The narration from Mālik about gold and silver differs. It is related from him that it is not permitted, except when the father removes them from his possession and passes them on to another. It is also related from him that it is permitted if he places them in a container or a utensil and places a seal over it and witnesses witness the fact. There is no disagreement among Mālik's disciples that the *waṣī* stands in the father's position in this. They disagreed about the mother, Ibn al-Qāsim said that she cannot be a substitute for the father, and he related this from Mālik; others from among his disciples said that she does. This was also the opinion of Abū Ḥanīfa. Al-Shāfiʿī said that the grandfather is a substitute for the father. The grandmother, mother's mother, according to Ibn Wahb stands in the position of the mother and the mother, according to him, stands in the position of the father.

49.2. Chapter 2: The Discussion of the Kinds of Gifts

A gift may be a gift of the corpus or the gift of the usufruct. Among the gifts of the corpus are those whose aim is the gaining of reward (*thawāb*) and among them are those whose aim is not reward. Those intended for reward may be for seeking favour with Allāh, or for seeking the favour of the creatures. There is no disagreement about the permissibility of gifts devoid of reward, the disagreement is about their *aḥkām*.

They disagreed about the gifts seeking reward. Mālik and Abū Ḥanīfa permitted them, while al-Shāfiʿī disallowed them, which was also the opinion of Dāwūd and Abū Thawr. The basis for the disagreement was whether they amount to a sale for an undetermined price. Those who considered them as sale for an undetermined price said that they are like the sales of *gharar* that are not permitted. Those who did not consider them as undetermined sales said they are permitted. It was as if Mālik considered custom as (a sufficient) condition in them, which is the gaining of a similar reward. It was for this reason that their opinions differed when the donor did not agree to the *thawāb*. What then was the *ḥukm*? They said that it is binding on him if the donee paid him its value, while it is said that it is not binding on him unless it satisfied him. This is ʿUmar's opinion as will be seen in what follows. If consent is stipulated as a condition in it, then there is no sale. The first view is well known from Mālik. If, however, he is made to accept its value, sale does take place. Mālik construes a gift to be for *thawāb* when there is disagreement about it, especially when a poor man makes a gift to a rich person, or any one in whose case it can be seen that he intends the attainment of *thawāb*.

Included in the gifts of the usufruct are those that are deferred and they are called ʿ*āriya* or a grant or what resembles them. Among them are those in which the stipulation is the duration of the lifetime of the donee and these are called *al-umrā*, like a person gifting to another residence in a house for his lifetime. The jurists disagreed about this into three opinions. First, that this is a definitive gift, that is, it is the gift of the corpus. This was the opinion of al-Shāfiʿī, Abū Ḥanīfa, al-Thawrī, Aḥmad and a group. The second opinion is that the only thing in it that is for life is the utility; if he dies the corpus reverts to the donor or to his heirs. This was Mālik's opinion and that of his disciples. In case he stipulates succession, according to Mālik, it reverts to the donor or his heirs when the succession terminates. The third opinion is when he says that this is for you and your successors, the corpus passes to the ownership of the donee, but if he does not mention successors the corpus reverts on the death of the donee to the donor or his heirs. This is the opinion of Dāwūd and Abū Thawr.

The cause of disagreement in this issue is the conflict of the traditions and the conflict between conditions and practice, on the one hand, and the traditions, on the other. The traditions are two. First is that which is agreed upon for its authenticity. It is what is related by Mālik from Jābir that the Messenger of Allāh (God's peace and blessings be upon him) said, "If any of you institutes a *waqf* for the life of a person and his successors, it belongs to the person for whom it is made, not reverting to the person who made it, ever". This is because he made a grant in which inheritance is now involved. The second tradition is that of Abū Zubayr from Jābir, who said, "The Messenger of Allāh (God's peace and blessings be upon him) said, 'O community of the Anṣār, hold on to your wealth and do not grant it for life. One who grants it for his life, it is for him in his life and on his death'". It is related from Jābir in a different version, "Do not grant it for life and do not turn it to a *ruqbā* (*waqf* with the condition that it will revert to the donor). One who grants it for life or turns it into a *ruqbā*, it belongs to his heirs".

The tradition of Abū Zubayr is opposed to the condition of the donor. The tradition of Mālik from him is also opposed to the condition of the donor, but it appears that in it the opposition is less, as the mentioning of successors gives the impression of perpetuity of the grant. Those who preferred the traditions over the condition argued on the basis of the tradition of Abū Zubayr from Jābir and also the tradition of Mālik from Jābir. Those who gave preference to the condition held on to Mālik's opinion. Those who held that the *ʿumrā* reverts to the donor if successors are not mentioned and to the donee if successors are mentioned went by the apparent meaning of the tradition. The tradition of Abū Zubayr from Jābir is disputed, I mean, the narration of Abū Zubayr from Jābir.

If he (the donor) uses the word residence, saying, "I make you a resident of this house for your life" the majority maintain that the word residence or service is different from the word *al-ᶜumrā* even when accompanied by the expression successors. Mālik considered the words *al-taᶜmīr* and *al-iskān* as similar. Al-Ḥasan, ᶜAṭāʾ and Qatāda used to hold *suknā* and *taᶜmīr* as synonymous as they do not indicate the house itself in perpetuity, according to the opinion of the majority in *al-ᶜumrā*. The truth is that *iskān* and *taᶜmīr* have the same meaning and it is necessary that the *ḥukm* with the expression "successors" be the opposite of that where the term "successors" is not mentioned, as has been upheld by the Ahl al-Ẓāhir.

49.3. Chapter 3: The Discussion of the *Aḥkām*

Among the well-known issues in this topic is the permissibility of *iᶜtiṣār*, which is the retraction of a gift. Mālik and the majority of the jurists of Medina held that the father has a right to retract what he has gifted to his son as long as the son has not married or procured loans, that is, as long as no outside right is claimed from him. The mother too has the right to retract what she has gifted, if the father is alive. It is also related from Mālik that she does not have a right to retract. Aḥmad and the Ahl al-Ẓāhir said that no one has the right to retract what he has gifted. Abū Ḥanīfah said that it is permitted to every person to retract what he has gifted, except what he has gifted to those in the prohibited degrees. They agreed that the gift that is called *ṣadaqa* (charity), seeking nearness to Allāh, no one has a right to retract.

The reason for disagreement is the conflict of traditions. Those who did not view retraction as a principle argued through the generality of the established tradition, that is, the words of the Prophet (God's peace and blessings be upon him), "The person retracting his gift is like a dog lapping up what it has vomited". Those who exempted the parents argued on the basis of the tradition of Ṭāwūs that the Prophet (God's peace and blessings be upon him) said, "It is not permitted to the donor to retract his gift, except for the father". The mother was included through analogy of the father. Al-Shāfiᶜī said that if the tradition of Ṭāwūs had a complete chain I would have followed it, while others said that the chain is complete through the channel of Ḥusayn al-Muᶜallim, who is reliable. Those who permitted retraction, except in the case of the prohibited degrees, relied upon what has been related by Mālik from ᶜUmar ibn al-Khaṭṭāb, may Allāh be pleased with him, who said, "He who makes a gift to those in the prohibited degrees or makes a *ṣadaqa* cannot retract it, while he who has made a gift with a view to seeking a reward (*thawāb*), he has the right to retract his gift if he is not satisfied". They also said, the principle is that he who makes a gift without compensation is not to be adjudged as if he had made a (contractual) promise, except what has been agreed upon in a gift by way of *ṣadaqa*.

The majority of the jurists maintain that one who grants a *ṣadaqa* to his son and the son dies after taking possession, inherits it. One among the *mursal* traditions of Mālik is: "A man from the Anṣār of al-Khazraj granted a *ṣadaqa* to his parents, who subsequently died. Their son inherited the property consisting of a palm-grove. He asked the Prophet (God's peace and blessings be upon him) about it, who said, 'You have been rewarded for your *ṣadaqa*, now take it as your inheritance' ". Abū Dāwūd has recorded from ʿAbd Allāh ibn Burayda from his father about a woman who came to the Messenger of Allāh (God's peace and blessings be upon him) and said, "I gave to my mother as *ṣadaqa* a female infant. She died and left this infant girl. The Prophet (God's peace and blessings be upon him) said, 'Your reward has been assured and she has now returned to you through inheritance' ".

The Ẓāhirites said that it is not permitted to any one to retract due to the generality of the words of the Prophet (God's peace and blessings be upon him) to ʿUmar about horses that he had given as *ṣadaqa*, "Do not buy them, the person who retracts his gift is like a dog lapping up what it vomited". The tradition's authenticity is agreed upon. Al-Qāḍī said that retraction of a gift is not an approved ethical norm. The Lawgiver (God's peace and blessings be upon him) was sent to perfect the ethical norms. This discussion is sufficient for this book.

L

THE BOOK OF *WAṢĀYĀ* (BEQUESTS)

The discussion of bequests is first divided into two kinds: first, the discussion of the elements; second, the *aḥkām*. We shall talk about those well-known issues that became prominent.

50.1. Chapter 1: The Discussion of the Elements

The elements are four: *mūṣī* (testator), *mūṣa lahu* (legatee), *mūṣa bih* (bequeathed property), and *waṣiyya* (testament or will).

They agreed that the testator could be any owner with a legally valid ownership. According to Mālik the bequest of a *safīh* (prodigal) or of a minor approaching majority is valid. Abū Ḥanīfa said that the bequest of a minor (*ṣabī*), who has not attained puberty, is not allowed. Both opinions are related from al-Shāfiʿī. The testament of non-believer is also valid according to them, as long as it is not for a forbidden thing.

In the case of the legatee, they agreed that a bequest is not valid for an heir, due to the words of the Prophet (God's peace and blessings be upon him), "No bequest for an heir". They differed whether it is valid for other than the close relations (*qarāba*). The majority of the jurists said that it is valid for other than the close relatives, but is considered reprehensible. Al-Ḥasan and Ṭāwūs said that it is to be returned to close relatives, which was also the opinion of Isḥāq. The proof of these jurists is in the words of the Exalted, "It is prescribed for you, when one of you approacheth death, if he leave wealth, that he bequeath unto parents and near relatives in kindness. (This is) a duty for all those who ward off (evil)".[183] They are of the opinion that the article "*al*" (prefixing the word "will") implies comprehensiveness restricted to those mentioned and exclusion of others. The majority argued on the basis of the well-known tradition of ʿImrān ibn Ḥuṣayn that "a man manumitted six slaves that he had during his illness, and he had no wealth besides them. The Messenger of Allāh drew lots between them and freed two keeping the other four enslaved". Those slaves were not relatives (of the deceased).

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[183] Qurʾān 2:18

They agreed that a bequest is not permitted for an heir, if the other heirs do not give their consent. They disagreed as we have said when the heirs agreed. The majority said it is permitted, while the Ahl al-Ẓāhir and al-Muzanī said it is not permitted. The reason for the disagreement is whether the prohibition relates to the underlying cause of (the right of) heirs or of non-rational (revealed) guidance. Those who maintained that it is revealed guidance said that it is not permitted even if the heirs permit it. Those who prohibited it due to the right of the heirs said that it is permitted when the heirs grant permission. The wavering on this issue refers to the vacillation about the meaning of the words of the Prophet (God's peace and blessings be upon him), "No bequest for an heir", whether they have an underlying meaning (cause) or are to be accepted as revealed teaching without the need for rationalization?

They disagreed about a bequest for a deceased person. A group, and they are the majority, said that it is annulled by the death of the legatee. Another group said it is not annulled. They also disagreed about the bequest for a killer, both for murder and manslaughter. Within this topic is also a well-known sub-issue, that is, if the heirs permit (prior to his death) a bequest for a deceased person, do they have the right to retract it after his death? It is said that they have the right, while it is said that they do not. Others make a distinction whether the heirs are from the family of the deceased. If they are from his family they have the right of retraction. All three opinions exist in the school (of Mālik).

50.2. Chapter 2: The Bequeathed Property

In the discussion of genus, they agreed about the permissibility of the bequest of the corpus, but disagreed about usufruct. The majority of the jurists of different regions said it is permitted. Ibn Abī Laylā, Ibn Shubrama, and the Ahl al-Ẓāhir said that a bequest of the usufruct is void. The argument of the majority was that usufruct carries the meaning of wealth. The argument of the other group was that the usufruct stands transferred to the heir and the deceased now has no ownership, thus, a bequest of what lies in the ownership of another is not permitted to him (the testator). This was also the opinion of Abū ʿUmar ibn ʿAbd al-Barr.

Regarding the amount (extent), the jurists agreed that a bequest is not valid for more than a third of the estate in the case of the person who has heirs. They disagreed about the person who has not left heirs, and also about the extent whether it is a third or less than it. All of them adopted the opinion that a bequest is not permitted for more than a third for one who has heirs according to what is established from the Prophet (God's peace and blessings be upon him), "that he visited Saᶜd ibn Abī Waqqāṣ and he said to him, 'O Messenger of Allāh, my ailment has overcome me as you can see and I have wealth, but no one inherits me except a daughter that I have. Do I, then, bequeath two-thirds of my wealth?' The Messenger of Allāh (God's peace and blessings be upon him) said, 'No!' Saʾd said to him, 'Half?' He said, 'No!!' The Messenger of Allāh (God's peace and blessings be upon him), then said, 'A third, a third is (more than) enough. If you leave your heirs rich, it is better than leaving them indigent, dependent on people' ". The jurists, due to this tradition, adopted the opinion that a bequest should not exceed a third.

They disagreed about the recommended rate. A group maintained that it is whatever is less than a third due to the words of the Prophet (God's peace and blessings be upon him) in the tradition, "A third is a lot (*kathīr*)". A large number of the earlier jurists held this opinion. Qatāda said that Abū Bakr made a bequest of a fifth, and ᶜUmar of a fourth, but a fifth is preferable for me. Those who said that the recommended rate is a third relied upon what is related from the Prophet (God's peace and blessings be upon him) that he said, "Allāh has rendered for you in bequest a third of your wealth as an addition (supplement) to your (good) deeds". This tradition is weak according to the traditionists. It is established from Ibn ᶜAbbās that he said, "If the people came down in bequest from a third to a fourth, it would be dearer to me, as the Messenger of Allāh (God's peace and blessings be upon him) said, 'A third, a third is more than enough".

With respect to their disagreement about the permissibility of *waṣiyya* for more than a third, for one who has no heirs, Mālik does not permit it, nor does al-Awzāᶜī, while the opinion of Aḥmad differed in it. Abū Ḥanīfa and Isḥāq permitted it, and it is also the opinion of Ibn Masᶜūd. The reason for the disagreement is whether this *ḥukm* is specific to the underlying cause stated by the lawgiver or is not specific, that is, not to leave heirs dependent on people, as the Prophet (God's peace and blessings be upon him) said, "If you leave your heirs rich, it is better for you than leaving them indigent, dependent on people". Those who consider this cause specific must remove the *ḥukm* with the removal of the cause, while those who considered it as an ᶜ*ibāda* (non-rational ruling), even if associated with a cause, or considered all the Muslims included as heirs in this meaning, said that a bequest exceeding a third is not permitted at all.

50.2.1. The Implication of the Term *Waṣiyya*

Waṣiyya, generally, is the gift by a man to another or to several, after his death, or is manumission of a slave, whether he has expressly stated the term *waṣīyya* or not. This contract, according to them, is *jāʾiz* (revocable) by agreement (of the jurists), I mean, the testator has the right to retract what he has bequeathed, except in the case of the *mudabbar* (slave declared to be free at his master's death), about whom they differed as will be stated in the book of *tadbīr*. They agreed that it does not become due to the legatee, except after the death of the testator. They disagreed about the acceptance of the legatee, whether it is a condition for its validity. Mālik said that acceptance by the legatee of the bequest is a condition for its validity. It is related from al-Shāfiʿī that it is not a condition for its validity. Mālik compared it to *hiba* (gift).

50.3. Chapter 3: The Discussion of the *Aḥkām*

The *aḥkām* relate either to the use of terms, or numerical calculations, or the law.

Among the well-known legal issues is their disagreement about the *ḥukm* of the testator who bequeaths a third of his wealth to a man and specifies what he bequeaths out of his wealth as a third. The heirs then say that what has been specified for him by the testator is more than a third. Mālik said that in such a case the heirs have an option to give the man what the testator specified or to give him a third from the entire wealth of the deceased. He was opposed in this by Abū Ḥanīfa, al-Shāfiʿī, Abū Thawr, Aḥmad and Dāwūd. Their argument is that the bequest, by agreement, has become due to the legatee by the death of the testator and by its acceptance by the legatee. How then can a thing that has become his due be transferred from his ownership without his voluntary consent or without the alteration of the bequest? Mālik's argument lies in the likelihood of the veracity of the heirs in what they claim. Abū ʿUmar ibn ʿAbd al-Barr has an outstanding opinion in this issue. He said that if the heirs claim this the burden is on them to prove it. If it is proved the legatee takes his one-third from the specified thing and shares it with the heirs, but if it is a third or less, the heirs are to be compelled to deliver it.

If they do not disagree that the bequeathed property is less than a third, then according to Mālik, the heirs have a choice in giving him what has been bequeathed to him or in giving him a third of the entire wealth of the deceased comprising either the same property or (a third of) the entire property, in accordance with the differing narrations from Mālik. Abū Ḥanīfa and al-Shāfiʿī said he gets a third of this (specified) thing and he becomes a joint owner (for the residue) with the heirs in the entire estate left by the deceased till his entire third is acquired.

The reason for the disagreement is that as the deceased has transgressed in making his bequest in a specified thing; is it then fair to the heirs that they be given a choice in executing the *waṣiyya* or in being lenient to him in view of the purpose that was permitted to the deceased of depriving them of his wealth, or to annul the transgression and convert the right to joint ownership. The latter is better when we say the transgression was in the specification as it was more than a third, I mean, the obligation is that the specification be invalidated. To obligate the heirs to let the specification take effect or to take out a third from the entire wealth is to place a burden upon them.

Within this topic is their disagreement about the person who was under an obligation to pay *zakāt*, but he did not make a bequest for it. If he made a bequest, is that also to be from the third or is it to be taken from the capital? Mālik said that if he did not make a bequest for it, it is not binding on the heirs to pay it. According to al-Shafiʿi, the heir must pay it from the capital. If he should bequeath it, Mālik then obliges them to pay it from the third. According to al-Shāfiʿī, it is to be taken in both cases from the capital, comparing it to a debt, on the basis of the words of the Prophet (God's peace and blessings be upon him), "The debt of Allāh has a prior right of satisfaction". The same is the case with obligatory *kaffāra* (expiation) and obligatory *ḥajj*, according to him. Mālik considers them from the genus of bequests required to be paid after death. There is no disagreement that if he had paid it during his lifetime (even on his death-bed), it would be from his capital, even if it was continuous. It is as if Mālik, places the burden on the heirs, I mean, even in the context of his death. He appears to suspect the deceased of ill-intention toward the heirs when he makes a bequest for such obligations. He said that if this is permitted it would be possible for a person to delay all his *zakāt* throughout his life and when he approaches death to make a bequest for them. When the other bequests clash with *zakāt*, it is to be given priority over those that are of lesser importance. Abū Ḥanīfa said that *zakāt* and all the other bequests are of the same order, intending thereby proportional division. Mālik and all his disciples agreed that the bequests which (collectively) amount to more than the third, if they are of equal status, are to be allotted the third proportionately, but if some of these are more important than the others the more important are to be given priority.

They disagreed about the order of priority, as is recorded in their books. Among the well-known arithmetical issues in this topic is when a man makes a bequest for one person for half his wealth and for another for two-thirds of his wealth, with the residue reverting to the heirs. According to Mālik and al-Shāfiʿī they divide the third among themselves by way of reduction (as in *ʿawl*), so that the first gets two-fifths and the other three-fifths of the third of the estate. Abū Ḥanīfa said that they are to share the third equally. The reason for the disagreement is whether the excess over the third, which is annulled, is not to be taken into account in the division, just as it is annulled itself by the rejection of the heirs. Those who said that it is annulled, but the consideration (of its ratios) is not annulled maintained that it should be shared by way of reduction, while those who maintained that its consideration is annulled, just as if it was specified, said that they divide it among themselves equally.

Among their disputes over terminology in this topic is the case when he (the testator) bequeaths a part of his wealth, and he has property that is known and also that which is unknown. According to Mālik, the bequest takes effect in that which is known to the exclusion of that which is unknown, but according to al-Shāfiʿī, it applies to both kinds. The reason for the disagreement is whether the term *māl*, which he used, applies to both known and unknown wealth, or only to the wealth known to him? In case there is a *mudabbar* and the wealth known to the deceased is insufficient to free him, the balance should be taken from the unknown wealth.

In this topic there are many cases and all of them refer to these three genera. There is no disagreement among them that a man may leave a testament for his children (to be followed) after his death as this is a minor *khilāfa*, like the greater general *khilāfa* of the *imām* for which he may leave a testament.

LI

THE BOOK OF *FARĀʾIḌ* (INHERITANCE)

The discussion in this book is about those who inherit and those who do not, and whether those who inherit do so always, or together with some heirs to the exclusion of others, and when they inherit along with others, how much they inherit. Similarly, when they inherit alone, how much they inherit. When they inherit with other heirs, does this (inheritance) vary from heir to heir?

Instruction in all this can be by different methods, most of which have been followed by the experts in inheritance. The present course in it begins by mentioning separately the *ḥukm* of each category of the heirs, when such a category exists alone (as an heir), and enumerating its *ḥukm* with each of the remaining categories. An example of this is a child, when he is the sole heir; how much is his inheritance? His position is then examined with (the existence of) each of the remaining heirs.

51.1. Chapter 1: The Different Categories of Heirs and Their Inheritance

The categories of heirs are three: *dhawū nasab* (blood relatives), *aṣhār* (relations by marriage), and *mawālī* (by contract). In blood relations, some are agreed upon and some are disputed. Those agreed upon are the *furūʿ*, that is, descendants; and *uṣūl*, ascendants, parents and grandparents, whether male or female. Then there are the *furūʿ* of the level of the deceased among the lower ascendants, that is brethren, male or female, and the distant ascendants in the same lineage, uncles and son's of uncles, specifically only the males among them.

If these heirs are enumerated, they come to ten among men and seven in women. The men are: the son, son's son howsoever low, father, paternal grandfather howsoever high, brother from whichever side, I mean, father's and mother's or of either one of them, brother's son howsoever low, uncle and uncle's son howsoever low, the husband, and the *mawlā*. As to the women, they are: daughter, son's daughter howsoever low, mother, grandmother howsoever high, sister, wife, and the *mawlā*.

Those disputed are the *dhawū l-arḥām* (distant kindred), for whom no share has been mentioned in the Book of Allāh and they are not the residuaries.

These, generally, are the sons of daughters, daughters of brothers, sons of sisters, daughters of uncles, and the father's mother's son, sons of mother's brother, father's sisters, mother's sisters, and maternal uncles. Mālik, al-Shāfiʿī, most of the jurists of different regions, and Zayd ibn al-Thābit from among the Companions maintained that they have no part in the inheritance. All the other Companions, the jurists of Iraq, Kūfa, and Baṣra, and a group of the jurists from the rest of the regions upheld their inheritance. Those who maintained their inheritance, differed about its nature. Abū Ḥanīfa and his disciples maintained their inheritance in the order of the residuaries, while all the others who grant them inheritance do so through the doctrine of substitution *tanzīl*, that is, to put them in the position of the person through whom they are related to the deceased.

The reliance of Mālik, and of those who adopted his opinion, is on the fact that as analogy has no operation in inheritance, the principle is that nothing should be established in it unless it is found in the Book or the established *sunna*, and these sources are absent in this issue. The other group believed that their evidence is in the Book, the *sunna*, and analogy. In the Book it is the words of the Exalted, "And those who are akin (*ūlū l-arḥām*) are nearer one to another in the ordinance of Allāh",[184] and "Unto the men (of a family) belongeth a share of that which parents and near kindred leave, and unto the women a share of that which parents and near kindred leave, whether it be little or much—a legal share".[185] The term *al-qarāba*, they say, applies to *dhawū l-arḥām*. The opponents are of the view that these verses are limited by the verses of inheritance. With respect to the *sunna* they argued on the basis of that which is recorded by al-Tirmidhī from ʿUmar ibn al-Khaṭṭāb, that he wrote to Abū ʿUbayda that the Messenger of Allāh (God's peace and blessings be upon him) said, "Allāh and His Prophet are the *mawlā* of one who does not have a *mawlā*, while the maternal uncle (*khāl*) is the heir of one who does not have an heir". As a rational argument, the earlier disciples of Abū Ḥanīfa said that the *dhawū l-arḥām* have a higher priority over the other Muslims, as there are gathered in them two bases, *qarāba* and Islam. They compared it to the preference of the full brother over the consanguine brother, I mean, the person who is supported on two grounds is better than the person who has one. Abū Zayd and his later followers compared inheritance with *wilāya* (guardianship) saying that as the guardianship for funeral, prayer, and burial of the deceased belongs to the *dhawū l-arḥām* in the absence of the sharers and residuaries, it is necessary that the *wilāya* for inheritance be theirs. The first group has objections to these analogies, but they are weak. If this has been established, we shall begin by mentioning each category out of the categories of the heirs, and state those which resemble principles among the well-known issues, those agreed upon and those that are disputed.

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[184] Qurʾān 33:6
[185] Qurʾān 4:7

51.1.1. Inheritance of Children

Muslims agreed that the inheritance of the child from his father or mother, if there are both males and females, is that the share of the male is equal to the share of two females. When a son inherits alone, he gets the entire wealth. In the case of daughters being sole inheritors, one alone gets half, but if there are three or more they get two-thirds. They disagreed about two daughters. The majority maintained that they get two-thirds, and it is related from Ibn ᶜAbbās that two daughters get half. The reason for the disagreement is the vacillation of the meaning of the words of the Exalted, "[A]nd if there be women more than two, then theirs is two-thirds of the inheritance",[186] whether the *ḥukm* of two females not expressed is to be linked with the *ḥukm* of three or with that of one. The apparent meaning through the indication of the text is that they be linked with of one female. It is said that the better-known opinion of Ibn ᶜAbbās is the same as that of the majority. It is related from Ibn ᶜAbd Allāh ibn Muḥammad ibn ᶜUqayl from Ḥātim ibn ᶜAbd Allāh and from Jābir "that the Prophet (God's peace and blessings be upon him) gave two daughters two-thirds". Ibn ᶜAbd al-Barr said, as far as I know, that a group of jurists accepted the tradition of ᶜAbd Allāh ibn ᶜUqayl, while others opposed him. The reason for agreement on this issue are the words of the Exalted, "[A]nd if there be women more than two, then theirs is two-thirds of the inheritance", up to the words "and if there be one (only) then the half".[187]

They agreed that the sons of sons stand in the position of the sons in their absence, inheriting as they inherit and excluding others like they exclude, except what has been related from Ibn Mujāhid. He said that the sons of sons do not exclude the husband from half, restricting him to a fourth as the son himself does, nor do they restrict the wife so as to move her from a fourth to an eighth, or the mother from a third to a sixth. They agreed that there is no inheritance for the daughters of sons with daughters, if the daughters of the deceased exhaust the two-thirds. They disagreed when there is with the daughters of the son a son of the son of their order or lower than them. The majority of the jurists of different regions said that he becomes a residuary with the daughters of the son for what is left over from the daughter, and they share it in the ratio of two shares of females for one of the male. This was also the opinion of ᶜAlī, may Allāh be pleased with him, and Zayd ibn Thābit from among the Companions. Abū Thawr and Dāwūd maintained that if the daughters exhaust the two-thirds, the remaining is for the son of the son to the exclusion of the daughters, whether they are in the same order as he is, or are above him or below him. Ibn Masᶜūd used to say in this, "for the male a share like that of two females", except when the fraction for the women is more than a sixth, otherwise they are to be given a sixth.

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[186] Qur'ān 4:11
[187] Qur'ān 4:11

The reliance of the majority is on the generality of the words of the Exalted, "Allāh chargeth you concerning (the provision for) your children: to the male the equivalent of the portion of two females", and the fact that the child of a child is included in the meaning of the term "child". In addition, since the son of the son becomes a residuary in his order for the entire wealth, it follows that he become a residuary for the residue. The reliance of Dāwūd and Abū Thawr is on the tradition of Ibn ᶜAbbās that the Prophet (God's peace and blessings be upon him) said, "Divide the inheritance among sharers according to the Book of Allāh, the Mighty and Exalted, and what is left as a residue from the shares, should go to the nearest male". As a rational argument too, it is because the son's daughter does not inherit, when alone, what remains after the two-thirds. It is appropriate that she should not inherit with another.

The reason for their disagreement is the conflict of analogy and the view on preference (*tarjīh*). Ibn Masᶜūd's opinion is based on his principle that as the daughters of the son do not inherit in the absence of a son more than a sixth, they are not entitled to inherit with another more than what is their due when alone. This is an argument that is close to Dāwūd's argument. The majority maintain that the son's son shares with them as a residuary whether he is of their order or is lower than them. Some of the later jurists, however, expressed an isolated view saying that he does not make them a residuary unless he is of the same order.

The majority of the jurists maintain that if the deceased has left behind a daughter and a son's daughter or sons's daughters, who do not have a brother, the son's daughters get a sixth in order to complete the two-thirds. The Shiᶜites opposed this saying that the son's daughter does not inherit anything with a daughter, as is the case of a son's son with a son. The disagreement about the son's daughters is in two cases: with son's sons, and with daughters in what is less than two-thirds and more than half. The conclusion about them is that when they accompany son's sons, it is said that they inherit, while it is said that they do not inherit. Those who maintain that they inherit hold that they inherit absolutely as residuaries, but some of them said that they inherit as residuaries, except when it is more than a sixth. When it is said that they inherit, it is also said that they do so if the son's son is of their order, and it is said of whatever order. The summary about their inheritance in the absence of a son's son in what is excess of the half to complete the two-thirds, it is said they inherit and it is said they do not.

51.1.2. Inheritance of Spouses

The jurists agreed that the inheritance of a man from his wife, if she does not leave behind a son or a daughter, or a son's son or son's daughter, whether male or female, is a half, except for the *mujtahid*'s dispute mentioned above. If she leaves behind a child (or a son's child), he gets a fourth. The inheritance of a woman from her husband, if the husband does not leave behind a child or a child of the son, is a fourth, but if he leaves behind a child or a son's child, then, it is an eighth. No one can exclude them from inheritance, or reduce their share except a child (or a son's child). This is based on the explicit prescription in the words of the Exalted, "And unto you belongeth a half of that which your wives leave, if they have no child; but if they have a child then unto you the fourth of that which they leave, after any legacy they may have bequeathed, or debt (they may have contracted, hath been paid). And unto them belongeth the fourth of that which ye leave, after any legacy ye may have bequeathed, or debt (ye may have contracted, hath been paid)".[188]

51.1.3. Inheritance of Father and Mother

The jurists agreed that if the father survives alone, he gets the entire wealth, and if the parents survive alone, the mother gets a third and the rest is for the father due to the words of the Exalted, "[If the deceased has no child] And his parents are his heirs, then to his mother appertaineth the third".[189] They agreed that the shares of the parents in the inheritance from their son (or their daughter), when their son has a child or a son's child, are two-sixths, that is, for each one of them a sixth due to the words of the Exalted, "And to his parents a sixth of the inheritance, if he have a child (*walad*)".[190] The majority are of the opinion that the term *walad* in this case refers to a male and not a female. They were opposed in this by some who had isolated opinions. They agreed that the share of the father cannot be reduced from a sixth, with other sharers, and that to him belongs whatever is in excess.

They agreed in this topic that the mother is excluded by the brothers from a third to a sixth due to the words of the Exalted, "And if they have brethren, then to his mother appertaineth the sixth".[191] They disagreed about the minimum number of brothers who reduce the share of the mother from a third to a sixth. ʿAlī, may Allāh be pleased with him, and Ibn Masʿūd maintained that the brothers who exclude (in this way) are two or more, which was also

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[189] Qurʾān 4:12

[190] Qurʾān 4:11 The word 'son' for *walad* in pickthall's translation has been changed to 'child'.

[191] Qurʾān 4:11

Mālik's opinion. Ibn ᶜAbbās held that they were three or more, and that two do not reduce her from a third to a sixth. The disagreement is caused by a dispute over the minimum number which a plural noun indicates. Those who said that the minimum a plural noun indicates is three, said that the brothers who exclude her are three or more, while those who maintained that the minimum included in the plural noun is two, said that the brothers who exclude her are two, I mean, in the words of the Exalted, "And if he has brethren".[192] There is no dispute that males and females are included in the term "brethren" in the verse, and this is according to the majority. Some of the later jurists thought that the mother is not reduced from a third to a sixth by sisters alone, for they assumed that the term "brethren" does not include sisters, unless there be with them a brother due to the immediate masculine denotation of the term; as the term "brethren" is a plural of brother, which is masculine.

Within this topic they differed about who inherits the sixth that is reduced from the share of the mother through brethren when the deceased is survived by parents and brethren. The majority said that this sixth is for the father along with four-sixths (as the father's presence excludes brothers). It is related from Ibn ᶜAbbās that this sixth is for the brothers who excluded (the mother from it), and for the father are his two-thirds; as (Ibn ᶜAbbās says) no principal heir who excludes (reduces) and does not get what he has caused except along with the parents. Some declared weak the chain of this narration from Ibn ᶜAbbās, although the opinion of Ibn ᶜAbbās agrees with analogy.

They disagreed, in this topic, over the two cases called *al-gharrāwayn*. This occurs when a deceased leaves behind a wife and his parents, or a husband and her parents. The majority said, in the first case, for the wife is a fourth and for the mother is a third of the residue, which is a fourth of the whole capital, and for the father is the residue, which is half of the total. In the second case, they said that for the husband is a half and for the mother a sixth of what is left, which is a sixth of the entire capital, and for the father is the remainder, which is two-sixths. This is the opinion of Zayd, and the better-known opinion of ᶜAlī (God be pleased with him). Ibn ᶜAbbās said, in the first case, that for the wife is a fourth of the whole capital, for the mother a third, which is also from the whole as she is a sharer (in Qurʾanic terms), and for the father is the residue as he is a residuary. He also said in the second that the husband takes half, and for the mother is a third, being a stated sharer, and for the father is the residue. This was the opinion of Shurayḥ, the *qāḍī*, of Dāwūd, Ibn Sīrīn and a group of jurists.

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[192] Qurʾān 4:11

The argument of the majority is that the father and mother when they survive alone for inheriting the wealth, the mother has a third and the father takes the residue (father gets twice the mother's share); therefore, the situation must be the same when they get the remainder of the wealth. It was as if they were of the view that if the inheritance of the mother was more than that of the father, it would be contrary to the rules of inheritance. The reliance of the other group is on the fact that the mother is an expressly mentioned sharer, while the father is a residuary, and the residuary does not have a fixed share along with the sharers, but what he gets can vary, more or less. The basis of the majority is thus based on rationalization; whereas the argument of the other group is closer to the text. I mean by rationalization here that between the mother and the father, the person to be given priority is one who was the greater cause (for the deceased's existence).

51.1.4. Inheritance of Uterine Brethren

The jurists agreed that (in the case of) uterine brethren, when one of them is inheriting alone he (or she) gets a sixth, whether male or female. If they are more than one, they share a third equally, the male among them getting the same share as the female. They agreed that they do not inherit with any of the four persons, namely, the father, father's father howsoever high, children, both male and female, and children of sons howsoever low, both male and female. All this is due to the words of the Exalted, "And if a man or a woman have a distant heir (having left neither parent nor child), and he (or she) have a brother or a sister (only on the mother's side) then to each one of them twain (the brother and the sister) the sixth, and if they be more than two, then they shall be sharers in the third".[193] This is so as there is consensus (*ijmāʿ*) that what is meant in this verse are uterine brethren only, and it has been read as "have a brother or a sister on the mother's side". Similarly, they agreed here, as far as I think, that *kalāla* means the absence of the four categories of relations that we have mentioned, that is, parents, grandparents, children, and children's children.

51.1.5. Inheritance of German and Consanguine Brethren

They agreed that german or consanguine brethren alone inherit in *kalāla* also. If the sister inherits alone, she gets a half, but if there are two they get two-thirds, as in the case of daughters. If the brethren are males and females, then the share of the male is equivalent to two shares of the female, as in the case of sons with daughters. This is because of the words of the Exalted, "They ask thee for a pronouncement. Say: Allāh hath pronounced for you concerning

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[193] Qurʾān 4:12

kalāla. If a man die childless and have a sister, hers is half the heritage, and he would have inherited from her had she died childless. And if there be two sisters, then theirs are two-thirds of the heritage, and if they be brethren, men and women, unto the male is the equivalent of the share of two females".[194] They differed, however, about the meaning of *kalāla* here in part and disagreed about some, and its discussion will come up God willing.

Within this topic they agreed that the german brethren, male or female, do not inherit anything with the male child, nor with a child's child, nor anything with the father. They disagreed about what was besides this. Among them is their disagreement about the inheritance of german brethren with a daughter or daughters. The majority said that they are residuaries and are to be given what is left over from the sisters, while Dāwūd ibn ʿAlī al-Ẓāhirī and another group maintained that the sister does not inherit anything with the daughter. The reliance of the majority in this is on the tradition of Ibn Masʿūd from the Prophet (God's peace and blessings be upon him), in which he said about the daughter, son's daughter, and sister, "that for the daughter is half, for the son's daughter a sixth completing the two-thirds, and whatever is left is for the sister". Through a rational argument too, just as they agreed on the inheritance of brethren with daughters, so too on the sisters. The reliance of the second group is upon the apparent meaning of the words of the Exalted, "And if a man die childless and he has a sister, hers is half the heritage, and he would have inherited from her had she died childless".[195] (They said that) He did not allot anything for the sister, except in the absence of a child. The majority, here, interpreted the term *walad* as a male to the exclusion of females.

The jurists agree, in this topic, that the german brethren exclude the consanguine brethren from inheritance on the analogy of son's children with sons. Abū ʿUmar said that this is related as *ḥasan* through reliable individual narrators from ʿAlī (God be pleased with him), who said, "The Messenger of Allāh (God's peace and blessings be upon him) decided that the uterine brothers inherit without the german brothers". The jurists agreed that when german sisters exhaust their two-thirds, there is nothing for the consanguine sisters with them, as is the case of son's daughters with actual daughters. If there is only one german sister then for the consanguine sisters is the rest of the two-thirds, that is, a sixth. They disagreed when there was with the consanguine sisters a brother. The majority said that they become residuaries and share the wealth giving the male the equivalent of the share of two females, as is the case of the son's daughters with daughters. Mālik stipulated

[184] Qurʾān 4:177
[195] Qurʾān 4:177

that he be in the same order. Ibn Masᶜūd said that when the true sisters exhaust the two-thirds, the remainder is for the male consanguine brothers to the exclusion of the sisters, which was also the opinion of Abū Thawr. Dāwūd opposed him in this issue, along with his agreement with him on the issue of sisters and the son's of children. If they have not exhausted the two-thirds, then, the male among the children of the father, according to him, gets two shares of the female, except when the share coming to the women is more than a sixth as is the case of the daughters with the son's children. The proofs of the two parties are identical in this issue.

They agreed that consanguine brethren stand in the position of german brothers in their absence, as is the case with the son's children with true children. If there is a male among them they become residuaries. After allotment to the sharers, they share the residue, with the male getting a share equivalent to the shares of two females as in the case of children, except in one case that is known as *mushtaraka*, in which the jurists disagreed. This occurs when a woman dies leaving her husband, mother, uterine brethren, and german brethren. ᶜUmar, ᶜUthmān and Zayd ibn Thābit used to give the husband half, the mother a sixth and to the uterine brethren a third, finishing the wealth leaving the german brothers with nothing. The german brethren (complained, and their share was recognized. They), then, used to share with the uterine brothers in the third, dividing it as a share for the male equivalent to the share of two females. Mālik, al-Shāfiᶜī and al-Thawrī among the jurists of different regions upheld this participation. ᶜAlī (God be pleased with him), Ubayy ibn Kaᶜb and Abū Mūsā al-Ashᶜarī did not make the german brothers participate with the uterine in this division, and did not give them anything. This opinion was upheld by Abū Ḥanīfa, Ibn Abī Laylā, Aḥmad, Abū Thawr, Dāwūd and a group among the jurists of different regions.

The proof of the first group is that the german brethren participate with the uterine brethren due to a reason, for which they are entitled to inheritance, and she is the mother (through whom they are related to the deceased). It is, therefore, necessary that they do not share it alone without them. If they share in the reason due to which they inherit, they must participate in the inheritance. The argument of the other group is that full brethren are residuaries, and there is nothing for residuaries if the shares of the sharers envelop the inheritance. Another argument for them is that all agree that if the deceased leaves behind a husband, a mother, a single uterine brother and ten or more german brothers, the uterine brother alone is entitled to an entire sixth, and the remaining sixth is to be shared by all the full brothers (each getting no more than a tenth of the third) even though they have the same mother. The reason for disagreement in most of the issues of inheritance is the conflict of analogies and the ambivalence of words in the cases where there is a text.

51.1.6. Inheritance of the Grandfather

The jurists agreed that the father excludes the grandfather, but he stands in the position of the father in his absence with the children, and that he is a residuary with the sharers. They disagreed whether he stands in the position of the father in excluding true brethren, or in the exclusion of consanguine brethren. Ibn ʿAbbās, Abū Bakr (God be pleased with him), and a group of jurists said that he excludes them, and this was the opinion of Abū Ḥanīfa, Abū Thawr, al-Muzanī and Ibn Surayj among the disciples of al-Shāfiʿī, Dāwūd and a group of jurists. ʿAlī ibn Abī Ṭālib (God be pleased with him), Zayd ibn Thābit and Ibn Masʿūd agreed on granting inheritance to them with the grandfather, except that they disagreed about the method, as we shall describe later.

The reliance of those who considered the grandfather of the same status as the father is upon the common meaning, that is, from the point of view that both are fathers with respect to the deceased, and also on the fact that many of the *aḥkām* are, by agreement, equally applicable to both so much so that it is related from Ibn ʿAbbās that he said, "Would that Zayd ibn Thābit had feared Allāh when he considered the son's son as a son, but did not consider the father's father as a father". They agreed that he is like the father in many other *aḥkām* besides those of inheritance, among them is that his testimony for his grandson is like the testimony of the father, and that the grandfather becomes free once he falls in the possession of the grandson just as the father would be if he is possessed by his son, and that satisfaction by way of retaliation (*qiṣāṣ*) is not to be derived from the grandfather just as it is not derived from the father. The reliance of those who make the brother inherit along with the grandfather is that the brother is closer to the deceased than the grandfather, as the grandfather is the father of the father of the deceased, while the brother is the son of the father of the deceased, and the son is closer than the father. In addition, they agreed that the son of a brother is prior to the uncle, he (the brother's son) is related through the father, while the uncle is related through the grandfather.

The reason for disagreement, therefore, is the conflict of analogies in this topic. If it is asked, which of the two analogies is stronger in accordance with the legal viewpoint? We would say it is the analogy of one who held the father and grandfather as equal, as the grandfather is a father in the second or third order, just as the son's son is a son in the second or the third order. Moreover, the son does not exclude the grandfather, while he does exclude the brothers; it follows that the grandfather should exclude him whom the son excludes. Further, the brother is neither an ascendant of the deceased nor a descendant, but is only a participant with the deceased in the ascendants; and the ascendant has a prior right to being a participant with the ascendants. In addition, the grandfather is not (merely) an ascendant through the father, he is a true ascendant, while the brother inherits because he is a descendant of an ascendant of the deceased, thus, he who is an ascendant of his ascendant is prior to one who is a descendant of an ascendant. It is, therefore, reasonable to claim that brothers are related through children whereas the grandfather is related through the father, because the brother is not the son of the deceased, but is the son of his father, while the grandfather is the father of the deceased.

(*Bunūwwa*) (sonship, filiation) is stronger than *ubūwwa* (paternity) in inheritance in the case of only one person and that is the propositus himself. In the case of *bunūwwa* that exists for the father of the propositus, it is not necessary that it be stronger in relation to the propositus than the *ubūwwa* that exists for the father of the propositus, because the *ubūwwa* that exists for the father of the propositus is some kind of *ubūwwa* for the propositus, I mean, distant *ubūwwa* for the propositus, while the *bunūwwa* that exists for the father of the propositus is not any kind of *bunūwwa*, that is, it is neither distant nor near. Thus, those who said that the brother has a better right than the grandfather, as the brother is relegated due to something because of which inheritance of *bunūwwa* exists, and who is the father, and the grandfather too is relegated because of *ubūwwa*, is an opinion that is erroneous and conjectural. The grandfather is some kind of father, while the brother is not some kind of son. On the whole the brother is an affiliate among the affiliates of the deceased, as if he was an accidental fact, while the grandfather is a cause among the causes (of his existence), and the cause has better right to assimilate ownership than an affiliate.

Those who made the grandfather inherit with the brothers, differed about the mode of such inheritance. The gist of Zayd's opinion in this is that there may either be with him, besides brothers, some sharers, or there may not be any. If there are no sharers having stated shares he is given the better of two (choices), either the third of the wealth, or he becomes like one of the male brethren, irrespective of whether the brethren are male or female or both, he divides the wealth with one brother through *muqāsama*; similarly, with two, or three, but with four brothers he takes a third. With sisters from one to four he divides it with them as a share of the male equivalent to the share of two females, but with five sisters he gets the third, as he is preferable in the division. This is the case with brethren to the exclusion of others. If, however, there are sharers with them, the division is begun with the sharers, who take their shares and whatever is left is to be given to him as the best of three situations: either the third of the remainder after the allotment to the sharers, or as a male among the brethren, or he is given a sixth of the wealth not reducing anything from it, whatever is left after that is shared by the brethren as a share of the male equivalent to the shares of two females as in al-Akdariyya, which we shall mention along with the opinions of the rest of the jurists.

ᶜAlī (God be pleased with him) used to give the grandfather whatever was better for him from two choices: either a sixth or that would not reduce him below the sixth, irrespective of their being sharers with the grandfather. As they had agreed that the sons do not reduce anything from his share, so it was appropriate that the brethren should not reduce it. The reliance for Zayd's opinion is (the argument) that as he excluded the uterine brothers, he gets the third which was due to them (if they were not excluded). Zayd's opinion was upheld by Mālik, al-Shāfiᶜi, al-Thawrī and a group, while the opinion of ᶜAlī (God be pleased with him) was adopted by Abū Ḥanīfa.

The jurists differed about the division known as *al-akdariyya*, which was the case of a woman who died leaving behind a husband, a mother, a sister and a grandfather. ᶜUmar (God be pleased with him) and Ibn Masᶜūd used to give the husband half, the mother a sixth, the sister half and the grandfather a sixth. This was done by the method of reduction (*ᶜawl*). ᶜAlī ibn Abī Ṭālib (God be pleased with him) and Zayd used to say that the husband gets half, the mother a third, the sister half and the grandfather a sixth as share. Zayd, however, used to combine the share of the sister and the grandfather and made them share on the basis of a share for the male equivalent to the share of two females. Some of them thought that this is not Zayd's opinion, and they all considered as weak the sharing upheld by Zayd in this division. Mālik adopted Zayd's opinion. It is said that the issue was called *al-akdariyya* due to the irritating opinion of Zayd.

All this is based on the opinion of those who upheld reduction (*ᶜawl*). The majority of the Companions upheld *ᶜawl* as did the jurists of different regions, except Ibn ᶜAbbās. It is related from him that he said, "The first person to apply reduction (*ᶜawl*) to inheritance was ᶜUmar ibn al-Khaṭṭāb, and by Allāh, had he preferred those whom Allāh has preferred and relegated those whom Allāh has relegated, he would not have applied reduction to inheritance". It was said to him, "Who are those whom Allāh has preferred, and those He has relegated?" He said, "Each (fixed) share that Allāh has not caused to descend, except to another (prescribed) share, that is what Allāh has preferred. Each share, that slips from its due and has nothing except the residue, that is what Allāh has relegated. The first is like a wife and mother, while the relegated is like the sisters and daughters, and when the two categories are combined it is obvious who Allāh has preferred. If something is left, it is for those relegated by Allāh, otherwise there is nothing for them". It was said to him, "Why did you not say this to ᶜUmar?" He said, "*Hibtuh* (I was afraid)".

Zayd was of the opinion that if there were, with the grandfather and german brothers, consanguine brethren, the german brethren push back the grandfather due to the consanguine brethren and prevent him, due to them, from a substantial part of the inheritance, but they do not inherit anything with the german brethren unless there is only one german sister, for she pushes back the grandfather because of her consanguine brethren who share with her so that she completes her half. If there is something in excess of the half, it belongs to the consanguine brethren who share it as one share of the male is equivalent to the shares of two females. If there is nothing in excess of the half, there is no inheritance for them. ʿAlī (God be pleased with him) did not take into account the consanguine brethren here due to *ijmāʿ* on the point that the german brethren exclude them, and also that this act is against the principles, I mean, to calculate on the basis of those who do not inherit.

The Companions disagreed in this topic about the case called *al-kharqāʾ*, into five opinions, in which there is a mother, a sister, and a grandfather. Abū Bakr (God be pleased with him) and Ibn ʿAbbās held that the mother gets a third, and the grandfather takes the residue, excluding the sister through him. This is based on the opinion that allows the grandfather to stand in the position of the father. ʿAlī (God be pleased with him) said that the mother gets a third, the sister half, and what remains is for the grandfather. ʿUthmān held that the mother gets a third, the sister a third, and the grandfather a third. Ibn Masʿūd said the sister gets half, the grandfather a third, and the mother a sixth, and he used to say, "May Allāh protect me from giving preference to the mother over the grandfather". Zayd held that the mother gets a third and the residue is shared between the grandfather and the sister as one share of the male is equivalent to the shares of two females.

51.1.7. Inheritance of Grandmothers

They agreed that the maternal grandmother gets a sixth in the absence of the mother, and for the paternal grandmother also, in the absence of the father, is a sixth. If they survive together, both share a sixth. Zayd and the jurists of Medina maintained that the maternal grandmother is assigned a sixth as a fixed share, if both exist together the sixth is to be shared between them as their proximity is the same, or the proximity of the paternal grandmother is higher. If the proximity of the maternal grandmother is higher, that is, if she is closer to the propositus, the sixth belongs to her and the paternal grandmother has nothing. It is related from him that whosoever is of a closer, the sixth belongs to her. This was also the opinion of ʿAlī (God be pleased with him).

Among the jurists of the regions, Abū Ḥanīfa, al-Thawrī and Abū Thawr, they did not combine for purposes of inheritance any other grandmothers, except these two. Al-Awzāʿī and Aḥmad used to combine the inheritance of three grandmothers, one from the mother's side, and two from the father's side, father's mother and father's father's mother, that is, grandfather's mother. Ibn Masᶜūd gave the inheritance to four grandmothers at the same time: mother's mother, father's mother, father's father's mother and mother's father's mother. This was also the opinion of al-Ḥasan and Ibn Sīrīn. Ibn Masᶜūd used to combine the shares of the grandmother, the nearest and the remotest, as long as they were not excluded by the presence of their daughters or the daughters of their daughters. It is related from him that he used to drop the remotest for the nearest if they were in the same lineage. It is related from Ibn ᶜAbbās that the grandmother is like the mother when the mother is absent, but the majority consider this isolated, but it has some validity through analogy.

The reliance of Zayd, the jurists of Medina, al-Shāfiᶜī, and whoever adopted the opinion of Zayd, is upon what has been related by Mālik that he said, "A grandmother came to Abū Bakr (God be pleased with him) asking him about her inheritance, so Abū Bakr said, 'There is nothing for you in the Book of Allāh, the Mighty and Glorious, and I do not know of anything in the *sunna* of the Messenger of Allāh (God's peace and blessings be upon him), so return till I ask some people'. Mughīra ibn Shuᶜba, then, said to him, 'I was there when the Messenger of Allāh gave her (the grandmother) a sixth.' Abū Bakr said, 'Is there someone else to support you?' He said, 'Muḥammad ibn Maslama.' He said the same thing that Mughīra had said, so Abū Bakr implemented (the rule) for her. Another grandmother came to ᶜUmar ibn al-Khaṭṭāb asking about her inheritance. He said to her, 'There is nothing for you in the Book of Allāh, the Mighty the Glorious, and there has been no decision like this before except for a different category of grandmothers. I am not one to make an addition to shares, but that sixth if both of you can share it together, it is for you, and whichever one of you takes it alone, it is for her'". Mālik has also related "that two grandmothers came to Abū Bakr, so he desired to give a sixth to the one who was from the mother's side. A man, then, said to him, 'Would you leave the one whom he would inherit, if he were alive and she died?' Abū Bakr then allotted the sixth to be shared between them". They said that it is obligatory that this *sunna* and consensus of the Companions should not be violated.

The reliance of those who made three grandmothers inherit (at the same time) is the tradition of ᶜUyayna from Manṣūr from Ibrāhīm "that the Prophet (God's peace and blessings be upon him) gave the inheritance to three grandmothers, two from the father's side and one from the mother's side". Ibn Masᶜūd's reliance is on analogy through the comparison with the paternal grandmother, but the tradition opposes him.

They disagreed whether the paternal grandmother is excluded by her son, who is the father. Zayd was of the opinion that she is excluded by him. It was adopted by Mālik, al-Shāfiᶜī, Abū Ḥanīfa and Dāwūd. Others said that the grandmother inherits with her son, which is related from ʿUmar and Ibn Masʿūd, and a group of the Companions. This was adopted by Shurayḥ, ʿAṭāʾ, Ibn Sīrīn and Aḥmad, and it was also the opinion of the Egyptian jurists.

The reliance of those who excluded the grandmother through her son is on the fact that as the grandfather is excluded by the father, it is, therefore, appropriate that the grandmother have priority for exclusion. In addition, as the maternal grandmother does not inherit anything, by consensus, with the mother, it should be the same for the paternal grandmother with the father. The reliance of the second group is upon what is related by al-Shaʿbī from Masrūq from ʿAbd Allāh, who said, "The first grandmother whom the Messenger of Allāh (God's peace and blessings be upon him) granted a sixth was the grandmother with her son and her son was alive". They added, as a rational argument, that as the mother and maternal grandmother are not excluded by males, the same should be the *ḥukm* of all grandmothers.

It must be known that Mālik does not oppose Zayd in any issue except one, and that is in the case of a woman who dies leaving a husband, a mother, uterine brethren, german brethren and a grandfather. Mālik said that the husband gets half, the mother a sixth, and the grandfather gets the residue, which is a third, while there is nothing for the german brethren. Zayd said that the husband gets half, the mother a sixth, for the grandfather a sixth, and the residue is for the german brethren. In this issue Mālik went against his principle that the grandfather does not exclude the german brethren, nor the consanguine brethren. His (Mālik's) reason is that when the grandfather excluded the uterine brethren from a third to which they were entitled to the exclusion of the german brethren, he had a greater right to it. Zayd, on the other hand, acted on his principle by which he does not exclude them.

51.2. Chapter 2: Exclusion (*Ḥajb*)

The jurists agreed that the german brother excludes the consanguine brother, the consanguine brother excludes the children of the german brother, the children of the german brother exclude the children of the consanguine brother, the children of the consanguine brother have priority over the grandchildren of the german brother, the children of the consanguine brother have priority over the uncle, who is the father's brother, the children of the uncle, who is the father's german brother have priority over the children of the father's consanguine brother. All of these categories exclude their children, and those who exclude a category also exclude those excluded by this category.

On the whole, the brothers who are closer to the deceased exclude those who are distant. If they are equal (of the same order), those depending on two grounds, mother and father, exclude those depending upon a single ground, father only. Similarly, the uncles who are closer (to the deceased) exclude those who are distant, if they are of the same order, those linked to the deceased due to two grounds exclude those linked with a single ground, I mean, the uncle who is the consanguine brother of the deceased's father excludes the son of the uncle who is the consanguine brother of the deceased's father.

They agreed that the german brethren and the consanguine brethren exclude uncles, because the brethren are the children of the father of the deceased, while the uncles are the children of his grandfather. The children exclude their children, the fathers exclude the grandfathers, and the children and their children exclude the brethren. The grandfather excludes the grandfathers above him by consensus, while the father excludes the brethren and those whom the brethren exclude. The grandfather excludes the uncles, by consensus, and also the uterine brothers. The children of german brothers exclude the children of the consanguine brethren. The daughters and the daughters of children exclude the uterine brethren.

The jurists disagreed about the person who leaves behind two sons of uncles, one of whom was also a uterine brother. Mālik, al-Shāfiʿī, Abū Ḥanīfa and al-Thawrī said for the uterine brother is a sixth and he is also a residuary in the remainder of the wealth with the son of the uncle, which they divide equally. This was the opinion of ʿAlī (God be pleased with him), Zayd and Ibn ʿAbbās. A group said that the wealth belongs entirely to the son of the uncle who is also a uterine brother. He takes a sixth as due to brotherhood and the remaining as a residuary, as he is linked (to the deceased) through two grounds. The person who held this opinion among Companions is Ibn Masʿūd, and among the jurists were Dāwūd, Abū Thawr and al-Ṭabarī. It is also the opinion of al-Ḥasan and ʿAṭāʾ.

The jurists disagreed about the *radd* (return) of what remains of the estate to the sharers, if there remains a part not covered by the shares and there is no residuary. Zayd did not uphold the doctrine of return and used to deliver the wealth to the treasury *bayt al-māl.* This was adopted by Mālik and al-Shāfiʿī. *Radd* was upheld by the majority of the Companions, that is, to the sharers, except for the husband and wife, though they did differ about its mode. This was adopted by the jurists of Iraq, the Kūfīs and Baṣrīs. These jurists agreed that *radd* takes place according to their shares (*pro rata*). The person who has a half, takes half of the remainder, and so on for each share. The reliance of these jurists is on the argument that proximity (*qarāba*) due to *dīn* and lineage is better than proximity due to *dīn* alone, that is, these people assimilated two grounds, while for the Muslims in general is a single ground.

There are some issues here, disagreement about which is well-known among the jurists. They are related to the bases of inheritance and must be mentioned here. Among these is the agreement of the Muslims that the non-believer does not inherit from the Muslim due to the words of the Exalted, "Allāh will not give the disbelievers any way (of success) against the believers",[196] and because of what is established through the words of the Prophet (God's peace and blessings be upon him), "The Muslim does not inherit from the disbeliever, nor the disbeliever from the Muslim". They disagreed about the inheritance of the Muslim from the disbeliever and the inheritance of the Muslim from the apostate. The majority of the jurists among the Companions and the *Tābiʿūn* and among the jurists of the regions maintained that the Muslim does not inherit from the disbeliever due to this established tradition. Muʿādh ibn Jabal and Muʿāwiya, from among the Companions, and Saʿīd ibn al-Musayyib and Masrūq, from among the *Tābiʿūn*, and a group of jurists said that a Muslim may inherit from a disbeliever. They compared this to (the marriage of) their women, saying that as it is permitted to us to marry their women and it is not permitted to us to marry our women to them, same is the case with inheritance and they related for this a *musnad* tradition, about which Abū ʿUmar said that it is not strong enough according to the majority. They also compared it to retaliation (*qiṣāṣ*) in injuries which is not equal.

The majority of the jurists of Ḥijāz said that the wealth of the apostate, when he is executed or dies, belongs to the community of the Muslims and is not inherited by his relatives. This was adopted by Mālik and al-Shāfiʿī, and was Zayd's opinion from among the Companions. Abū Ḥanīfa, al-Thawrī, the majority of the Kūfans and many of the Baṣrans said that it is inherited by his Muslim heirs. It is the opinion of Ibn Masʿūd and ʿAlī, may Allāh be pleased with them both, from among the Companions. The reliance of the first group is on the generality of the tradition, while the Ḥanafites restrict the generality through analogy. Their analogy in this is that their (the heirs') proximity is more than that of the Muslims as it is based on two grounds, Islam and *qarāba*, while the Muslims have only one ground, Islam. Perhaps, they strengthened this with the continuity of the *ḥukm* of Islam for his wealth on the evidence that it is not to be taken immediately, but remains held by him till he dies, thus, his life is given consideration for his wealth to remain in his ownership, which would not be possible if his wealth did not have inviolability under Islam, and it is for this reason that acknowledgement of apostasy is not allowed against a disbeliever. Al-Shāfiʿī and others beside him said he is to be held liable for missing *salāh* during the period of apostasy, when he repents from it. Another group said that his wealth is suspended as it has inviolability through Islam. It is suspended in the hope that he would return to Islam, and the entitlement of the Muslims to his wealth is not by way of inheritance. One group gave an isolated opinion saying that his wealth belongs to the Muslims as soon as he becomes an apostate, and I believe that it is Ashhab who maintains this.

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[196] Qurʾān 4:141

They agreed about the members of a single community that they inherit from each other. They disagreed about the inheritance of (the members of) different religious communities. Mālik and a group of jurists maintained that the members of different communities do not inherit among themselves, like the Jews and Christians. This was adopted by Aḥmad and a group of jurists. Al-Shāfiʿī, Abū Ḥanīfa, Abū Thawr, al-Thawrī, Dāwūd and others said that all the disbelievers inherit (among themselves). Shurayḥ, Ibn Abī Laylā, and a group of jurists used to acknowledge three communities that do not inherit among themselves: Christians, Jews and Sabians, as one community; the Magians and those who do not have a Book as a (second) community; and Muslims as a (third) community. An opinion similar to that of Mālik is related from Ibn Abī Laylā.

The reliance of Mālik and those who adopted his opinion is on what is related by reliable narrators from ʿAmr ibn Shuʿayb from his father from his grandfather that the Prophet (God's peace and blessings be upon him) said, "The members of two communities do not inherit among themselves". The reliance of the Shāfiʿites and the Ḥanafites is on the words of the Prophet (God's peace and blessings be upon him), "A Muslim does not inherit from a disbeliever, nor a disbeliever from a Muslim". The meaning that emerges from this through the indication of the text is that a Muslim inherits from a Muslim and a disbeliever from a disbeliever. There is a weakness in an opinion based on the (implicit unspoken) indication of the text, especially here.

They differed about the *ḥumalāʾ* (immigrants), and the *ḥumalāʾ* are people who move with their children from the lands of the polytheists to the land of Islam, I mean, the children are born in the lands of the polytheists and then they move to the lands of Islam and claim that birth as effective in establishing descent (among themselves). They differed about them into three opinions. First, that they inherit according to what they assert of their descent, which is the opinion of a group among the *Tābiʿūn* and was adopted by Isḥāq. Second, the opinion that they do not inherit except through evidence establishing their descent, which was the opinion of Shurayḥ, al-Ḥasan and a group of jurists. Third, an opinion that they do not inherit at all. All three opinions are related from ʿUmar, except that the well-known opinion from him is that he did not allow to inherit except those who were born in Arab lands, which is the opinion of ʿUthmān and of ʿUmar ibn ʿAbd al-ʿAzīz.

The opinions of Mālik and his disciples differ about this. Among them are those who do not permit inheritance except through evidence, which is the opinion of Ibn al-Qāsim. Among them are those who hold that they do not inherit at all, even through reliable evidence. The person who held this opinion among the disciples of Mālik is ʿAbd al-Malik ibn al-Mājishūn. Ibn al-Qāsim has related from Mālik about the inhabitants of a fortress who surrendered to Muslim authority, supporting each other about their inheritance. From this it is derived that they inherit without evidence, as Mālik does not permit the testimony of the disbelievers for each other. If, however, they are made captive, their claim is not acceptable. Similar details are upheld by the Kūfīs, al-Shāfiʿī, Aḥmad and Abū Thawr, as they said that if they come into Muslim lands and no one has dominion over them, their claim about their descent is accepted, but if they are made captive and enslaved, their claim is not accepted, except through evidence. Thus, in this issue there are four opinions, two extreme and two making distinctions.

The majority of the jurists of the regions and those among the Companions, ʿAlī, Zayd and ʿUmar maintained that one who does not inherit does not exclude (others from inheritance by way of *ḥajb*), like a disbeliever, or a slave, or a murderer. Ibn Masʿūd used to exclude through these three without granting them inheritance, I mean, through the People of the Book, slaves, and those guilty of intentional homicide. This was adopted by Dāwūd and Abū Thawr. The reliance of the majority is on the argument that exclusion and inheritance are close to each other and that they go together (so that when one goes away the other follows). The argument of the other group is that exclusion is not removed except by death.

The jurists differed about those who were missing in war or at sea or under a landslide, and it was not known which one of them died first before his companion, how they were to inherit from each other if they were heirs. Mālik and the jurists of Medina held that they could not inherit from each other, and their estates collectively would go to the survivors among their relatives who were heirs, or they would go to the treasury (*bayt al-māl*) if they did not have relatives who could inherit. This was al-Shāfiʿī's opinion and also of Abū Ḥanīfa and his disciples in so far as it is related by al-Ṭaḥāwī. ʿAlī, ʿUmar, may Allāh be pleased with them both, the jurists of Kūfa, Abū Ḥanīfa, as quoted by (writers) other than al-Ṭaḥawī, and the majority of the Baṣrans maintained that they do inherit, and the mode of their inheritance is that each inherits from his companion on the basis of his original wealth and not what they have inherited from each other, that is, the wealth of the heir is not combined with what he inherits from others, they are made to inherit the whole as if it were one unit of wealth as is the case with those whose deaths are known to have preceded the deaths of others. An example of this is the case of a husband and wife who died in war, at sea, or through a landslide and each one of them had a thousand *dirhams*. The husband will inherit from his wife five hundred *dirhams*, while the wife will inherit a fourth out of the one thousand that the husband had excluding the five hundred that he inherited from her, which comes to two hundred and fifty.

Among the issues in this topic is the disagreement of the jurists about the estate of a child of a woman accused through the process of *liᶜān* and a child born through unlawful intercourse (*zinā*). The jurists of Medina and Zayd ibn Thābit held that the estate of the child of the *mulāᶜana* is to be inherited just like her other children and that his mother gets a third, while the remaining goes to the treasury, unless there are uterine brethren who will get a third, or the woman may be a *mawlā* in which case the remaining wealth will go to her *mawālī*, otherwise the remainder will go to the treasury. This was adopted by Mālik, al-Shāfiᶜī, Abū Ḥanīfa and his disciples, except that Abū Ḥanīfa according to his principle considers the *dhawū l-arḥām* superior to the community of the Muslims, and also following the analogy of those who uphold the doctrine of return (*radd*), the remainder will be returned to the mother. ᶜAlī, ᶜUmar and Ibn Masᶜūd held that his residuaries are the residuaries of the mother, unless she is absent (dead), and they used to substitute through the doctrine of *tanzīl* (substitution) the mother for the father. This was adopted by al-Ḥasan, Ibn Sīrīn, al-Thawrī, Ibn Ḥanbal and a group of jurists.

The reliance of the first group is the general meaning of the words of the Exalted, "And if he have no *walad* (son in this case) and his parents are his heirs, then to his mother appertaineth a sixth".[197] They said this woman is a mother and to each mother goes a third, thus, for this woman too is a third. The reliance of the second group is what has been related of the tradition of ᶜUmar from the Prophet (God's peace and blessings be upon him), "that he linked the child of a *mulāᶜana* with his mother", and also the tradition of ᶜAmr ibn Shuᶜayb from his father from his grandfather, who said, "The Prophet (God's peace and blessings be upon him) gave the estate of the child of the *mulāᶜana* to his mother and his heirs". They also relied on the tradition of Wāthila ibn al-Asqaᶜ from the Prophet (God's peace and blessings be upon him), "A woman gathers three kinds of wealth: that of her freed slave, that which she finds, and that of her child who is free of blame", and on the tradition of Makḥūl from the Prophet (God's peace and blessings be upon him) to the same effect. All of these have been recorded by Abū Dāwūd and others besides him. Al-Qāḍī said that acting according to these tradition is obligatory as they restricted the general meaning in the Book, and the majority believe that a particular *sunna* restricts the generality of the Book. Perhaps, these traditions did not reach the first group or were not proved authentic according to them. This opinion is related from Ibn ᶜAbbās and ᶜUthmān, and was well known among the First Generation. Its being well known among the Companions is an indication of the authenticity of these traditions, and such an opinion cannot depend on analogy. Allāh knows best.

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[197] Qurʾān 4:11

Among the issues of the establishment of paternity, which is a requisite for inheritance, is their disagreement about the person who leaves behind two sons, with one of them acknowledging the existence of a third son and the other denying it. Mālik and Abū Ḥanīfa said that it is obligatory on him to give him his due in inheritance, meaning thereby the one who acknowledged, although his paternity is not established in this way. Al-Shāfiʿī said that paternity is not established in this case nor is it obligatory on the one acknowledging it to give him anything from his share of inheritance. Mālik and Abū Ḥanīfa differed about the amount for which the acknowledging brother is liable. Mālik said that the obligation is to give what would have been due to him had the other brother acknowledged him and his paternity had been established. Abū Ḥanīfa said that it is obligatory on him to pay him half of what he gets. The same is the *ḥukm* according to Mālik and Abū Ḥanīfa about the person who is survived by one son and he acknowledges the existence of another son, I mean, paternity is not established but inheritance is obligatory. From al-Shāfiʿī there are two opinions about this issue. First, that paternity is not established nor is inheritance obligatory. Second, that paternity is established and inheritance is obligatory, and this is the opinion over which there is altercation among the Shāfiʿites, among the issues of proclamation, and they render it as a question of public interest, that is, each person who is entitled to wealth may establish paternity through acknowledgement, whether he is alone or there are others besides him.

The reliance of the Shāfiʿites in the first issue and in one of his (al-Shāfiʿī's) opinions, I mean, the opinion that is not well known, is on the argument that paternity is not established except by two *ʿadl* witnesses, and as this is not established, therefore, there is no inheritance, as paternity is the primary point while inheritance is secondary, and when the primary issue is not established the secondary is non-existent. The reliance of Mālik and Abū Ḥanīfa is on the argument that the establishment of paternity is a right extendible to the brother denying it and can only be established by two *ʿadl* witnesses; however, his share of the inheritance is in the hands of the brother who has acknowledged him and the acknowledgement is effective as it is a claim that he has acknowledged against himself. The fact is that a decision against him by the judge cannot be issued except after the establishment of paternity. Yet, it is not permitted to him, between his Lord and himself, that he should deny someone whom he knows to be his co-owner in the inheritance to the extent of his share.

The reliance of the Shāfiʿites, in establishing paternity through the acknowledgement of one person who is entitled to inheritance, is based on transmission and analogy. With respect to transmission, it is the tradition of Mālik from Ibn Shihāb from ʿUrwa from ʿĀʾisha, agreed upon for its soundness, in which she said, " ʿUtba ibn Abī Waqqāṣ acknowledged in front of his brother Saʿd ibn Abī Waqqāṣ that the son of the slave-girl of Zamʿa is mine so take care of him. At the time of the conquest of Mecca, Saʿd ibn Abī Waqqās took possession of him saying, 'My brother's son, he acknowledged him before me.' ʿAbd ibn Zamʿa challenged him saying, 'He is my brother, son of my father's slave-girl, born on his bed'. They dragged him to the Messenger of Allāh (God's peace and blessings be upon him) and Saʿd said, 'O Messenger of Allāh, he is my brother's son, he acknowledged him before me'. ʿAbd ibn Zamʿa challenged him saying, 'He is my brother, the son of my father's slave girl, born on his bed.' The Messenger of Allāh (God's peace and blessings be upon him) said, 'He is yours, O ʿAbd ibn Zamʿa'. The Messenger of Allāh (God's peace and blessings be upon him), then, said, 'The child belongs to the *firāsh* (bed where it is born),[198] and to the fornicator the stone (*rajm*)'. He then said to Sawda bint Zamʿa, on seeing his resemblance with ʿUtba ibn Abī Waqqāṣ, 'Veil yourself from him'. She said, 'He did not see her till he met his God' ". Thus, the Messenger of Allāh decided to grant ʿAbd ibn Zamʿa his brother and established his paternity through acknowledgement, when there was no contending heir. For the majority of *fuqahāʾ*, the understanding of this tradition became difficult, due to its conflict with the agreed principle for establishing paternity, and they have different interpretations for this (tradition). This is so as the apparent meaning of this tradition indicates that he established his paternity simply through an acknowledgement by his brother, while the principle is that paternity is not established without two *ʿadl* witnesses, and it was for this reason that people made different interpretations in this.

A group said that the Prophet (God's peace and blessings be upon him) established his paternity through the acknowledgement of his brother, as it is possible that he knew that this *ama* had sexual relations with (her master) Zamʿa ibn Qays, and that she was his *firāsh*. They said that what confirms this is the fact that Zamʿa was related to him by marriage, and Sawda bint Zamʿa was the Prophet's wife, so it was possible that the affair was not unknown to him. This is on the assumption that the *qāḍī* does not decide on the basis of his personal knowledge. This interpretation is not suited to Mālik's opinion, as the *qāḍī*, according to him, does not decide on the basis of his personal information, but it suits al-Shāfiʿī's opinion, according to his second opinion, I mean, the one in which paternity is not established. Those who upheld this opinion said that he ordered Sawda to veil herself as a precaution due to a semblance of a doubt, not that it was obligatory. Some of the Shāfiᶜites said on this basis that the husband has the right to ask his wife to veil herself from her brother. Another group said that his command to Sawda to veil herself is evidence that his paternity was not linked with the statement of ᶜUtba nor with his knowledge about the *firāsh*. These jurists made a distinction about the statement of the Prophet (God's peace and blessings be upon him), "He is for you" and said he meant by this "he is your slave as he is the son of your father's *ama*". This, however, is not apparent in the indication of the cause in the command of the Prophet (God's peace and blessings be upon him) in his statement, "The child belongs to the *firāsh* and to the fornicator the stone". Al-Ṭahāwī said that he intended by his words, "he is yours, O ᶜAbd ibn Zamᶜa" that you have possession over him like the possession of a finder over found property. All these interpretations are weak due to the *taᶜlīl* (indication of the underlying cause) by the Prophet of his *ḥukm* by saying, "The child belongs to the *firāsh* and to the fornicator the stone".

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[198] That is, the paternity of the child is attributed to the man who had legal access to the woman for sexual intercourse.

The rule upon which the Shāfiᶜites rely in this opinion is that the acknowledgement of one who is entitled to inherit amounts to an acknowledgement of succession (*khilāfa*), that is, the acknowledgement of one who collects the inheritance of the deceased. According to others, it is acknowledgement of testimony (*shahāda*) and not acknowledgement of succession, meaning thereby that the acknowledgement that was due from the deceased has been transferred to the one who collects his inheritance.

The majority of the jurists agreed that children born through *zinā* cannot be attributed to their (natural) parents, except what took place in *jāhiliyya* according to what is related from ᶜUmar ibn al-Khaṭṭāb with reported disagreement of the Companions. A group came up with an isolated opinion saying that the child born through *zinā* was legally attributed to the parents in Islam, I mean, one who was born through *zinā* after Islam. They agreed that a child cannot be legally associated with the *firāsh* (lawful sexual relationship) if born within a period that is less than six months, either from the time of the contract or from the time of consummation, and the period of the relationship is counted in the shortest period of gestation beginning with the time of consummation, even if the man separated from the woman or dissociated himself from her (thereafter).

They disagreed about the longest period of pregnancy through which the father can be associated with the child. Mālik said that it is five years, while some of his disciples said it is seven. Al-Shāfiᶜī said that it is four years. The Kūfīs said it is two years. Muḥammad ibn al-Ḥakam said it is a year. Dāwūd said it is six months. This counting is based on practice and experience. The opinions of Ibn ᶜAbd al-Ḥakam and the Ẓāhirites are closer to the normal. The rule should be based upon what is normal, not upon what is rare, which would, perhaps, be impossible.

Mālik and al-Shāfiʿī held that when a man marries a woman, but does not consummate the marriage or does so later, and the woman gives birth to a child in six months from the time of the contract not from the time of consummation, the child is not to be associated with him, unless she gave birth to it after six months or more from the time of consummation. Abū Ḥanīfa said that she is his legal wife (*firāsh*) and the child is associated with him. Mālik's argument is that she does not become a *firāsh* except through the possibility of intercourse and that is through consummation. The reliance of Abū Ḥanīfa is on the generality of the words of the Prophet (God's peace and blessings be upon him), "The child belongs to the *firāsh* (lawful marital or sexual relationship)". It was as if he considered this as a command to be obeyed without rationalization (*taʿabbud*) in giving the possibility of lawful sexual intercourse greater weight than that of unlawful sexual intercourse for purposes of associating the child with lawful sexual intercourse.

They disagreed under this topic about the establishment of paternity through physiognomy (*qāfa*). This occurs when two men have sexual intercourse with the same woman in a single period of purity, through a valid marriage or *milk yamīn*. The *ḥukm* for *qāfa* can also be conceived in the case of a foundling claimed by two men or three. *Al-Qāfa* according to the Arabs were a group of people who had the skills to identify the resemblance in the features of people. The use of *qāfa* was upheld by Mālik, al-Shāfiʿī, Aḥmad, Abū Thawr and al-Awzāʿī from among the jurists of different regions. The *ḥukm* of *qāfa* was rejected by the Kūfīs and most of the jurists of Iraq. The *ḥukm* according to them was that if two men claimed a child, it would belong to both, in case none of them claimed through *firāsh*, as in the case of the foundling, or when a woman becomes a *firāsh* for two men like an *ama* or a free woman with whom two men have intercourse in a single period of purity.[199]

According to the majority who uphold this opinion, it is permitted that there be, according to them, two fathers only for a child. Muḥammad, the disciple of Abū Ḥanīfa said that it is permitted that there be three if they claim this. All this is the mixing up and the annulment of (the rules derived from) reason and transmission.

The reliance for the deduction of those who upheld physiognomy is what was related by Mālik from Sulaymān ibn Yasār that ʿUmar ibn al-Khaṭṭāb used to assign the children born during *jāhiliyya* to those who were related to them, that is, those who claimed them after Islam. Two men came to him, both claiming the child of a woman. He called a physiognomist, who looked at them and said, "They have both participated in it". ᶜUmar beat him with his stick. He, then, called the woman and said to her, "Tell me what you think". She said, "He belongs to one of the men, who used to visit my people regarding camels and used to associate with me, till he thought and we thought that he had made me pregnant". (She continued) that he then went away and she even made a sacrifice for him. He then assigned the other man to succeed him, and who associated with her, meaning thereby the second man, and she said that she did not know to whom the child belonged. At this the physiognomist said, "*Allāhu akbar*". ᶜUmar said to the boy, "Choose whom you will".

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[199] The only conceivable case in which this could occur in Islam is the hypothetical case of error *(shubhat al-milk)*, which is discussed in some law manuals, but it is difficult to imagine otherwise. A woman can marry a second husband only after the death of the first, or after divorce from him. In both cases she can marry the second after her *ʿidda*.

They said that the decision of ᶜUmar in the presence of the Companions about the utilization of physiognomy, without denial by any of them, amounts to *ijmā*ᶜ (consensus). According to Mālik, the *ḥukm* of participation in paternity, as judged by the physiognomist, is to be postponed till the child attains puberty. It is then to be said to him, "Choose whom you like". The child cannot, however, be associated with both. This was the opinion of al-Shāfiᶜī. Abū Thawr said that he becomes the son of both, if the physiognomist says that both contributed to his conception. According to Mālik, he cannot be the son of both due to the words of the Exalted, "O mankind! Lo! We have made you from a male and a female".[200] The supporters of physiognomy also argued on the basis of the tradition of Ibn Shihāb from ᶜUrwa from ᶜĀ'isha, who said: The Messenger of Allāh (God's peace and blessings be upon him) (once) came in very pleased, his face beaming with delight, and said: "Have you not heard what Mujazziz al-Mudlijiyy said to Zayd and ᶜUsāma on seeing their feet? He said, 'These feet are related to each other'". They said that this is related from Ibn ᶜAbbās and from Anas ibn Mālik.

No one opposed them from among the Companions (regarding the validity of the findings of the physiognomists). The Kūfīs asserted the principle that no decision be given in favour of either of the litigants, unless there is an indication of a *firāsh* (lawful sexual relationship), due to the words of the Prophet (God's peace and blessings be upon him), "The child belongs to the *firāsh*". If the *firāsh* is absent or is ambiguous the child belongs to both. It was as if they considered this as legal *bunūwwa* (paternity, filiation) and not natural (physical). Thus, it is not necessary for one who denies that one child can have two fathers according to reason, to deny that it can be so legally. An opinion similar to theirs is related from ᶜUmar, and ᶜAbd al-Razzāq narrated one from ᶜAlī.

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[200] Qur'ān 49:13

Al-Shāfiʿī said that less than two physiognomists are not acceptable. From Mālik there are two opinions about this, the first is like the opinion of al-Shāfiʿī, and the second is that the finding of one physiognomist is accepted. The physiognomist, according to the well-known opinion of Mālik, is to be employed in the cases of *milk yamīn* only and not in the cases of *nikāḥ* (marriage). Ibn Wahb related from him an opinion similar to that of al-Shāfiʿī. Abū ʿUmar ibn ʿAbd al-Barr said that there is a *ḥasan*, *musnad* tradition in this, which has been accepted by a number of traditionists and the Ẓāhirites, and is related by al-Thawrī from Ṣāliḥ ibn Ḥayy from al-Shaʿbī from Zayd ibn Arqam, who said, " ʿAlī was in Yemen when they brought up to him a woman with whom three men had committed sexual intercourse in a single period of purity. He asked each one of them to acknowledge the child as belonging to the other, but each refused. He then drew lots between them and granted the child to the man whose name was drawn through the lot and imposed upon him two-third *diya*. This was reported to the Prophet (God's peace and blessings be upon him), who admired his decision. He was so pleased with it that he smiled widely as his front teeth shone". In this tradition we find the implementation of the *ḥukm* through physiognomy and the assignment of the child through lots.

They disagreed about the inheritance of the murderer, into four opinions. A group said that the murderer does not inherit his victim at all, while some others said that he does. Another group made a distinction between manslaughter and intentional killing, saying that he does not inherit anything in *ʿamd* (murder), but does inherit in cases of *khaṭaʾ*, except from the *diya*. This is the opinion of Mālik and his disciples. Others made a distinction between intentional homicide as an obligatory act (excusable homicide) and when it was not obligatory, as for example in the case of the person who has the task of implementing the *ḥudūd* (the executioner). They also distinguished between suspicious and unsuspicious circumstances.

The reason for disagreement is the conflict between the legal principle related to this with a view based on *maṣlaḥa*, as *maṣlaḥa* requires that he should not inherit so that people may not employ murder as a means to inheritance on the basis of the apparent meaning. *Taʿabbud* (blind obedience) requires that this should not be considered, because had this been the intention it would have been considered by the Lawgiver, as the Ẓāhirites say, "And thy Lord was never forgetful".[201]

They disagreed about the heir who was not a Muslim, but becomes a Muslim after the death of the propositus, and before the division of the estate; similarly, when the propositus professed a faith other than Islam. The majority said that consideration in this is to be given to the time of death. If on the day he died his heir was not a Muslim, he cannot inherit at all, whether he converted to Islam before the division or after it. Similarly, if the propositus professed a faith other than Islam and his heir was not a Muslim, he inherits from him by necessity, whether his acceptance of Islam was prior to the division or after it. A group said, among them al-Ḥasan and Qatāda, that the thing to be reckoned is the time of division, and this is related from ʿUmar ibn al-Khaṭṭāb. The reliance of both sides is on the words of the Prophet (God's peace and blessings be upon him), "Any house or land that was divided in *jāhiliyya* stays divided according the division of *jāhiliyya*, and any house or land that was found in Islam and was not divided, then, that is to be divided according to Islam". Those who took into consideration the time of division assigned the *ḥukm* of Islam as at that time, while those who took into account the time when division becomes due assigned the *ḥukm* of Islam from the time of death. It is related from the tradition of ʿAṭā᾽ that "a man converted to Islam at the (time of) inheritance in the period of the Messenger of Allāh (God's peace and blessings be upon him), prior to the division. The Messenger of Allāh (God's peace and blessings be upon him) gave him his share". The same is the *ḥukm*, according to them, in the case of (slave) heirs who are emancipated after the death (of the propositus) and prior to the division. These, then, are the well-known issues that are related to this book.

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[201] Qurʾān 19:64

Al-Qāḍī (Ibn Rushd) said that as inheritance depends on one of three causes, descent, marital relations, and *walā᾽*, and as we have already spoken about the heirs through descent and marriage we must now discuss *walā᾽*, for whom it is obligatory, in whose case it is obligatory and in whose case it is not, and what are its *aḥkām*.

51.3. Chapter 3: Clientage (*Walā᾽*)

The discussion of entitlement to *walā᾽* consists of important issues that are of the nature of principles in this topic.

51.3.1. Issue 1

The jurists agreed that whoever sets free his slave on his own account, his *walā᾽* belongs to him and he inherits him if he does not have heirs, and he is a residuary if there are heirs who do not exhaust the wealth.

The entitlement to *walā᾽* for the emancipator freeing the slave on his own account is established through the words of the Prophet (God's peace and blessings be upon him) in the tradition of Barīra, "*Walā᾽* belongs to one who sets (him) free". They disagreed when he emancipates his own slave for the sake of someone else. Mālik said that the *walā᾽* belongs to the person on whose account he is set free, not the person who undertakes the emancipation. Al-Shāfiʿī and Abū Ḥanīfa said that if he sets him free with the knowledge of the person on whose account he does it, then, the *walāʾ* belongs to the other person, but if he sets him free without his knowledge, it belongs to the person who undertook the act.

The reliance of the Ḥanafites and the Shāfiʿites is on the apparent meaning of the words of the Prophet, "*Walāʾ* belongs to one who sets (him) free", and on his words, "*Walāʾ* is kinship like the kinship of descent". They said as it is not permitted that descent be linked to a free man without his approval, so is *walāʾ*. As a rational argument (they said), as his emancipation is freedom that occurs within his owned property, it follows that *walāʾ* should belong to him, the basis being the same as when he sets him free on his own account. Mālik's argument is that when he emancipates him on the other person's account, it is as if he loses ownership in him, and (himself) resembles the agent. It is for this reason that they agreed that when the other person on whose behalf emancipation is made permits him, the *walāʾ* belongs to him and not the one undertaking the act. According Mālik, a person who says to his slave, "You are free for the sake of Allāh and the Muslims", the *walāʾ* belongs to the Muslims, but according to them (al-Shāfiʿī and Abū Hanīfa) it belongs to the emancipator.

51.3.2. Issue 2

The jurists disagreed about the person who converts to Islam at the hands of a certain man, whether his *walāʾ* belongs to him. Mālik, al-Shāfiʿī, al-Thawrī, Dāwūd and a group of jurists said that there is no *walāʾ* for him. Abū Ḥanīfa and his disciples said that *walāʾ* belongs to him, if he agrees to accept him as his *mawlā*. This is so as it is their principle that it is up to an individual to consider someone else as his *mawlā* so that he will inherit him and act as his *ʿāqila*, and he has the right to transfer the *walāʾ* to someone else if he does not pay the dues of the *ʿāqila* on his behalf. Others said that he becomes his *mawlā* by the very act of conversion to Islam at his hands.

The reliance of the first group is on the words of the Prophet (God's peace and blessings be upon him), "The *walāʾ* belongs to the one who sets (him) free". This word, *innamā*, (only) when it introduces a sentence is what is they call *ḥāṣira*, "the confining tool", and the definite article prefixing *walā*, according to them, is for *ḥaṣr*. The meaning of *ḥaṣr* also implies the idea of confinement, as the the *ḥukm* is specific to the person (or the thing) for whom it is laid down and nothing else shares it with him. So according to the meaning of this tradition, *walāʾ* cannot belong to anyone except the emancipator who undertook the act. The reliance of the Ḥanafites in establishing *walāʾ*, through the contract of clientage, are the words of the

Exalted, "And unto each we have appointed heirs (*mawālī*) of that which parents and near kindred leave", and His words, "As for those with whom your right hands have made a covenant, give them their due".[202] The proof of those who said that *walāʾ* can be acquired by the act of conversion to Islam at the *mawlā's* hands alone is the tradition of Tamīm al-Dārī, who said, "I asked the Messenger of Allāh about a polytheist converting to Islam at the hands of a Muslim, and he said, 'His rights are superior to the rest of the people, and are preferable during his life and after his death'". It was also decided accordingly by ʿUmar ibn ʿAbd al-ʿAzīz. The answer of the first group is that the implications of the words of the Exalted, "As for those with whom your right hands have made a covenant, give them their due",[203] have been abrogated by the verses of inheritance, and that this was the *ḥukm* in early Islam.

They agreed that it is not permitted to sell *walāʾ* or to gift it away due to the Prophet's established prohibition of this, except in the case of *walāʾ* that is unrestrained (*sāʾiba*).

51.3.3. Issue 3

The jurists disagreed when the master says to his slave you are free without restraints (*sāʾiba*). Mālik said that his *walāʾ* and dues of the *ʿāqila* are for all the Muslims, and he considered it the same as when he sets him free categorically on account of the Muslims, unless he intends thereby the meaning of freedom alone, in which case *walāʾ* will belong to him. Al-Shāfiʿī and Abū Ḥanīfa said that his *walāʾ* belongs to the emancipator in all circumstances. This was also the opinion of Aḥmad, Dāwūd and Abū Thawr. A group of jurists said that he has the right to assign his *walāʾ* to whomsoever he likes, and if generalizes his *walāʾ*, it belongs to the Muslims. This was the opinion of al-Layth and al-Awzāʿī. Ibrahīm and al-Shaʿbī said that there is no harm in the sale of the *walāʾ* of the *sāʾiba*, or in its donation. The arguments of these jurists are the same as the proofs that are stated in the preceding issue. I do not recall at the present moment the argument of those who permitted its sale.

51.3.4. Issue 4

The jurists disagreed about the *walāʾ* of a Muslim slave, to whom it belongs, when manumitted by a Christian prior to sale. Mālik and his disciples said that his *walāʾ* belongs to the Muslims, and if his *mawlā* converts to Islam later, the *walāʾ* does not revert to him, nor does the inheritance. The majority said that his *walāʾ* belongs to his master, and if he converts to Islam, he gets the inheritance too.

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[202] Qurʾān 4:33
[203] Qurʾān 4:33

The argument of the majority is that *walāʾ* is like descent, if the father converts to Islam after the conversion of the son he inherits him, so also in the case of the slave. Mālik's reliance is on the generality of the words of the Exalted, "And Allāh will not give the disbelievers any way (of success) against the believers".[204] He says that as *walāʾ* did not belong to him on the day of manumission it is not due to him through what follows.

If, however, it belongs to him on the day of manumission and then some obstacle occurs that prevents the assignment of *walāʾ* to him, the jurists agreed that *walāʾ* will revert to him when such obstacle is removed. It is for this reason that they agreed when a Christian manumits a *dhimmī* slave of his, before either of them has converted to Islam, with the slave converting thereafter, the *walāʾ* is cancelled, but if the master converts to Islam, it will revert to him. They did disagree about the case of a *ḥarbī* (the warring enemy) who sets free a slave professing his faith and (later) both cross over to the Muslims. Mālik said he is his *mawlā* and will inherit from him. Abū Ḥanīfa said that the relationship of *walāʾ* does not exist between them, and it is up to the slave to accept whom he likes among those professing his faith for *walāʾ* and affiliation. Ashhab opposed Mālik and said that if the slave converts to Islam before, his *walāʾ* cannot revert to his master ever. Ibn al-Qāsim said that it does, which is the meaning in Mālik's opinion, as Mālik considers the time of manumission (as being effective).

All these issues are hypothetical in their opinions and do not actually take place now, as there is none among the religion of Christians who enslave each other, nor in the religion of the Jews according to what they believe today, considering it as proscribed.

51.3.5. Issue 5

The majority of the jurists agreed that women have no part in inheritance through *walāʾ*, unless they have undertaken manumission themselves on their own account or what has been caused by those whom they directly manumitted, either through *walāʾ* or through descent. For example, in the case of a manumitted slave of a manumitted slave or the children of a manumitted slave. They do not inherit from the manumitted slave of the person from whom they inherit, except what is related from Shurayḥ. His argument is that as she has the *walāʾ* of one whom she manumitted on her own account, she has the *walāʾ* of one whom the propositus manumitted on the analogy of the (entitlement) of a man. This is what they call *qiyās al-maʿnā*, which is the highest category of analogy; however, it has been rendered feeble as it is isolated. The argument of the majority is that *walā᾽* became due on the basis of the benevolence of the manumitter for the manumitted, and this benevolence is found in the case of one who has directly manumitted, or is found due to a cause as strong as that, which is being a residuary.

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[204] Qurʾān 4:141

Al-Qāḍī (Ibn Rushd) said that as it has been settled who is entitled to *walā᾽* and who is not, what remains is the gradation of the possessors of *walā᾽* in the topic of *walā᾽*.

51.3.6. Gradation in *Walā᾽*

Among the best known of their issues in this topic is what they call *walā᾽ al-kubr*. An example is the case of a man who manumits his slave and then dies leaving behind two brothers or two sons. One of the brothers, or one of the sons, then dies leaving behind a son. The majority said that in this issue, the right of the dead brother about *walā᾽* is not inherited from him by his son, but it passes on to his brother as he has a right to it prior to his (brother's) son, as against (the rules of) inheritance, where exclusion is caused by the presence of the person closest to the deceased, but here it depends on being the closest to the person undertaking the manumission. This is related from ᶜUmar ibn al-Khaṭṭāb, ᶜAlī, ᶜUthmān, Ibn Masᶜūd and Zayd ibn Thābit from among the Companions. Shurayḥ and a group of jurists from Baṣra said that the right of the dead brother, in this issue, passes on to his children. The argument of these jurists is based on the similarity of *walā᾽* with inheritance. The argument of the first group is that *walā᾽* is a kind of lineage whose origin lies with the direct manumitter.

A well-known issue in this topic is the issue called *jarr al-walā᾽*. It takes the form of a slave who has children from an *ama*. The *ama* is manumitted and then the slave (her husband) is also manumitted. The jurists disagreed as to whom the children's *walā᾽* belongs when the father is manumitted. This is so as they agreed that their *walā᾽* after the freedom of the mother, whom the freed slave later marries, belongs to the *mawālī* of the mother, slavery not affecting the child when he is in its mother's womb. They disagreed when the father is freed, whether the *walā᾽* of his children passes on to his master. The majority—Mālik, Abū Ḥanīfa, al-Shāfiᶜī and their disciples—maintained that it does. This was also the opinion of ᶜAlī (God be pleased with him), Ibn Masᶜūd, al-Zubayr and ᶜUthmān ibn ᶜAffān. ᶜAṭā᾽, ᶜIkrima, Ibn Shihāb and a group said that *walā᾽* does not pass on to him. It is also related from ᶜUmar, and was decided this way by ᶜAbd al-Malik ibn Marwān when Qubayṣa ibn Dhū᾽ayb related it to him from ᶜUmar ibn al-Khaṭṭāb, though an opinion similar to that of the majority is related from ᶜUmar. The argument of the majority is that *walā᾽* is like paternity, and paternity belongs to the father and not the mother. The argument of the second group is that as the question of the determination of the children's freedom is dependent on the status of their mother, they are dependent on her in the results of their emancipation also, that is, for *walāʾ*.

Mālik held the opinion that the *walāʾ* of the grandchildren passes on to the grandfather, if the father is a slave, unless the father is freed. This was also the opinion of al-Shāfiʿī. The Kūfans opposed him relying on the argument that the *walāʾ* of the grandchildren is established for the manumitter of the grandfather through the father, and if the father does not have the *walāʾ*, it is proper that the grandfather not have it either. The reliance of the second group is on the argument that the slavery of the father is like his death, in which case it is necessary that the *walāʾ* pass on to the father's father.

There is no dispute among those who say the *walāʾ* belongs to the residuaries, as far as I know, that the descendants have a right prior to the ascendants and that it does not pass on to the ascendants, except in the absence of the descendants, as against the rule of inheritance. *Bunūwwa* is stronger for purposes of residue than *ubūwwa*, and the father is the weakest as a residuary. Brethren and their children are closer, according to Mālik, than the grandfather. According to al-Shāfiʿī and Abū Ḥanīfa, the grandfather is closer than them.

The reason for the disagreement is that one who is the closest through lineage and the strongest as a residuary does not inherit *walāʾ* as a prescribed share, but as a residuary. If the *mawlāʾ* among the descendants dies without leaving any heirs, or has heirs who do not exhaust the inheritance, his residuary for *walāʾ* is the highest ascendant. Similarly, the residuaries of the highest ascendant are those who are related to the ascendant through descent, I mean, his daughters and sons and the children of his children.

Within this topic is a well-known issue. When a woman, who has *walāʾ*, dies leaving behind a son and residuaries, to whom is the *walāʾ* transferred? A group said it passes to her residuaries, as they are the ones who compose the *ʿāqila* for her, and *walāʾ* belongs to the residuaries. This is the opinion of ʿAlī ibn Abī Ṭālib. Another group said that it passes to her son, which is the opinion of ʿUmar ibn al-Khaṭṭāb and is followed by the jurists of the regions. This is opposed to this legal tradition, as a woman's son is not among her residuaries.

The book of *farāʾiḍ* and *walāʾ* is completed, praise be to Allāh, as is His due.

LII

THE BOOK OF *ʿITQ* (MANUMISSION; EMANCIPATION)

The discussion in this book relates to those (persons) whose acts of emancipation are valid and those whose acts are not, those on whom emancipation becomes binding and those on whom it does not, that is, by law. It is also about the words used for emancipation, about oaths related to it, about its *aḥkām*, and about the conditions imposed in it. We shall mention, under these headings, those well-known issues that relate mostly to the transmitted texts.

They agreed that the person whose act of emancipation is valid is the sole owner, with valid ownership, in possession of discretion, of sound body, and having sufficient resources not being destitute. They disagreed about the person whose liabilities cover his assets. They also disagreed about one who emancipates while he is sick (*marīḍ*) and about the *ḥukm* governing him.

The jurists disagreed about the permissibility of emancipation by the person whose liabilities exceeded his assets. The majority of the jurists of Medina, Mālik and others, said that it is not permitted. This was also the opinion of al-Awzāʿī and al-Layth. The jurists of Iraq said that this is permitted till such time that he is placed under interdiction by the judge. This was the opinion of those among them who upheld interdiction. The derivation of an opinion from Mālik's principles indicates permissibility on the analogy of what is related from him in *rahn* (security for a debt) that it is permitted, even if his liabilities exceed his assets, as long as the judge does not interdict him.

The argument of those who prohibited his (act of) emancipation is that his wealth in such a state is linked with the right of the creditors, therefore, he does not have a right to dispose of anything from it without compensation. This is the underlying cause due to which the judge interdicts him with respect to disposal, and the *aḥkām* must coexist with their causes. Interdiction by the judge is not the underlying cause itself, rather it is an obligatory *ḥukm* necessitated by the underlying cause, thus, it is not to be taken into account.

The argument of the other party is that a consensus has taken place on the point that he (whose liabilities cover his assets) has the right to have intercourse with his slave girl, make her pregnant, and (to spend from his assets and) not to reimburse anything of the amount spent on himself or his family until the judge interdicts him, thus, tying down his hands. It is, therefore, necessary that the same *ḥukm* be applicable here. This is also the opinion of al-Shāfiʿī.

There is no disagreement among all of them that emancipation by a person who has not attained puberty is not valid, unless it is a part of a bequest, or by a person interdicted (*maḥjūr*), who is not permitted to emancipate any of his slaves, except that Mālik and his disciples permitted him to emancipate the slave-girl who is the mother of his child (*umm al-walad*).

In the case of the *marīḍ* (one seriously ill), the majority maintain that his act of emancipation takes effect if he recovers from his illness, but if he dies it is effective up to a third of his estate. The Ẓāhirites said that his act of manumission is the same as that of a healthy person. The reliance of the majority is on the tradition of ʿImrān ibn Ḥuṣayn about the person manumitting six slaves, which has preceded.

The persons compelled to emancipate their slaves constitute three cases of those who make a partial emancipation. One of these cases is agreed upon while two are disputed. These (two disputed cases) are: the case of one who comes to own the person who has to be legally emancipated (like owning his mother), and the person who maims his slave. Those who make a partial emancipation are of two kinds. First, is the case of the person who emancipates his slave, but does not own more than a part of him. The second is the case of a person who owns the slave in full, but chooses to emancipate him in part.

The jurists differed about the *ḥukm* of the slave owned by two men, one of whom manumits him to the extent of his share. Mālik, al-Shāfiʿī and Aḥmad ibn Ḥanbal said that if the emancipator is financially sound the share of his co-owner is evaluated fairly and he pays it to him; freeing the slave completely. In such a case the *walāʾ* belongs to him. If the emancipator is in financial straits, he is not obliged to pay anything, and the freed person remains a slave in part, and his *aḥkām* would be the those of a slave. Abū Yūsuf and Muḥammad said that if he (the emancipator) is facing financial difficulties, the slave is to work for his value for the owner who did not emancipate his share of the slave, but he is a free man the day the first person liberated his share; his *walāʾ* belongs to the first. This was the opinion of al-Awzāʿī, Ibn Shubrama, Ibn Abī Laylā and a group of Kūfī jurists, except that Ibn Shubrama and Ibn Abī Laylā stipulated that the slave has recourse to the first owner for the amount of work he has done, when his financial condition improves.

The majority maintain about the co-owner who has not emancipated his share that he has an option between setting free his share or having it evaluated. Abū Ḥanīfa said that the partner who is financially sound has three options. First, to free his share just as his partner has set free his; the *walāʾ*

would then be shared by them. There is no dispute about this among them (the Ḥanafites). The second option is that he has his share valued. Third, that he asks the slave to work for it, the *walā*ʾ being shared by them. The first person who emancipated him, when he pays the valued share, may ask the slave to work for what he has paid and the *walā*ʾ will belong to him completely.

The reliance of Mālik and al-Shāfiᶜī is on the tradition of Ibn ᶜUmar that the Messenger of Allāh (God's peace and blessings be upon him) said, "One who emancipates a slave in whom he has a share, and he possesses wealth that is equal to the price of the slave, he is to be asked to pay a fair valuation. He pays the co-owners their shares, and the slave is freed on his account, otherwise the slave is free to the extent he is freed". The reliance of Muḥammad and Abū Yūsuf, the disciples of Abū Ḥanīfa, and of those who uphold their opinion is the tradition of Abū Hurayra that the Prophet (God's peace and blessings be upon him) said, "One who manumits a part of a slave that he owns, may have him released with his wealth, if he has wealth, but if he does not have it the slave is to be asked to work for it without hardship". Both traditions have been recorded by the recorders of *ṣaḥīḥ* traditions, al-Bukhārī, Muslim and others besides them.

Each party has reasons for the preference of the tradition adopted by it. The Kūfīs declined the tradition of Ibn ᶜUmar on account of the fact that some of its narrators doubted the source of the final words not found in the tradition of Abū Hurayra, namely "Otherwise the slave is free to the extent he is freed", whether these are the words of the Prophet or the words of Nāfiᶜ. In addition, there is a difference of words used in its different versions. What the Mālikites consider as weak in the tradition of Abū Hurayra is that some of the narrators from Qatāda reported different words about work (by the slave). As a rational argument, the Mālikites relied on the fact that payment of the valued share is binding on the (first) owner, if he has wealth, due to the damage he has caused to his partner, while the slave has caused no harm to him; so nothing is binding on him. The argument of the Kūfīs, by way of reason, is that freedom is an indivisible legal right. If the emancipating partner is well off the entire emancipation becomes his liability, but if he is in difficult circumstances, the slave works for his (remaining) value. There is no harm in this ruling to the co-owner and no harm is done to the slave. Perhaps, they introduced *qiyās al-shabah* saying that as emancipation is found in the law in two forms—one form occurring through choice, which is the emancipation of the slave by his master seeking the favour of Allāh, and another form that is not voluntary, which is compelling the master to free a slave whom he cannot own legally—it is necessary that freedom through work be the same. The emancipation that is voluntary is through *kitāba*, while that which is not voluntary is through work.

Mālik and al-Shāfiʿī, in one of his opinions, differed when the emancipator is in difficult straits, whether the emancipation of the share of his co-owner is to be imposed upon him through a judicial decree or by the coming into effect of the *ḥukm*, that is, the obligation of (total) emancipation passes on to him by the very act of emancipation. The Shāfiʿites said that he is freed through the application of the *ḥukm*, while the Mālikites said that it is decreed. The Mālikites argued that had it been obligatory through application of the *ḥukm*, it would have been applicable in times of hardship and ease. The Shāfiʿites argued on the basis of the binding nature of the words of the Prophet (God's peace and blessings be upon him), "he is to be asked to pay a fair valuation". They argued that things that are subject to valuation are valued after their destruction, and he has destroyed the share of his co-owner by the very act of emancipation. He is, thus, obliged to pay fair valuation at the time of such destruction, even if the judge has not decreed this to be so. The co-owner, therefore, has no right to manumit his share, as manumission has become effective. This is evident.

Abū Ḥanīfa's opinion in this issue goes against the apparent meaning of the two traditions. Other isolated cases of disagreement are also reported. It is related from Ibn Sīrīn that he considered the share of the co-owner to be the liability of the *bayt al-māl* (treasury). It is related from Rabīʿa, about a person manumitting a share that he has in a slave, that the manumission is void. One group said that the whole value is not to be the liability of a person who is in financial straits and manumission is to be valid in what he has manumitted. Another group maintained that it is obligatory to hold the manumitter liable through valuation, whether he is in difficult straits or in financial ease, and the co-owner has recourse to him. In some narrations of the tradition of Ibn ʿUmar, the words "financial straits" have been dropped. All this is a disagreement based on the differences in traditions; perhaps, all the traditions did not reach them. Mālik's opinion in one issue, out of these, has differed, which is the case of a person in difficult straits. The *ḥukm* (in his case) was deferred by delaying evaluation till such time that he attained financial ease. It is said that he is liable for a fair value, while it is said that he is not.

Those who adopted these traditions agreed that if a person acquires, of his own volition, a share in a slave who is to be set free automatically, the remaining share in the slave is also set free on his account, in case he is in financial ease. If, however, he acquires the share without choice, as in the case of inheriting a share in the slave, a group said that the remaining part of the slave is set free on his account when he is in financial ease. Another group said that the manumission is not on his account, while a third group said that he is manumitted on his account with the condition of work (on the part of the slave), yet another group said that manumission does not take place at all.

If the master owns the entire slave and manumits part of him, then, the majority of the jurists of Hijāz and Iraq—Mālik, al-Shāfiʿī, al-Thawrī, al-Awzāʿī, Aḥmad, Ibn Abī Laylā, Muḥammad ibn al-Ḥasan and Abū Yūsuf—say that the entire slave is set free. Abū Ḥanīfa and the Ẓāhirites said that only the part manumitted by him is free and the slave works for the rest. This is also the opinion of Ṭāwūs and Ḥammād. The basis for the argument of the majority is that as the *sunna* has established the manumission of the share of another person in the case of a shared slave, due to the sanctity of manumission, it is appropriate that it be obligatory when he is the sole owner. Abū Ḥanīfa's argument is that the basis for the obligation of manumission on the person who divides up manumission is the harm that is likely to be caused to the co-owner, in the case of a shared slave, but when the entire ownership is his own there is no harm to others. In short, the basis for disagreement, through rational reasoning, is whether the ʿ*illa* (underlying cause) of this *ḥukm* is the integrity of manumission, that is, division should not occur in it, or it is the harm caused to the co-owner.

The Ḥanafites (Abū Ḥanīfa alone in this case) argued on the basis of what has been related from Ismāʿīl ibn Umayya from his father from his grandfather that he emancipated a part of his slave and the Messenger of Allāh (God's peace and blessings be upon him) did not disapprove such emancipation. Among the proofs of the majority is what has been recorded by al-Nasāʾī and Abū Dāwūd from Abū al-Malīḥ from his father "that a member of (the tribe of) Hudhayl emancipated part of one of his slaves, so the Prophet (God's peace and blessings be upon him) completed his emancipation saying, 'There is no partner for Allāh' ". In this way he explicitly stated the underlying cause (ʿ*illa*) adopted by the majority. This ʿ*illa* was superior, as the ʿ*illa* mentioned expressly is superior to the one that is derived. The reason for their disagreement, thus, is the conflict of traditions pertaining to this topic and the conflict of *qiyās*.

The jurists disagreed about manumission resulting from maiming. Mālik, al-Layth and al-Awzāʿī said that if a person maims his slave, he is emancipated on his account. Abū Ḥanīfa and al-Shāfiʿī said that he is not emancipated. Al-Awzāʿī gave an isolated opinion saying that if a person maims another's slave, he is set free on his account, while the majority maintain that he compensates the loss he causes in the value of the slave. Mālik, and those who adopted his opinion, relied on the tradition of ʿAmr ibn Shuʿayb from his father from his grandfather "that a person found one of his slaves in a compromising position with his slave-girl, so he cut off his penis and severed his nose. He came to the Prophet (God's peace and blessings be upon him) and mentioned this to him. He asked the man, 'What led you to do this?' He (the man) said that he did such and such a thing. The Prophet (God's peace and blessings be upon him) said to him (the slave), 'Go! You are a free man' ". The source for the other party are the words of the Prophet (God's peace and blessings be upon him), in the tradition of Ibn ᶜUmar, "One who slaps his slave or strikes him, the expiation for him is manumission".

They said that he did not consider manumission binding in this, but merely a recommendation. They maintain as a rational argument that the principle in law is that the master is not to be coerced into freeing his slave, unless (the principle) is restricted by evidence (*dalīl*). The traditions from ᶜAmr ibn Shuᶜayb are disputed as to their authenticity and did not attain the strength to restrict such a principle.

Now a question is, does a slave, who is the kin of the owner, become free automatically once he falls into the ownership of his relative? If so, then, who is (the relative) to be emancipated in this way? They differed about this. The majority of the jurists, except Dāwūd and his disciples, maintained that emancipation of a slave, who is a relative, is to take place once he is owned by him. Dāwūd and his disciples did not hold the view that a person is to be emancipated once he is owned by a close relation. Those who upheld emancipation differed about who was to be set free and who was not after agreeing that a man's parents and his children are to be set free once any of them falls into his ownership.

Mālik said that three categories of relatives are to be set free. First, the ascendants. They are fathers, grandfathers, grandmothers, mothers and their fathers and mothers. In fact, any one who is linked to the person through paternity. Second are the descendants. These are the sons and daughters and their children, howsoever low (in descent), and whether they are males of females. As a whole, all those with whom the person is linked through paternity, whether direct or indirect and whether they are males or females. Third are those who share his paternity with him through the same ascendants. These are his brethren, whether german, consanguine or uterine. He confined himself to persons related to each other through direct parenthood and did not hold the emancipation of the brethren's children as obligatory.

Al-Shāfiᶜī held an opinion similar to Mālik's with respect to the ascendants and descendants, but he disagreed with him about brethren and did not deem their emancipation as obligatory. Abū Ḥanīfa, on the other hand, held as obligatory the emancipation of all blood relatives in the lineage including paternal uncles and aunts, maternal uncles and aunts, brethren's children, and all those who resembled these categories, and who fall in the prohibited degrees for marriage.

The reason for the disagreement of the Ẓāhirites with the majority is their difference over the meaning of the established tradition, comprising the words of the Prophet (God's peace and blessings be upon him), "A son is not to be given compensation by his father, unless he found him enslaved, bought him, and emancipated him". It is recorded by Muslim, al-Tirmidhī, Abū Dāwūd and others. The majority said that it is understood from this tradition that if he buys him it is obligatory on him to emancipate him, but purchasing him is not obligatory on him. The Ẓāhirites said that the meaning of this tradition is that it is neither obligatory on him to purchase him nor to set him free, and attributing manumission to him is evidence of the validity of his ownership. If what they (the majority) say had been correct, the words would have been "if he purchases him, let him set him free". The reliance of the Ḥanafites is on what has been related by Qatāda from al-Ḥasan from Samura that the Prophet (God's peace and blessings be upon him) said, "If anyone owns a relative, he is free". This tradition was apparently not deemed authentic by Mālik and al-Shāfiʿī. Mālik viewed the brethren through the analogy of children and parents. Al-Shāfiʿī did not consider the brethren as similar to parents, but did hold children to be similar to parents.

The Mālikites aspired to argue for their school on the ground that sonship (*bunwwa*) is an attribute that is the opposite of servility (*ʿubūdiyya*) and, therefore, cannot be combined with it due to the words of the Exalted, "When it is not meet for (the Majesty of) the Beneficent that he should choose a son. There is none in the heavens and the earth but cometh unto the Beneficent as a slave".[205] This "servility" has a meaning different from the "servility" on the basis of which they argue. This servility is subject to reasoning and so is sonship, but the servility that exists between the creatures and their Master is servility stipulated by revelation and not by reason, and by stipulation I mean that which is without the influence of reason, as is assumed by them. It is a weak argument. Allāh, in fact, has deemed sonship to be the same as paternity by genus of their existence, or of kind, that is, the two in existence, one of them a father and the other a son, are very close to each other, so much so that they are either of the same genus or of the same category, while there is none among creatures who can share anything with Allāh from near or from far. In fact, the dissimilarity between them (Allāh and His creation) is the utmost possible. It is, thus, not correct that there be among the things in existence here an association with Him like that between the father and the son. On the other hand, if the relationship of the creatures with Him had been compared with the relationship of a slave with his master, it would have been closer to the truth of the matter rather than the relationship between a father and his son, as the disparity between the master and his slave is of a much more acute than that between the father and his son. The truth is that there is no similarity between the two relationships. Yet, as there is not, in the existing realities, a relationship with a greater disparity than this, a disparity as to being noble at one end or base at the other end, that is, in the relationship of the master and his slave, it becomes exemplary. Those who saw love, mercy, sympathy and compassion in the relationship of a father and his son, permitted, according to the religion of Jesus (ᶜĪsā), the saying that some people are the sons of Allāh. These are all the issues related to emancipation that is imposed upon a person without his own volition.

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[205] Qurʾān 19:92-93

They disagreed about the *aḥkām* of emancipation in an issue that relates to transmission. They disagreed about the person who freed his slaves during his illness, or made such freedom subject to his death, when he had no wealth beside them. Mālik, al-Shāfiᶜī, their disciples, Aḥmad and a group said that if he manumitted them during his illness and had no other wealth beside them, they are to be split up into three groups and one group from among them is to be freed, after his death, by drawing lots, and the same is their *ḥukm* in the case of a bequest (*waṣiyya*). Ashhab and Aṣbagh opposed Mālik in terminal manumission through illness, saying that the drawing of lots relates to bequest, while the *ḥukm* of this terminal manumission is like that of the *mudabbar* slave.

There is no disagreement in Mālik's school that if *mudabbars* are emancipated at the same time and the third of the estate is insufficient (to free them), a part of each is manumitted from the third, to the extent of the share of each in the third. Abū Ḥanīfa and his disciples maintained in this terminal manumission that if the third is insufficient, a third part of each is manumitted, while others said that a third part of the entire (number) is manumitted. Some, among them, took into account a third of the value of the entire (number), which is the opinion of Mālik and al-Shāfiᶜī, while others considered the number. According to Mālik, if there were six slaves, for example, a third of them would be manumitted by value, which may amount to two of them, or less, or more. A group said that the consideration is for number, thus, if there were six, two of them would be manumitted, and if there were seven, two and a third from among them would be manumitted—this too would be by the drawing of lots, after they had been split up into three groups.

The reliance of the jurists of Ḥijāz is what is related by the people of Baṣra from ᶜImrān ibn al-Ḥuṣayn "that a man freed six slaves close to his death and he had no other wealth. The Messenger of Allāh (God's peace and blessings be upon him) was consulted, and he divided them into three groups and then drew lots between them freeing two and keeping four enslaved". It is recorded by al-Bukhārī and Muslim with complete chains, but with a *mursal isnād* by Mālik. The reliance of the Ḥanafites, in accordance with their practice of rejecting traditions transmitted through single *isnād* (*khabar aḥād*) when they opposed established principles based on *tawātur*, is that the master made total manumission obligatory for each one of them and if he had owned (sufficient) wealth this would be implemented (*in toto*) on the basis of consensus, but when he does not possess sufficient wealth, it is obligatory that the (legal) act of the master be implemented for each one them to the extent of the permissible third. This principle, however, is not clearly applicable to this case in the rules of the law. It is possible to say that if a third of each one of them is manumitted it would be harmful for the heirs and the manumitted slaves, and the law has made it obligatory for one undertaking partial manumission to complete it, and as there is no one here to complete it, it is better to gather it in a few determined individuals, but when value is taken into account and not the number the transaction leads again to this situation of partial manumission. It is, therefore, better to consider number, which is the meaning in the tradition also. The manumitted part in each one of them is the right of Allāh and it is necessary that it be assimilated in some specified individuals, its basis being the rights of humans.

They disagreed about the wealth of the slave, when he is manumitted, as to whom it will belong. A group said that the wealth is for the master, while another group said that his wealth follows him. The first view was upheld by Ibn Masᶜūd, from among the Companions, and of Abū Ḥanīfa from among the *fuqahā*ᵓ along with al-Thawrī, Aḥmad, and Isḥāq. The second view was that of Ibn ᶜUmar, ᶜĀᵓisha, al-Ḥasan, ᶜAṭāᵓ, Mālik and the jurists of Madīna, the proof for them being the tradition of Ibn ᶜUmar that the Prophet (God's peace and blessings be upon him) said, "(In the case of) one who manumits a slave, the wealth (of the slave) belongs to him (the slave), unless the master stipulates (retaining) his wealth".

The words (legal form) of emancipation may be unequivocal or indirect according to most of the jurists of the regions. Unequivocal words are like saying, "you are free" or "you are manumitted" or derivatives of the root meaning of the words "freedom" and "manumission". These words are binding for the master by the consensus of the jurists. Indirect expressions are like a master saying to his slave, "I have no hold over you" or "I have no ownership in you". In these, according to the majority, the slave elicits the intention of the master irrespective of his intention to manumit. They disagreed, however, in the case where the master addresses his slave as "my son or his slave-girl as "my daughter", or he says "O! my father" or "O! my mother". A group held, and they are the majority, that manumission is not binding on him. Abū Ḥanīfa said they are to be manumitted on his account. Zufar held an deviant opinion saying that if the master says of his slave, "this is my son", then the slave is to be freed, even if the slave is twenty years old and the master is thirty.

Within this topic is their disagreement about a person who says to his slave, "you are none, but a freeman". A group, and these are the majority, said that this is praise for him (a courtesy), while a group said that he becomes a free man, which is the opinion of al-Ḥasan al-Baṣrī. Within these issues is also the case of a person calling out to his slave by name, when another (another one of his slaves) answers and he says to him, "you are free", but he says that I had intended the other. It is said that both are to be set free, while it is said that his intention is to be elicited. They agreed that one who manumits what is in the womb of his slave-girl, he is free to the exclusion of the slave-girl (the mother). They disagreed over the case in which the master emancipates his slave-girl, but exempts what is in her womb. A group said that he has the right to make an exemption, while another group said that both are free.

They disagreed about manumission conditional upon the will of Allāh. A group said that there is no proviso in this as in the case of divorce, which is the opinion of Mālik. Another group said that provisos are effective in it, and they maintain the same in the case of divorce. I mean by this a person saying to his slave, "You are free, God willing". Similarly, they differed about the *occurrence of manumission with the condition of ownership. Mālik said it* takes place, while al-Shāfiʿī and others said it does not. Their proof is in the words of the Prophet (God's peace and blessings be upon him), "There is no manumission in what is not owned by the son of Adam". The argument of the second group lies in its resemblance with *yamīn* (oath).

The words in this topic resemble those in the subject of divorce and its conditions are like the conditions of divorce. So also oaths in it are similar to oaths in divorce. As to its *aḥkām*, these are many. Among these, according to the majority, is that children follow their mother in emancipation and slavery. A group differed and said, "Except when the father is an Arab". There is disagreement about manumission effective at a future date. A group said that he has no right (in this period) to have intercourse with her, to sell her, or to gift her away. This was upheld by Mālik. A group said that he has all these rights, which was the opinion of al-Awzāʿī and al-Shāfiʿī.

They agreed about the stipulation of service for a determined period (to be performed) by the manumitted person before or after manumission, but they disagreed about the person who said to his slave, "If I sell you, you are a free man". A group said that this is not effective as after he has sold him he does not have the right to manumit him. Others said that if he sells him, he is to be set free on his account, that is, from the wealth of the seller when he sells him. This is the opinion of Mālik and al-Shāfiʿī. The former was held by Abū Ḥanīfa, his disciples and al-Thawrī. The cases in this chapter are many, but this is sufficient.

LIII

THE BOOK OF *KITĀBA* (MANUMISSION BY CONTRACT)

A comprehensive examination of *kitāba* covers its elements, conditions, and *aḥkām*. The elements are three: the contract, its conditions, and characteristics; *the contracting party and his attributes; and the subject-matter of the contract* and its description. In each of these categories, we shall mention the issues that were well known among the jurists of the regions.

53.1. Chapter 1: Issues Related to the Contract

Among the well-known issues in this category is their disagreement about the contract of *kitāba*, whether it is obligatory (*wājib*) or recommended (*mandūb*). The jurists of the various regions said that it is recommended, while the Ẓāhirites said it is obligatory. They argued on the basis of the words of the Exalted, "And such of your slaves as seek a writing (of emancipation), write it out for them if ye are aware of aught of good in them",[206] saying that the command (*amr*) here implies an obligation. When the majority considered the principle that no one is to be forced to emancipate his slaves, they interpreted the verse to indicate a recommendation, so that it would not conflict with this principle. Further, as the slave has no right to demand a decree for his (own) sale, which amounts to the passing of his corpus from his ownership with compensation, it is appropriate that he have no right to ask for a decree for passing out of his ownership without compensation, for he is his owner and the services of the slave belong to the master. This issue is closely related to the *aḥkām* of this contract rather than to its elements.

The contract in general means that the slave purchases himself and his wealth from his master with the wealth that the slave earns. Thus, the *elements of this contract comprise the price, the object of the price, the period* (of payment), and the words that indicate the contract. They agreed about the price that it is valid if it can be ascertained with the (same) knowledge that is stipulated for sales. They disagreed when the form of words employed contains some ambiguity. Abū Ḥanīfa and Mālik said that it is permitted if he contracts *kitāba* with his slave in consideration (payment) of a slave-girl or a male slave without describing them as long as they are considered average among slaves. Al-Shāfiʿī said that it is not permitted unless he describes clearly the slave to be presented as consideration for his freedom. Those who required examination of the slave to be offered as a price held it similar to sales, while those who viewed its object as generosity and a lack of avarice, permitted a small degree of *gharar* in it, as is the case in dower (*ṣadāq*). Mālik permits, between a slave and his master in *mukātaba*, even a certain amount of *ribā* that would not be permitted between strangers, like the sale of food before taking possession, the cancellation of a debt with a debt, and discount for early payment. Al-Shāfiʿī and Aḥmad prohibited this. Both opinions are related from Abū Ḥanīfa. The reliance of those who permitted it, saying that there is no *ribā* between a master and his slave, is (on the argument) that he and his wealth belong to the master and that *kitāba* in itself is a *sunna*.

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[206] Qur'ān 24:33

They agreed about the period that it is permitted with a delay, but disagreed whether it could be immediate, and this, after their agreement that it is permitted immediately for the wealth that is in the possession of the slave, which is referred to as *qiṭāʿa* not *kitāba*. It is in *kitāba* that the slave stipulates to purchase himself and his wealth from his master with wealth that he will earn. The point of disagreement is whether it is permitted that he purchase himself from his master with wealth that is not in his possession. Al-Shāfiʿī said that this is futile talk and nothing is binding upon the master in this case. The later Mālikites said that the *kitāba* becomes binding upon the master and the slave has a right to take up the issue with the judge and present before him wealth in accordance with the situation of the slave. The argument of the Mālikites is that the master obliged the slave to enter into *kitāba*, except that he stipulated in it a condition, which becomes an obstacle, thus, the contract is valid and the condition is void. The argument of the Shāfiʿites is that an invalid condition leads to the vitiation of the contract, like a person selling a slave-girl stipulates that he (the buyer) will not have intercourse with her as he did not have wealth in hand; thus, it leads to an inability and is contrary to the purpose of *kitāba*. The thrust of the Mālikite opinion is that a period is one of the elements of *kitāba*, and if something contrary to this element is stipulated, the condition is void and the contract is valid.

They agreed that if the master says to his slave, "I have entered into *kitāba* with you for a thousand *dirhams*, when you pay it you are free", the slave is free if he pays it. They disagreed if he says to him, "I have entered into *kitāba* with you for one thousand *dirhams*", but remains silent about whether he would be free or not, not saying "you are free if you pay it". Mālik and Abū Ḥanīfa say that he is free as *kitāba* is a legal term and invokes all its *aḥkām*.

A group said that he is not free unless the master pronounces the words unequivocally. The opinion of Al-Shāfiʿī varied in this. Within this topic is the conflict of Ibn al-Qāsim's and Mālik's opinions about the person who says to his slave, "you are free and a thousand *dīnārs* are due from you". The school differed about this with Mālik saying that the payment is binding upon him and he is free. Ibn al-Qāsim said that he is free, but payment is not binding upon him. On the other hand, when he says, "you are free on the condition that you owe a thousand *dīnārs*", the school differed about this with Mālik saying that he is free and he owes the money like any other debtor. It is also said that the slave has an option, if he chooses freedom the payment becomes due and emancipation is effective, otherwise he remains a slave. Another opinion maintains that if he accepts, it amounts to *kitāba* and he will be freed upon payment. Both opinions are Ibn al-Qāsim's.

Kitāba is valid, according to Mālik, on the basis of specified work, and it is also permitted according to him without qualification, in which case it reverts to a reasonable *kitāba*, as is the case (of dower) in marriage (*nikāḥ*). *Kitāba* is also permitted, according to him, for the value of the slave, I mean, reasonable *kitāba* with respect to time and price. It was due to this that it was said he permitted immediate *kitāba*.

They disagreed whether it was a condition of *kitāba* that the master reduce some of the payment of *kitāba* on the completion of the payment, because of their disagreement about the meaning of the words of the Exalted, "And bestow upon them of the wealth of Allāh which He hath bestowed upon you".[207] The reason is that some of them were of the view that it is the masters who are the addressees in this verse, while others said that it is the community of Muslims to whom a recommendation has been made to assist the *mukātab* slaves. Those who held this view disagreed whether it contained an obligation or recommendation. Those who held the former opinion differed about the amount of the obligation. Some said it should be a reasonable sum, while others fixed it.

Several issues relate to the *mukātab*. Among them is whether *kitāba* with adolescents is valid, and whether in a single contract of *kitāba* more than one slave can be included. Whether *kitāba* with a slave who is partly owned is valid without the permission of the co-owner. Whether *kitāba* with a slave, who is unable to work, is valid. Whether *kitāba* with a person, who is part slave, is valid.

In the case of the adolescent, who had not attained puberty, but was strong and able to work, Abū Ḥanīfa permitted *kitāba*, while al-Shafiʿī prohibited it, except for those who had attained puberty. From Mālik both views are related.

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[207] Qurʾān 24:32

The argument of those who stipulate puberty is the comparison with the rest of the contracts. The argument of those who did not stipulate it is that things are permitted between master and slave that are not permitted between strangers, and the the important factor is the ability to work, which may be present in one who has not attained puberty.

Can more than one slave be included in a single *kitāba*? The jurists disagreed about this. Further, when we uphold inclusion, are they become sureties for each other through the same *kitāba*, so that none is emancipated until all are emancipated together? There is disagreement in this too. With respect to the permissibility of inclusion, the majority uphold it, while a group prohibited it, which is one of the opinions of al-Shāfiʿī. Do some stand surety for others? There are three opinions about this from those who upheld inclusion. A group said that this is implied by the contract of *kitāba*, that is, they will stand surety for each other. This was the opinion of Mālik and Sufyān. Others said that it is not binding by the absolute contract, but it is through a stipulated condition. This was Abū Ḥanīfa's opinion and that of his disciples. Al-Shāfiʿī said that it is not permitted, either by the implication of the contract or by stipulation, and each is emancipated by the payment of his proportional share.

The basis for those who rejected the ruling of becoming sureties is the element of *gharar* in it, as the amounts that are due from each are unknown. The basis for those who permitted this is that minor *gharar* to be tolerated for purposes of *kitāba*, as it is a transaction between a master and his slave, and the slave and his wealth belong to the master. Mālik's argument is that as it is a single *kitāba*, it follows that the *ḥukm* for all of them be that for a single person. The argument of the Shāfiʿites is that surety of one them for the other is just like the surety of one stranger for another, and those who held that the surety of one stranger for another is not valid said that it is not permitted on this occasion either. They denied surety in *kitāba* as in case of the inability of the *mukātab* the surety would have recourse to nothing. This does not appear to be so from the surety of the slaves, one for the other; what is apparent is that the condition is the cause, for one who is not able to work is hindered by the inability of one who is not. This is *gharar* specific to *kitāba*. It may also be said that inclusion may lead to the emancipation of those who are unable to work in order that they be free. Just as it results in the (continued) enslavement of those who can work, it causes the emancipation of those who cannot. Abū Ḥanīfa held it to be similar to the surety of a stranger for another stranger, in cases where surety is permitted, and made it binding through a condition, though he still does not permit surety in *kitāba* generally.

The jurists disagreed about two co-owners of a slave, whether one of them can contract *kitāba* for his share without the permission of his partner. Some said that he does not have this right and the *kitāba* would be void, and what he gains from it is to be shared between them according to their shares. A group said that it is not permitted to a person to contract *kitāba* for his share to the exclusion of the share of the other co-owner. One group made a distinction saying it is permitted with the permission of the co-owner, but it is not valid without his permission. The first opinion was held by Mālik, the second by Ibn Abī Laylā and Aḥmad, and the third by Abū Ḥanīfa and al-Shāfiʿī, in one of his opinions; he has another opinion similar to that of Mālik.

Mālik's argument is that if this were to be permitted, it would lead to the complete emancipation of the slave through valuation in favour of the person who contracted the *kitāba* for his share. This is not permitted, except in the division of emancipation. Those who held the view that he has right to contract *kitāba*, maintained that he is to complete the emancipation if the slave makes the payment, provided he is financially sound. Mālik's argument here is based on a principle, which is not agreed to by his opponents, but that does not affect the soundness of the principle itself. The stipulation of a condition, however, is weak. Abū Ḥanīfa maintains, about the mode of payment to the *mukātib* (master), when the *kitāba* is with the permission of his co-owner, that whatever is paid to the co-owner who contracted the *kitāba*, the other co-owner takes out of it his share and recovers the remaining from the slave who works for him till such time that the agreed payment is completed. In this there is an estrangement from the principles.

Is the *kitāba* of one who is unable to work valid? There is no disagreement, as far as I know, among them that a condition for the *mukātab* is that he should be strong enough to work, due to the words of the Exalted, "[I]f ye are aware of aught of good in them".[208] They differed about the meaning of the term "*khayr*" (good) in the text. Al-Shāfiʿī said it means work and reliability, while some of them said it means wealth and reliability. Others said that it means right conduct and the observance of *dīn*. Some denied *kitāba* for those who did not have a skill, for fear that they would start begging, while others permitted this due to the tradition of Barīra that "she was granted *kitāba* in a state when she needed to ask from others". Mālik considered as abominable the *kitāba* of a female slave, when she did not have an income through a skill for fear that it might lead her to prostitute herself. Mālik permitted the *kitāba* of the *mudabbara* and all those who were partly slaves, except the *umm al-walad*, as he (the master) had no right to use her for services.

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[208] Qurʾān 24:33

53.2. Chapter 2: The Parties to the Contract

They agreed that one of the conditions for the *mukātib* (master) is that he should be the owner, with a valid ownership, should not be under interdiction, and be in possession of a sound body (not a *marīḍ*). They disagreed whether a *mukātab* could enter into *kitāba* with his slave. This discussion will come up when we consider what is permitted to the *mukātab* and what is not. Mālik did not permit that a slave authorized to trade (*maʾdhūn*) should contract *kitāba* with another slave, as *kitāba* is manumission and he is not permitted to manumit. Similarly, *kitāba* by one whose assets are immersed in debt is not permitted, except when the creditors grant permission, and the payment of *kitāba* consists of something that can be a substitute of the slave. The *kitāba* of the *marīḍ* is valid, according to him, up to a third. The whole question is to be suspended till he recovers, in which case it would be valid; but if he dies, it would take effect out of a third, being the same as manumission. It is said that if he can oblige with payment it is accepted, but if he cannot, he works for it; if he makes the payment while he (the master) is ill, it amounts to manumission. The *kitāba* of a Christian with a Muslim is valid, according to him, and he (the Muslim *mukātab*) is to be sold out as in the case of an ordinary slave (so that he does not remain a slave of the Christian).

These, then, are the well-known issues that are related to the elements, that is, the *mukātib*, *mukātab*, and *kitāba*. The *aḥkām* are many, as are the conditions, whether permissible or prohibited. It appears that the foremost *aḥkām* of this contract would be: when is the *mukātab* emancipated, when is he enslaved due to inability (to pay), what is his legal position if he dies before he is emancipated or re-enslaved, who is included with him in the *kitāba* and who is not, and the distinction between what is left out of the restrictions of slavery and what is not? We begin by mentioning the issues of the *aḥkām* in each category out of these five categories.

53.2.1 Category 1

When is he emancipated? They agreed that he is emancipated on paying the entire value of the *kitāba*. They disagreed when he is unable to pay part of it, but has paid the rest. The majority say that he is a slave as long as some part of the *kitāba* remains, and is to be enslaved if he is unable to pay it. From the earlier jurists four opinions, besides the opinion of the majority, are related. First, the *mukātab* is emancipated by the very act of *kitāba*. Second, he is free to the extent that he has made the payment. Third, he is emancipated if he has paid half or more than that. Fourth, he is free if he has paid a third, otherwise he remains a slave.

The reliance of the majority is on what has been recorded by Abū Dāwūd from ʿAmr ibn Shuʿayb from his father from his grandfather that the Prophet

(God's peace and blessings be upon him) said, "Any slave who is granted a *kitāba* for a hundred ounces and pays all except ten ounces remains a slave, and any slave who is granted a *kitāba* for a hundred *dīnārs* and he pays all except ten *dīnārs* remains a slave". The reliance of those who hold that he is emancipated by the contract itself is on its similarity with sale. It is as if the *mukātab* had purchased himself from his master and the buyer being unable to pay, the seller has no recourse to him except to share his wealth, just as one who purchased him from him on credit becomes insolvent and then dies. The reliance of those who maintained that he is set free to the extent of what he has paid is what has been related by Yahyā ibn Kathīr from ʿIkrima from ibn ʿAbbās that the Prophet (God's peace and blessings be upon him) said "For the *mukātab* is paid the *diya* of a free man to the extent that he has paid and the *diya* of a slave for the part that of him that is still a slave". It is recorded by al-Nasāʾī. The disagreement in it is related to ʿIkrima, just as the disagreement in the tradition of ʿAmr ibn Shuʿayb is related to the fact that he related from a written *ṣaḥīfa*. This opinion was upheld by ʿAlī, that is, the one in the tradition of Ibn ʿAbbās. It is related from ʿUmar ibn al-Khaṭṭāb (who said) that if he pays a part of what is owed he is emancipated. Ibn Masʿūd used to say (he is emancipated if he pays) a third. The opinions of the Companions, though they are not a *ḥujja*, yet it is manifest that a verdict issued by them is to be interpreted as containing a *sunna*, which must have reached them.

In this issue there is a fifth opinion. If he pays three-fourths, he is emancipated and remains a debtor without means for purposes of the remaining fourth. It is said that if he has paid to the extent of his value, he remains a debtor (for the remaining and is emancipated). This is the opinion of ʿĀʾisha, Ibn ʿUmar, and Zayd ibn Thābit. The well-known opinion from Ibn ʿUmar and from Umm Salama is like the opinion of the majority, and it is their opinion that the jurists of the various regions have relied upon. This is so as the narrations from them are authentic beyond doubt, and are related by Mālik in his *Muwaṭṭaʾ*. In addition, it reflects care for the wealth of the masters, and also because in sold commodities the recourse is to the corpus of the sale when the buyer becomes insolvent.

53.2.2. Category 2

They agreed that he is enslaved when he is unable to make part of the payment or the whole of it, in accordance with their disagreements we have presented earlier. They disagreed whether the slave has the right to declare his inability on his own, without any reason, or that he has no such right except for a reason. Al-Shāfiʿī said that *kitāba* is a contract binding upon the slave, but it is not binding upon the master. Mālik and Abū Ḥanīfa said that *kitāba* is a contract that is binding on both, that is, the master and the slave. The conclusion from Mālik's opinions is that the master and the slave may either agree upon the slave's inability or they may disagree. If they differ, then it may be the master who claims the inability of the slave, while the slave denies it, or *vice versa*, that is, the master desires the existence of *kitāba*, while the slave claims inability. If they agree upon inability, the issue falls into two cases. First, that a child has entered (been born) into the *kitāba*, or it has not. If a child has entered into the *kitāba*, there is no disagreement, according to him, that inability is not permitted. If there is no child, then, there are two opinions related from him. First, that it is not permitted if he possesses wealth, which was also Abū Ḥanīfa's opinion. Second, that it is permitted to him to claim it. If, however, the slave is claiming inability and the master is denying it, the slave has no right to do so if he possesses wealth or has the capacity to work. On the other hand, if the master claims inability with the slave denying it, he cannot impose inability on him, except by the decree of the judge. This he can do by establishing that he (the slave) has no wealth nor the capacity to work.

We refer now to the reliance for their evidence on the actual point of disagreement over the issue. The reliance of Al-Shāfiʿī is on the report that "Barīra came over to ʿĀʾisha saying to her, 'I want that you should buy me and emancipate me'. She said, 'If your family (masters) are willing'. The family came and sold her while she was a *mukātaba*". It is recorded by al-Bukhārī. The reliance of the Mālikites is on the comparison with other binding contracts, and the *ḥukm* of the slave in this must be the same as that of the master, as it is in the nature of contracts that they be binding or have options equally for both parties. If they are binding for one party and not for the other, they become inconsistent with the principles. They attributed the *ʿilla* to the tradition of Barīra that what the family sold was her *kitāba* and not her corpus. The Ḥanafites say that as the predominant right in *kitāba* belongs to the slave, it is, therefore, necessary that the contract be binding with respect to the subordinate right belonging to the master; its basis being *nikāḥ*, which is not binding for the husband due to the existence of the right of *ṭalāq* that he possesses, but it is binding for the wife. The Mālikites object to this by saying that it is binding in so far as compensation has been given, for he does not have the right to recover the dower.

53.2.3. Category 3

They agreed about his *ḥukm* when he dies before paying for the *kitāba*, that is, if he dies childless without paying anything toward the *kitāba* he would be considered a slave. They disagreed when he dies leaving behind a child. Mālik said that the child's *ḥukm* is the same as his *ḥukm*. If he leaves behind wealth that can satisfy the payment of the *kitāba*, it is paid and the children are emancipated. If he does not leave behind sufficient wealth, but the children are strong enough to work, they are allowed to make the payments of their father till they express their inability to do so or are emancipated. If they neither have wealth nor the ability to work, they are to be enslaved. If something is left over from the payment of the *kitāba*, they inherit it according to the laws of inheritance applicable to free persons. Only his children, who were part of the *kitāba* are to inherit his wealth to the exclusion of the other relatives, if he had relatives other than his children, who were part of the *kitāba*. Abū Ḥanīfa said that after the payment of *kitāba* has been made, the wealth left by him is inherited by the children who were made a part of the *kitāba*, the children who were born during the period of *kitāba*, his free children, and all his heirs. Al-Shāfiʿī said that the wealth is not inherited by his free children, or by those who were made part of the *kitāba*, or those who were born during the period of the *kitāba*, and the wealth belongs to his master.

It is obligatory on his children, who have been made a part of the *kitāba*, that they work toward its fulfilment in proportion to their shares in it, and the share of the father is to be charged to them. Abū Ḥanīfa also upheld the charging of the father's share to them, as did all the jurists of Kūfa. Some, among those who upheld charging of his share, said that it is to be by value, which is the opinion of al-Shāfiʿī. It is also said that it is by price, or that it is to be per head. These jurists said that the share of the father is to be charged to the account of the sons who were part of the *kitāba*, not those who were born during the period of *kitāba*, as the children who were born during the *kitāba* take up the father's rights.

Mālik's argument is that the slaves participating in a single *kitāba* are sureties for each other, therefore, if one of them is emancipated or dies, the others are not absolved of his share. The argument of the other group is that there is no surety in *kitāba*. Mālik has also related in his *Muwaṭṭaʾ* on the authority of ʿAbd al-Malik ibn Marwān an opinion similar to that of the Kūfīs. The reason for their disagreement is the state in which the *mukātab* dies. According to Mālik, he dies a *mukātab* and according to Abū Ḥanīfa he dies a free man, while for Al-Shāfiʿī he dies a slave. It was on these principles that they built up the *aḥkām* related to it. The reliance of al-Shāfiʿī is on the argument that between bondage and freedom there is no middle position, thus, if he dies as a *mukātab*, he is still not a free person, as freedom takes effect after he has paid for the *kitāba* and this he has not yet done. The consequence is that he dies a slave for it is not proper that a corpse be emancipated. The argument of the Ḥanafites is that freedom takes effect with his death with the existence of wealth for which he contracted *kitāba*, for it does not suit him to keep himself in bondage, and it is necessary that freedom be accessible to him with the coming into existence of the wealth, not through its actual delivery to his master. Mālik deemed his death to be a state between bondage and freedom, which is *kitāba*. In so far as his free children have not inherited from him, he is given the *ḥukm* of a slave, and if the master has not inherited from him, he is given the *ḥukm* of a free man. The issue is within the scope of *ijtihād*.

Related to this category is their disagreement of the *umm al-walad* of the *mukātab*, when the *mukātab* dies and leaves behind children who are not capable of working, and the mother decides to work on their behalf. Mālik said that she has a right to do so. Al-Shāfiʿī and the Kūfīs said that she does not have a right to do so. Their argument is that the *umm al-walad* is the property of the master when the *mukātab* dies. Mālik maintained that the protection of *kitāba* that was available to her master flows over to her and her children. There is ambiguity in Mālik's opinion that if the *mukātab* leaves behind children, who cannot work, and an *umm al-walad* who is unable to work, she is to be sold and the remaining amount of *kitāba* is to be paid. According to Abū Yūsuf and Muḥammad ibn al-Ḥasan; it is not permitted to the *mukātab* to sell his *umm al-walad*, while it is permitted according to Abū Ḥanīfa and al-Shāfiʿī.

Mālik's disciples differed about the *umm al-walad* of the *mukātab*, when the *mukātab* dies leaving behind children and has satisfied the dues of *kitāba*, whether she is to be emancipated. Ibn al-Qāsim maintained, if she has borne a child, she is to be emancipated otherwise she is kept in bondage. Ashhab said that she is emancipated at all costs. On the principles of al-Shāfiʿī, whatever the *mukātab* has left is the property of the master and the children cannot benefit from it for the payment of what he owed of the *kitāba*, whether they were with him in the *kitāba* or were born in its duration; they have to work. According to the principles of Abū Ḥanīfa they are free, by all means. The opinion of Ibn al-Qāsim appears to be based on *istiḥsān*.

53.2.4. Category 4

This relates to the question of who participates with him in the *kitāba* and who does not. They agreed under this topic that the children of the *mukātab* are not included in his *kitāba*, unless stipulated, as they are separate slaves of their master. Similarly they agreed about the inclusion of whoever is born to him in the period of the *kitāba*. They disagreed about the *umm al-walad* as has preceded. They disagreed about the inclusion of his wealth through the unqualified contract. Mālik said that his wealth is included in the *kitāba*. Al-Shāfiʿī and Abū Ḥanīfa said that it is not included. Al-Awzāʿī said that it is included if stipulated, that is, when the *mukātab* stipulates it. This issue is based on the question whether a slave can own, and whether his wealth goes with him in manumission. This has preceded.

53.2.5. Category 5

It is the examination of what is disallowed to the *mukātab* and what is not. Whatever is left of the *aḥkām* of the *mukātab*, relates to this issue.

We say: The jurists agreed under this topic that the *mukātab* does not have the right to donate anything of value from his wealth, nor does he manumit or give charity without the permission of his master. He is interdicted with respect to these and other similar things, that is, he does not have the right to dispose of anything without compensation. They differed under this topic in different cases. Among them is the case when he does not inform the master of his intentions or that he has manumitted (someone), except after he has paid the *kitāba*. Mālik and a group of jurists said that it (his action) takes effect, but others denied it. The argument of those who prohibited it is that it took place in a state when its occurrence was not permitted, therefore, it is *fāsid*. The argument of those who permitted it is that the cause of the legal obstacle is no longer there, which was the fear that the *mukātab* would be unable to pay (his dues). The basis for their disagreement is whether the permission of the master is a condition for the contract to become binding or is a condition of its validity. Those who said that it is a condition of its validity did not permit it, even if he manumitted (someone). Those who said that it is a condition of its becoming binding said that it is permitted if he manumitted someone as the contract was made in a valid manner, thus, when the requirement of permission was removed the contract became valid, as if he had granted permission; this is according to those who consider his (act of) manumission to be valid when the master grants permission. Some persons disagreed even in this after their agreement that his manumission is not valid if the master does not grant permission. A group said that it is valid, while another said that it is not, which was Abū Ḥanīfa's opinion. Mālik upheld its permission and both opinions are related from al-Shāfiʿī.

Those who permitted this disagreed about the *walāʾ* of the emancipated person, as to whom it belongs. Mālik said that if the *mukātab* dies before he is emancipated, the *walāʾ* of his slave belongs to his (*mukātab's*) master, but if he dies when he had been emancipated, the *walāʾ* would belong to him. A group from among these jurists said that the *walāʾ* in each case would belong to the master. The reliance of those who did not permit manumission by the *mukātab* is that *walāʾ* belongs to the person who manumits, due to the words of the Prophet (God's peace and blessings be upon him), "*Walāʾ* is for the person who manumits", and the *mukātab* cannot possess the *walāʾ* during his *kitāba*, therefore, his manumission is also not valid. The argument of those who held that *walāʾ* belongs to the master is that the slave of his slave is in the position of his slave. Those who tried to distinguish between these relied on *istiḥsān*.

Within this topic is their dispute about the issue whether the *mukātab* has the right to marry or to travel, without the permission of his master. The majority out of them said that he does not have the right to marry, except by the permission of his master, while some permitted him to do so. The majority permitted him to travel, while some denied this right to him, which was Mālik's opinion. Saḥnūn from among the disciples of Mālik permitted him to travel and did not permit the master to stipulate "no travelling" as a condition for the *mukātab*. Ibn al-Qāsim permitted him travel over short distances. The *ʿilla* for the prohibition of marriage is the fear that it might lead to his inability (to meet his payments), while the *ʿilla* for the permission of travel is that through it he will strengthen the means of earning and hence the means of payment. As a whole, in this issue, the jurists had three opinions. First, that the *mukātab* has the right to travel with or without the permission of his master, and it is not permitted to stipulate a condition for him that he cannot travel. This was the opinion of Abū Ḥanīfa and al-Shāfiʿī. The second opinion is that travel is not permitted to him except with the permission of his master, which was Mālik's opinion. Third that he has the right to travel by the implication of the unqualified contract, unless the master stipulates that he will not travel. This opinion was held by Aḥmad, al-Thawrī and others.

In this topic is also their disagreement whether the *mukātab* has the right to contract *kitāba* with his slave. Mālik permitted this as long as he is no granting concessions to the person; it was also the opinion of Abū Ḥanīfa and al-Thawrī. For Al-Shāfiʿī both opinions are related, one confirming *kitāba* and the other declaring it void. The argument of the majority is that it is commutative contract that has as its purpose the earning of profit, therefore, it resembles all other permitted contracts of sale and purchase. The argument of the Shāfiʿites is that *walāʾ* belongs to the person who manumits and the *mukātab* cannot possess *walāʾ* as he is not a free person.

They agreed that the master had no right to withdraw anything from his (the *mukātab's*) wealth nor could he benefit from it. They disagreed about the master having intercourse with his slave-girl, who was a *mukātaba*. The majority came to prohibit this, while Aḥmad, Dāwūd and Saʿīd ibn al-Musayyib, from among the Companions, said that it is permitted if he stipulates this as condition for her. The majority's argument was that it is intercourse that is to end in separation in the future and it, therefore, resembles a temporary marriage. The argument of the other group is based on its similarity with the position of the *mudabbara*. They agreed that if she was reduced to inability (of making payments) intercourse with her was permitted. Those who prohibited this differed about the case when he has intercourse with her, whether he is liable to *ḥadd*. The majority said that there is no *ḥadd* for him as it is intercourse in a situation of doubt (*shubha*). Some of them said he is liable to *ḥadd*. They disagreed (in this case) about her entitlement to dower. The jurists, as far as I know, maintain that the laws applicable to him, with respect to marriage, divorce, evidence, penalties, and others, are those that are specific for slaves.

In this discussion is also their disagreement about his sale (to another). The majority said that the *mukātab* is not to be sold, except with the condition that he will be allowed to retain his *kitāba* with the buyer. Some of them said that his sale is valid as long as he has not paid anything of his *kitāba*, as Barīra was sold when she had not paid anything from her *kitāba*. Some said that if the *mukātab* agrees to the sale it is valid, which is al-Shāfiʿī's opinion, as *kitāba*, according to him, is not a binding contract favouring the slave; he argued on the basis of the tradition of Barīra when she was a *mukātaba* and was sold. The argument of those who did not permit the *mukātab's* sale was based on the breach of contract involved in it, and Allāh has commanded the fulfilment of contracts. The issue turns on the point whether *kitāba* is a binding contract. Similarly, they disagreed about the sale of the *kitāba*. Al-Shāfiʿī and Abū Ḥanīfa said that it is not permitted, while Mālik permitted it, but upheld the right of pre-emption in it for the *mukātab*. Those who permitted this compared it with the sale of a debt, while those who did not allow it viewed it as a category of *gharar*. Similarly, Mālik compared *shufʿa* (pre-emption) in it to pre-emption in debts. For this there is a tradition from the Prophet (God's peace and blessings be upon him), I mean, for pre-emption in debts. The opinion of Mālik in the sale of *kitāba* is that if it is contracted for gold, it is permitted to be sold for immediate goods not delayed, due to the occurrence of sale of a debt for a debt. If the *kitāba* is for goods its purchase is to be for gold or silver or dissimilar goods. When he is emancipated the *walāʾ* would belong to the master not to the buyer. Within this topic is also the issue whether the master has the right to force his slave to accept *kitāba*?

54.3. Chapter 3: The Conditions of *Kitāba*

Among the conditions of *kitāba* are those that are legally prescribed. These are conditions essential for the contract—their discussion has preceded in the description of the elements of this contract. Among them are those that are stipulated by mutual consent, some of these (if stipulated) vitiate the contract. Among them are also those conditions the stipulation of which renders the contract vitiated, but if they are given up the contract becomes valid. Among them (finally) are those that are permissible and are not binding, while there are those that are binding. All these conditions are expounded in the books of *furūʿ* (manuals of *fiqh*), while this book of ours is not a book of *furūʿ* (manual of *fiqh*), it is a book of principles.

The conditions that generally render the contract void are those which are contrary to the conditions legally prescribed for the validity of the contract. The permissible conditions are those that do not lead to the vacation of the conditions rendering the contract valid nor do they make them binding. The jurists do not, as a whole, disagree about all these conditions, but they differ about the conditions due to their disagreement whether a condition is one of the validating conditions. They would differ depending on how close or far a condition is from vacating a validating condition. It was for this reason that Mālik determined a third category of conditions. These conditions, if adopted by the stipulator, render the contract void, but if they are not acted upon, the contract is valid. It is necessary that we understand this for all the other *sharᶜī* contracts.

Among the well-known issues in this topic is where service, travel, or the like, is stipulated in *kitāba* and the slave becomes strong enough to make the payments before the expiry of the (stipulated) period of *kitāba*. Is he to be emancipated? Mālik and a group (of jurists) said that this condition is void and he is to be emancipated on payment of all the wealth. Another group said that he is not to be emancipated till he pays the entire sum and in addition fulfils other stipulated conditions. This is based on a tradition traced to ᶜUmar ibn al-Khaṭṭāb (God be pleased with him) that he manumitted the slaves of the state and stipulated for them that they serve the Caliph for another three years. They did not disagree that the slave's manumission, if his master manumits him and stipulates for him service for a number of years, is incomplete till he serves for the stated number of years. Some deduced from this that the condition is binding. These then are the well-known issues occurring in the principles in this book.

There are other issues, which are mentioned in this book, though they belong to other books. If they are mentioned in this book, it is on the assumption that they are cases falling under the principles in this book, but when they are mentioned in other books they are presented as principles. It is for this reason that mentioning them in this book is preferable. Among these is their disagreement when the master weds his daughter to the *mukātab*, the master subsequently dies and the daughter inherits. Mālik and Al-Shāfiᶜī said that the marriage is annulled as she now owns part of him, and what the right hand of a woman possesses is a prohibited category for her by consensus (*ijmāᶜ*). Abū Ḥanīfa said that the marriage is valid for what she has inherited is wealth that is a liability of the *mukātab* not his corpus. This issue deserves to be in the Book of Marriage (*nikāḥ*).

Within this category is their disagreement when the *mukātab* dies and he owes a debt and part of the payment of *kitāba*. Does the master share with the creditors? The majority said he does not share his claim with the creditors.

Shurayḥ, Ibn Abī Laylā and a group said that the master participates with the creditors. Similarly, they disagreed when he becomes insolvent and owes debts that submerge what he possesses: do the claims extend to his corpus? Mālik, al-Shāfiʿī and Abū Ḥanīfa said that they (the creditors) have no claim over his corpus. Al-Thawrī and Aḥmad said that they take him over unless the master has him released. They agreed that if he is unable to pay the reparation for an offence, he is to be surrendered in lieu of it, unless the master pays the reparation. The discussion whether he participates in the distribution belongs to the Book of Insolvency and the discussion of offences to the Book of Offences. On the issues relating to judicial verdicts, which are cases in this book and principles in the Book of Judgments, disagreement over their *ḥukm* concerns the disputes of the master and the *mukātab* over the wealth of *kitāba*. Mālik and Abū Ḥanīfa said that the acceptable statement is that of the *mukātab*, while al-Shāfiʿī, Muḥammad and Abū Yūsuf said that they are required to take oaths and then rescind the contract on the analogy of the parties to a sale.

The cases under this topic are many, but those recalled at the moment are mentioned in the discussion we have presented. Those who come across well-known issues disputed among the jurists of the regions and they are related to transmission, must verify them in this topic. The purpose is the recording of the well-known issues over which dispute arose between the jurists of the regions together with the issues expressly stated by the *sharʿ*. This is so, and we have stated this more than once, because our intention in this book is to establish the issues expressly stated by the texts, agreed upon or disputed, and to mention those issues about which the texts are silent, but in which disagreement of the jurists of the regions has become well known.

Truly, the knowledge of these two categories of issues provides the *mujtahid* with general principles for those issues over which the texts are silent and in cases where disagreement among the jurists of the regions is not well known, irrespective of an opinion from any of the jurists having been related in it. It is likely that one who works through these issues and understands the principles of the causes that generated the disagreement of the jurists in them, will be able to derive what is required in each particular case, I mean, what is the answer for it in the opinion of each one of the *fuqahāʾ* of the regions, that is, in one particular issue itself, and will know when a jurist has opposed his own principle and when he has not. This is the case when an opinion has been related from him in that issue. If, however, a verdict has not been related from him or it has not reached the investigator of these principles, it is possible for him to come up with the answer in accordance with the principles of that jurist according to whose school he is rendering an opinion, and according to the truth to which his *ijtihād* leads him. We hope, God willing, after being free of this book, to compile a book for Mālik's school that assimilates the principles of his school and the well-known issues that work as principles for further derivation. This is what Ibn al-Qāsim did in *al-Mudawwana*. He reconciled that in which he did not have his opinion with what he possessed of the issues of Mālik in the same category and that resembled principles in so far as people (jurists) adopted them for purposes of practice and *taqlīd* in rendering *aḥkām* and verdicts. It is, however, a strength of this book that through it a person can attain, as we have said, the status of *ijtihād* as he proceeds, along with a knowledge of the Arabic language and of *uṣūl al-fiqh* that is sufficient for this purpose. It is for this reason that we thought that the most suitable title for this book would be if we name it: *Bidāyat al-Mujtahid wa Kifāyat al-Muqtaṣid*

LIV

THE BOOK OF *TADBĪR* (MANUMISSION AT THE DEATH OF OWNER)

The study of *tadbīr* covers its elements and its *aḥkām*. It has four elements: meaning, words, the *mudabbir*, and the *mudabbar*. The *aḥkām* are of two categories: *aḥkām* relating to the contract, and the *aḥkām* relating to the *mudabbar*.

54.1. Chapter 1: The Elements

We say: The Muslims agreed over the permissibility of *tadbīr*, and that is when the master says to his slave, "You are free when I turn my back (die)", or he does not qualify his statement and says, "You are a *mudabbar*". These, according to them, by agreement, are the two forms for *tadbīr*. The jurists are of two categories with respect to *tadbīr* and *waṣiyya*. Among them are those, who do not distinguish between the two, and there are those who made a distinction between *tadbīr* and *waṣiyya* by rendering *tadbīr* as binding and *waṣiyya* as not binding (terminable). Those who distinguished between them, disagreed over whether the unqualified form for manumission after death includes the meaning of *waṣiyya* or the *ḥukm* of *tadbīr*, that is, when he says, "You are free after my death". Mālik said that if he says "You are free after my death", and it is valid, then, it is apparent that it is *waṣiyya*, and the acceptable statement would be his (the master's) (in case of dispute). It is also possible to retract this, unless he had intended *tadbīr*. Abū Ḥanīfa said that the apparent meaning in this is *tadbīr* and he has no right to retract it. 'Ibn al-Qāsim adopted Mālik's opinion, while Ashhab adopted Abū Ḥanīfa's, though he added: unless there is corroborating evidence to show that it is *waṣiyya*, like his (the master's) being on a journey or being ill and what resembles it among the circumstances in which people usually write their testaments.

In accordance with the opinion of those who do not distinguish between *waṣiyya* and *tadbīr*, which includes al-Shāfiʿī and those who adopted his opinion, this form is manifestly for *tadbīr*. According to the opinions of those who do make a distinction it is either one of the allegorical forms used for *tadbīr*, or it is not an allegorical form for *waṣiyya* or for *tadbīr*. This happens when the person interprets it to mean *waṣiyya*, but it does not serve either as an explicit, or as an allegorical statement, for *waṣiyya*. When he interprets it to mean *tadbīr*, invoking the intention for *waṣiyya*, it serves as an allegorical statement for *tadbīr*.

With respect to the *mudabbar*, they agreed that the person who accepts this contract is a slave under valid (legal) bondage and that his emancipation is not automatic, and it makes no difference whether it is full or partial ownership. They disagreed about the *ḥukm* of one who is owned in part and is then granted *tadbīr*. Mālik said this is permitted, and for the person (co-owner) who has not granted *tadbīr* there are two options. First, that they subject him to mutual valuation, if the person who granted him *tadbīr* buys him (in full), he becomes a *mudabbar* completely, but if he does not purchase him *tadbīr* is revoked. The second option is that he claim the value of his share. Abū Ḥanīfa said that the co-owner, who does not grant *tadbīr*, has three options. If he likes he can hold on to his share, or if he likes he may make the slave serve him for the value of the share that he has in the slave, or he may claim the value of his share from his co-owner if he is well off, otherwise, he makes the slave serve him. Al-Shāfiʿī said that *tadbīr* is valid, and nothing else follows from it. The slave stays a *mudabbar* to the extent of the share owned by the *mudabbir*, that is, half, or a third, or whatever is his share. When the *mudabbir* dies that part of him is emancipated, and the value of the remaining part is not to be paid to his other master as is done in the case of emancipation, as the wealth (of the *mudabbir*) now belongs to others and these are the heirs. This issue, however, belongs to the *aḥkām* and not to the elements, that is, the *aḥkām* of the *mudabbar* and should be expounded there.

About the *mudabbir* (master pronouncing *tadbīr*) they agreed that a condition for him is that he be the owner with valid ownership and should not be under interdiction, whether he is in sound health or is ill. Among the conditions is also this that his debts should not have absorbed (or exceeded) his wealth, as they agreed that debts nullify *tadbīr*. They disagreed about (the *ḥukm* of) the *tadbīr* of the prodigal (*safīh*). These, then, are the elements of this legal category.

The bases of the *aḥkām* of *tadbīr* refer to five categories. First, from what kind of wealth is the (value of the) *mudabbar* debited; is it from the capital or from the third of the estate? Second, what *aḥkām* of slavery still cling to him and what do not, that is, as long as he is a *mudabbar*? Third, what follows him in his emancipation, and what does not? Fourth are the contingencies that nullify *tadbīr*, while fifth are the *aḥkām* of splitting up *tadbīr*.

54.2. Chapter 2: The *Aḥkām* of *Tadbīr*

54.2.1. Category 1

The jurists disagreed about the part (head of account) from which the *mudabbar's* value is to be debited, when the *mudabbir* dies. The majority maintained that it is to be debited to the third (of the estate). A group, most of whom were the Ẓāhirites, said that it is to be debited to the capital. Those who held that it is to be debited from a third considered it similar to a bequest (*waṣiyya*), as it is a *ḥukm* that takes effect after death. A tradition is related from the Prophet (God's peace and blessings be upon him) that he said, "The *mudabbar* is from the third". It is, however, a weak tradition according to the traditionists, as it is narrated by ᶜAlī ibn Ṭaybān from Nāfiᶜ from ᶜAbd Allāh ibn ᶜUmar, and the traditions of ᶜAlī ibn Ṭaybān are rejected by the traditionists. Those who held it to be deducted from the capital, considered it to be something that a man donates from his wealth during his lifetime, and, therefore, it resembles a gift (*hiba*). The upholders of the view of a third, disagreed in some cases. When a person declares a slave a *mudabbar* during his lifetime and emancipates another during his illness, and dies thereafter, with the third falling short of the combined value of the two, Mālik said that the *mudabbar* is to be preferred as his transaction was undertaken in the time of health, while al-Shāfiᶜī said that the conclusively emancipated slave is to be preferred as his right cannot be rejected. According to his principles *tadbīr* can be withdrawn. This issue deserves to be in the Book of Bequests.

54.2.2. Category 2

The best-known issue in this is whether the *mudabbir* has the right to sell the *mudabbar*. Mālik, Abū Ḥanīfa, and a group from Kūfa said that the master has no right to sell his *mudabbar*. Al-Shāfiᶜī, Aḥmad, the Ẓāhirites and Abū Thawr said that he has a right to retract and then sell his *mudabbar*. Al-Awzāᶜī said that he is not to be sold, except to a person who desires to emancipate him. In this issue, Mālik and Abū Ḥanīfa differed in cases, one of which is when he sells him and the buyer manumits him. Mālik said that manumission takes effect, while Abū Ḥanīfa and the Kūfīs said the sale is cancelled, whether the buyer manumits him or he does not, which is better analogy as it (sale in this case) is prohibited by way of *ᶜibāda*.

The reliance of those who permitted his sale is what is established through the tradition of Jābir "that the Prophet (God's peace and blessings be upon him) sold a *mudabbar*", and, perhaps, they also held it similar to a bequest. The reliance of the Mālikites is on the generality of the words of the Exalted, "O ye who believe! Fulfil your undertakings", as it is manumission with a delay and resembles the case of the *umm al-walad* or it resembles an unqualified manumission. The reason for the disagreement here is the conflict of analogy with the text, or of the general word with the particular.

There is no disagreement among them that the *aḥkām* for the *mudabbar* about *ḥudūd*, divorce, testimony, and all other issues are the same as those of slaves.

They disagreed in this topic about the permissibility of having sexual relations with the *mudabbara*. The majority of the jurists inclined toward the permissibility of intercourse with her, while its prohibition is related from Ibn Shihāb and its abomination from al-Awzāʿī if the master did not have it with her before. The argument of the majority is based on its similarity with the *umm al-walad*, while those who did not permit it held her case to be similar to a manumitted female slave with a delay. Those who prohibited intercourse with a female slave manumitted with a delay compared her case to that of a wife married for a period, which is *mutʿa*. They agreed that the master has the right to demand service of the *mudabbar* and to deprive him of his wealth whenever he likes as is the case with any slave. Mālik said the exception is when he falls ill contacting a threatening illness, and in this case it is reprehensible.

54.2.3. Category 3

One of the best-known issues about who (or what) goes along with the slave in *tadbīr* is their disagreement about the children of the *mudabbara*, to whom she gives birth through wedlock or through unlawful intercourse, after pronouncement of *tadbīr* by her master. The majority said that her children, born after her *tadbīr*, are in the same position as she is: they are emancipated with her or are kept enslaved with her. Al-Shāfiʿī said, in an opinion preferred by his disciples, that they are not emancipated through her emancipation. They agreed, however, that if the master emancipates her in his lifetime they are also emancipated with her.

The argument of the Shāfiʿites is that if they are not emancipated in immediate emancipation, it is appropriate that they should not be emancipated through freedom that is delayed by means of stipulation. They also argued that the jurists have unanimously agreed that in the case of a legatee through manumission the children do not participate in the manumission. The majority maintained that *tadbīr* has some kind of sanctity and, therefore, validated the manumission of children due to its similarity with *kitāba*. This opinion of the majority is related from ʿUthmān, Ibn Masʿūd, and Ibn ʿUmar, while al-Shāfiʿī's opinion is related from ʿUmar ibn ʿAbd al-ʿAzīz, ʿAṭāʾ ibn Abī Rabāḥ and Makḥūl.

The summary of the views in Mālik's school in this is that the children of each woman follow her, if she is free they too are free, if she is a *mukātaba* they are *mukātabs*, if she is a *mudabbara* they are *mudabbars*, and if she is manumitted with a delay they too are manumitted with a delay. Similarly, in the case of the *umm al-walad*, her children have the same status (as that of their mother). The Ẓāhirites disagreed with this. The person manumitted in part also falls under the same rule, according to Mālik.

The jurists agreed unanimously that each child born through marriage follows the status of its mother in freedom and bondage, as in all contracts occurring between these two stages that lead to freedom, except those in which they have differed like *tadbīr* and the one whose husband is from the Arab nation. They also agreed that each child born through a possession of the right hand (*milk al-yamīn*) is subordinate to the status of his father; if he is free the child is free too, if he is a slave, the child too is a slave, and if he is a *mukātab*, the child is also a *mukātab*. They disagreed about the *mudabbar*, when he possesses a slave and a child is born to that slave. Mālik said that its *ḥukm* is the *ḥukm* of the father, that is, he is a *mudabbar*. Abū Ḥanīfa and al-Shāfiʿī said that the child does not follow him in *tadbīr*. The reliance of Mālik is on consensus (*ijmāʿ*) on the point that the child from the possession of the right hand is subordinate to the *ḥukm* of his father, except for the *mudabbar*, which amounts to the analogy of a disputed point on a point of consensus. The argument of the Shāfiʿites is that the child of the *mudabbar* is a kind of wealth owned by him, and the wealth of the *mudabbar* belongs to the master and can be taken over by the master. It is not conceded to him that he is a kind of his wealth and, according to Mālik, his wealth follows him to freedom.

54.2.4. Category 4

We have already talked, in relation to the splitting up of *tadbīr*, about the person who pronounced *tadbīr* for the share he possessed in a slave, when his co-owner had not done the same. So, reference should be made to it. With respect to the person who pronounces *tadbīr* in part, when he owns the slave completely, the verdict issued, according to Mālik, is that of complete *tadbīr*, on the analogy of one who splits up manumission.

54.2.5. Category 5

In this topic is their disagreement over a debt nullifying *tadbīr*. Mālik and al-Shāfiʿī said that a debt annuls it, while Abū Ḥanīfa said that it does not and he (the slave) works to pay off the debt, whether the debt covers his entire value or part of it. In this topic is also their disagreement about a Christian pronouncing *tadbīr* for his Christian slave, when the slave becomes a Muslim before the death of his master. Al-Shāfʿī said that he is to be sold immediately, the very hour when he accepts Islam and his *tadbīr* is nullified. Mālik said that he should be separated from his Christian master. He is to be released in lieu of *kharāj* due from his Christian master, and is not to be sold till his master dies or the price is entirely paid; if he dies, the *mudabbar* is emancipated, unless there is a debt in excess of his wealth. The Kūfīs said that if a Christian *mudabbar* converts to Islam, his value is determined and he works for this value.

The *mudabbar*, who is declared a *mudabbar* during his master's good health, is to be preferred (for a right to the third of the estate), according to Mālik, over a *mudabbar* declared to be so during the master's illness.

LV

THE BOOK OF *UMMAHĀT AL-AWLĀD* (SLAVE-WOMEN BEARING THEIR MASTER'S CHILD)

The principles of this topic focus on whether the *umm al-walad* may be sold. If she is not to be sold, then, when does she become the *umm walad* and due to what does she become an *umm walad*? What rights are left to her master with respect to bondage? When does she become a free woman?

The earlier and the later jurists disagreed about the first issue. The established report from ʿUmar (God be pleased with him) is that he decided that she is not to be sold and is a free woman, on the death of her master, and her value is to be debited to the capital of his estate. A similar report is related from ʿUthmān, and it is the opinion of most of the *Tābiʿūn* and the majority of the jurists of the regions. Abū Bakr Siddīq and ʿAlī, may Allāh be pleased with them both, Ibn ʿAbbās, Ibn al-Zubayr, Jābir ibn ʿAbd Allāh and Abū Saʿīd al-Khudrī used to permit the sale of the *umm al-walad*. This was upheld by the Ẓāhirites from among the jurists of the regions. Jābir and Abū Saʿīd said that, "We used to sell the *ummahāt al-awlād* and the Prophet being among us did not see any harm in it".

They argued on the basis of what is related from Jābir, who said, "We used to sell the *ummahāt al-walad* in the period of the Prophet (God's peace and blessings be upon him), in that of Abū Bakr, and in the early days of the Caliphate of ʿUmar. It was then that ʿUmar prohibited us from selling them". Among the grounds for the Ẓāhirites in this issue is a kind of reasoning that is known as *istiṣḥāb ḥāl al-ijmāʿ*. They said that as the *ijmāʿ* occurred on the point that she is owned before birth (of the child), it is necessary that it should be the same after birth, unless evidence indicates the contrary. The strength of this kind of reasoning has been shown in the books on *uṣūl*, and it is not valid according to those who uphold analogy (*qiyās*) being evidence only in the opinion of one who denies analogy. Perhaps, the majority argued with them in a similar way, which is known as matching one claim with another (*muqābalat al-daʿwā biʾl-daʿwā*). It occurs when they say, "Do you not know that consensus has taken place on the prohibition of her sale in the period of her pregnancy? If this so, it is necessary that this requirement of the consensus stay with her even after she has delivered". The later Ẓāhirites, however, introduced a conflicting factor. They do not accept the prohibition of her sale during the period of her pregnancy.

Among the traditions on which the majority have relied in this topic is that related from the Prophet (God's peace and blessings be upon him), who said about Māriya his slave-girl when she gave birth to Ibrāhīm, "Her child has set her free". On the same issue is the tradition of Ibn ᶜAbbās from the Prophet (God's peace and blessings be upon him), who said, "Any woman who bears a child to her master is free when he dies". Both traditions have not proved sound according to the traditionists, which is stated by Abū ᶜUmar ibn ᶜAbd al-Barr, may Allāh have mercy on him, who was an authority this field. Perhaps they gave a rational argument that some protection is necessary for her due to her link with the child and the fact that it is a part of her. This reasoning is given by ᶜUmar (God be pleased with him) when he upheld that she is not to be sold saying, "Our flesh stands mixed with theirs, as does our blood stand mixed with theirs".

When does she become an *umm al-walad*? They agreed that she becomes an *umm walad* if he owned her before she conceived from him. They disagreed when she is already pregnant from him or after she has given birth to his child. Mālik said that she does not become an *umm walad* if she gave birth to his child before he came to own her, even when she gives birth to another child of his after he has owned her. Abū Ḥanīfa said that she does become an *umm walad*. Mālik's opinion differed when he comes to own her and she is pregnant. Analogy dictates that she should become an *umm walad* in all cases for it is against all noble traits that a man sell the mother of his child. The Prophet (God's peace and blessings be upon him) said, "I was sent to perfect all noble traits".

About the question, with what does she become an *umm walad*, Mālik said it is anything that she delivers from which it can be known that it was to be a child, even if it is an embryo or a blood-clot. Al-Shāfiᶜī said it is necessary that physical appearance and features be discernible in this. Their disagreement relates to the meaning of the term "birth" or what verifies the meaning of "child".

In the remaining *aḥkām* of bondage, they agreed that she is like an ordinary female slave in her testimony, penalties, bloodwit, *arsh* (estimated compensation) for her injuries. The majority of those who prohibited her sale do not foresee any contingent happening that would necessitate her sale, except what is related from ᶜUmar ibn al-Khaṭṭāb that if she is commits unlawful intercourse she is to return to bondage. The opinions of Mālik and al-Shāfiᶜī differed whether the master can make her serve him all his life and earn through these services. Mālik said that he does not have that right, except for her sexual favours, while al-Shāfiʿī said that he does. Mālik's argument is that as he does not own her corpus for purposes of sale, so he does not possess her for hiring, except that he permitted the hiring of her children other than his own, as their inviolability is weaker in his view. Al-Shāfiʿī's reliance is on the occurrence of consensus that he is permitted to have intercourse with her. The reason for the disagreement is the vacillation of her hiring between two rules: first, intercourse with her; and second, her sale. It is necessary that the manifestly stronger rule be preferred.

When does she become a free woman? There is no disagreement among them that this time arrives when the master dies. I know of no one up till now who has said that she is emancipated from a third of the estate. The statement of one who would say, on the analogy of the *mudabbar*, that she is manumitted from a third, is weak.

LVI

THE BOOK OF *JINĀYĀT* (OFFENCES)

Offences that have prescribed legal penalties, are four. First, offences against the body, life, or limbs, which are called *qatl* (homicide) and *jurh* (injuries, wounds). Second, offences involving sexual organs, which are called *zinā* (unlawful sexual intercourse) and *sifā* (fornication). Third, offences against wealth (property) in which acquisition is sometimes accompanied by force of arms and is called *hirāba* (brigandage), when committed without justification, and *baghy* (insurrection, rebellion), when committed with a reason, but when acquisition takes place by way of stealth from a place of safe-custody (*ḥirz*), it is called *sariqa* (theft). If the acquisition is effected through the use of high status, or through the power of the *sulṭān*, it is called *ghasb* (usurpation). Fourth, offences against reputation, which are called *qadhf*. Fifth,[209] offences that are committed through a delict resulting in making lawful what the law has prohibited from among edibles and beverages. Out of these, in this *sharīʿa*, there is a penalty for the drinking of wine (*khamr*) alone. It is a penalty that was agreed upon after the time of the lawgiver (God's peace and blessings be upon him).

We begin, from among these, with penalties that are prescribed for bloodshed and say: The obligation for causing loss of life or limb is either *qiṣāṣ* (retaliation) or financial compensation, which is called *diya* (bloodwit, reparation). The study in this book is first divided into two parts: the study of *qiṣāṣ* and the study of *diya*. The study of *qiṣāṣ* is divided to *qiṣāṣ* for loss of life and *qiṣāṣ* for limbs. The study of *diya* is also divided into the study of *diya* for loss of life and *diya* for the severance of limbs and (for inflicting) wounds. This book is, thus, divided first into two books. In the first is transcribed the book of *qiṣāṣ*, while in the second is transcribed the book of *diyāt*.

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[209] The author begins by saying that there are four offences, but here he mentions a fifth category. The reason appears to be that this fifth category does not fall under the categories that "have prescribed legal penalties", by which he could mean those whose penalty is not explicitly mentioned in the Qur'ān or *sunna*. It is well known that though drinking of wine is established as an offence from the Qur'ān and *sunna*, there is some ambiguity about the exact penalty for drinking wine.

56.1. THE BOOK OF QIṢĀṢ (*LEX TALIONIS*; RETALIATION)

This book is divided into two sections. First is the study of *qiṣāṣ* for loss of life, while the second is *qiṣāṣ* for limbs. We begin with *qiṣāṣ* for life.

56.1.1. The Book of *Qiṣāṣ* for Loss of Life

The study of this book is first divided into two parts: the cause, that is, the cause of *qiṣāṣ*, and the obligation, that is, *qiṣāṣ* and its substitutes, when it has one. We begin first with the examination of the cause. The study of the cause relates to the description of homicide and the killer, which combined gives rise to the cause, and to the description of the victim in *qiṣāṣ*. Not every killer, that there may be, is liable to *qiṣāṣ*, nor is he liable for every homicide that he may have committed, nor due to any victim, who may have been killed, rather (the liability arises) for a particular killer, for a determined homicide, and due to a specific victim. As the aim in this chapter is to maintain a balance, we begin first with the discussion of the murderer, then with the act of murder, and finally the victim.

56.1.1.1. The Discussion of the Conditions of the Murderer

We say:[210] They agreed that for the murderer, who is subjected to *qiṣāṣ* (or *qawad*), it is stipulated, by agreement, that he be sane, *bāligh* (having attained puberty), and possess a free will for acting directly, without the participation of another. They disagreed generally about the *mukrah* (one coerced) and the *mukrih* (coercer): the person issuing the order (*āmir*) and one directly committing the act (*mubāshir*). Mālik, al-Shāfiʿī, al-Thawrī, Aḥmad, Abū Thawr and a group of jurists said that the liability (for *qiṣāṣ*) is on the *mubāshir* rather than on the *āmir*, but the *āmir* is to be punished (with a penalty other than *qiṣāṣ*). A group of jurists said that both are to be subjected to *qiṣāṣ*. This is the case when there is no coercion and the *āmir* has no authority over the *maʾmūr* (person given the order). When the *āmir* has authority over the *maʾmūr*, that is, the *mubāshir*, they disagree into three opinions. One group said that the *āmir* is subjected to *qiṣāṣ* and not the *maʾmūr* (who may be punished under *taʿzīr*), which is the opinion of Dāwūd and Abū Ḥanīfa and is one of the two opinions of al-Shāfiʿī. Another group said that the person coerced is to be subjected to *qiṣāṣ* and not the *āmir*, which is the other of the two opinions of al-Shāfiʿī. The third group said that they are both to be subjected to *qiṣāṣ*, which is Mālik's opinion.

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[210] The terminology used by the author in this section is somewhat indiscriminate. In particular, the use of the term "*qatl*" and its different forms. He uses the term *qatl* where he should be using the term "*qiṣāṣ*". Apparently, he is following the terminology found in the traditions on the subject. A literal translation of such use would be "is put to death", or better still "executed", but that is not the *ḥukm* in these cases. The *ḥukm* is *qiṣāṣ*, which has certain formalities before an offender can be executed or put to death. Wherever this term is used the phrases "subject to *qiṣāṣ*" or "is subjected to *qiṣāṣ*", or "retaliation", have been employed, as the context dictates.

Those who did not impose *ḥadd* on the *maʾmūr*, took into account the effectiveness of coercion in the waiving of many obligations in the law, due to the similarity of the state of the coerced with one who has no will of his own. Those who upheld *qiṣāṣ* for him, applied to him the *ḥukm* of a person with a free will and this is because the coerced person resembles, from one aspect, a person having a free will, while he resembles from another aspect a person dominated and under duress, like one falling from a height, or swept by the wind from place to place. Those who subjected both to *qiṣāṣ* did not hold coercion as an obstacle (in the way of punishment) for the *maʾmūr*, nor did they consider the absence of direct causation an obstacle for the *āmir*. Those who subjected only the *āmir* to *qiṣāṣ* compared the person given the order with a dumb instrument. Jurists applying *ḥadd* to the person who does not act directly consider the term "murderer" applicable to him metaphorically. The Mālikites relied, in murder by the coerced, on murder under threat of death, by virtue of their consensus that if a person is close to death due to starvation (duress), he has no right to kill a human being and consume him.

Homicide is intentional or by mistake, the killer has legal capacity or he does not—and we shall be discussing intentional homicide (murder) under the case of subjecting a group to *qiṣāṣ* for killing one person—but when a murderer participates with one who is making a mistake, or a person with legal capacity participates with one lacking capacity, like a murderer with a minor or an insane person and a free person with a slave in the killing of a slave, under the rules of those who do not subject a free person to *qiṣāṣ* for killing a slave, then, the jurists disagreed in this. Mālik and al-Shāfiʿī said that the murderer is subjected to *qiṣāṣ*, while the person guilty of manslaughter and the minor are liable to half of the blood money, though Mālik transfers it to the *ʿāqila*, while al-Shāfiʿī directs it to his wealth, as will be discussed in what follows. Similarly, both had the same opinion about the free man and the slave, who kill a slave intentionally, that the slave is to be subjected to *qiṣāṣ*, while the free person pays half the value (of blood-money). The same is the case for a Muslim and a *dhimmī*, who are both subjected to *qiṣāṣ*.

Abū Ḥanīfa said that when a person, who may be liable to *qiṣāṣ*, participates in the offence with another who may not be liable to it, there is no *qiṣāṣ* on either one of them and both pay the *diya*. The argument of the Ḥanafites is that this is a case of *shubha* (doubt), as *qiṣāṣ* cannot be split up and there is a possibility here that the actual loss of life was caused by the act of the person who is not liable to *qiṣāṣ*, just as there is a possibility that it was caused by the person who is liable to *qiṣāṣ*. The Prophet (God's peace and blessings be upon him) has said, "Waive the *ḥudud* on the basis of doubt". Thus, when *qiṣāṣ* cannot be imposed, its substitute becomes obligatory, which is *diya*. The argument of the second group is based on *maṣlaḥa* that requires severity for the curtailment of bloodshed. It is as if each one of them had committed the murder alone and should be awarded the same penalty, but this is weak in terms of analogy.

They agreed about the description of the act for which *qiṣāṣ* becomes obligatory that it is intentional homicide (murder). They are in agreement that homicide is of two kinds: intentional (murder) and by mistake or accident (manslaughter). They disagreed whether there was a third category between these two and that is what they called *shibh al-ᶜamd* (quasi-wilful homicide). This (category) was upheld by the majority of the jurists of the regions and its denial by Mālik is well known, except in the case of a son killing his father. It is said that a different opinion is also related from him in this. ᶜUmar ibn al-Khaṭṭāb, ᶜAlī, ᶜUthmān, Zayd ibn Thābit, Abū Mūsā al-Ashᶜarī and al-Mughīra all confirmed it (quasi-wilful murder) and no one opposed them in this from among the Companions.

Those who upheld it distinguished quasi-wilful homicide from intentional homicide. This distinction refers mostly to the type of instrument with which murder is committed and also to the circumstances in which the blow was struck. Abū Ḥanīfa said that the use of an instrument not made of iron, like a stick, or fire or whatever is similar, results in *shibh al-ᶜamd*, while Abū Yūsuf and Muḥammad said that *shibh al-ᶜamd* is caused by that which is not usually employed for killing. Al-Shāfiᶜī said that *shibh al-ᶜamd* is caused by means used intentionally for beating, but not for killing, that is, the intention is to strike and not to commit homicide, but it results in homicide and *khaṭaʾ* (mistake) is that which is completely by mistake, while intentional homicide is that which is completely with intention. This is the best (distinction).

The reliance of those who deny that there is a middle category is on the argument that there is no middle ground between having an intention and not having an intention. The argument of those who uphold the middle category is that no one but Almighty Allāh is aware of true intentions, but the *ḥukm* is to be assigned (by humans) on the basis of the apparent circumstances. Thus, if a person intends something else with an instrument that is usually employed for killing he will be assigned the usual *ḥukm* and he who intends murder will be assigned the *ḥukm* of murder, without doubt. When a person intends to kill a specific person with an instrument that is not usually employed for murder, his case will vacillate between *ᶜamd* and *khaṭaʾ*, but this is for our purposes only and not in the reckoning of Allāh, the Exalted.

Shibh al-ᶜamd, from one aspect, is similar to the case of *ᶜamd* in that there exists an intention to strike the victim and from another aspect it resembles *shibh al-khaṭaʾ* as an instrument is employed that is not normally used for killing. A *marfūʿ* tradition attributed to the Prophet (God's peace and blessings be upon him) says, "Beware! Homicide through quasi-wilful mistake, that which is committed with a whip, stick, or stone, has an enhanced *diya* of a hundred she-camels, forty of whom bear their offspring in their wombs". It is, however, a tradition lacking sufficient support of the traditionists and is not settled with respect to its chains of transmission in accordance with the statement of Abū ʿUmar ibn ʿAbd al-Barr, though Abū Dāwūd and others have recorded it. This category of homicide, according to those who do not uphold it, gives rise to *qiṣāṣ*, but according to those who uphold it, it necessitates the payment of *diya* alone.

There is no dispute in Mālik's school that a blow struck with anger or malice makes *qiṣāṣ* obligatory (in case of death). They disagreed when it would be considered intentional if struck in sport, or for disciplining, in the case of one who has a right to discipline.

The condition stipulated for the victim, by virtue of which *qiṣāṣ* becomes obligatory, is that he should be at least of the same status as the murderer. The things due to which people differ are Islam and *kufr*, freedom and bondage, being male or female and being one or more. They agreed that if the victim is equal to the killer in these four things, *qiṣāṣ* will become obligatory. They disagreed about these four categories when they did not exist together. If a free man killed a slave, the jurists disagreed about it. Mālik, al-Shāfiʿī, al-Layth, Aḥmad and Abū Thawr said that the free man is not to be subjected to *qiṣāṣ* because of a slave. Abū Ḥanīfa and his disciples said that a free man is to be subjected to *qiṣāṣ* for a slave, except when he owns the slave. A group said that a free man is subjected to *qiṣāṣ* for a slave whether he belongs to him or to someone else. This was upheld by al-Nakhʿaī.

Those who said that a free man is not subjected to *qiṣāṣ* because of a slave argued through the implication of the text in the words of the Exalted, "Retaliation is prescribed for you in the matter of the murdered; the free man for the free man and slave for the slave and the female for the female".[211] Those who said that a free man is subjected to *qiṣāṣ* for a slave argued on the basis of the words of the Prophet (God's peace and blessings be upon him), "The blood of the Muslims is equal (in status) among them, the lowest of them creates an equal liability for them, but they are superior to those beside them". The reason for the disagreement is the conflict of the general meaning with the implication of the text. The distinction, however, is weak.

There is no disagreement among them that the slave is subject to *qiṣāṣ* because of a free man and also one who has a subordinate status (with respect to the four categories) because of one having a superior status. Among the proofs of those who said that the free man is subjected to *qiṣāṣ* because of the slave is also what is related by al-Ḥasan from Samura that the Prophet (God's peace and blessings be upon him) said, "We put to death one who kills his slave". As a rational argument, they said that as his killing is prohibited like that of a free man, it is necessary that *qiṣāṣ* in it should be similar to the *qiṣāṣ* of the free man.

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[211] Qurʾān 2:178

The jurists disagreed into three opinions about the execution of a believer because of a *dhimmī*. A group said that a believer is not to be executed (subjected to *qiṣāṣ*) because of a *kāfir*. Among those who upheld this are al-Shāfiʿī, al-Thawrī, Aḥmad, Dāwūd and a group. Another group said that he is subjected to *qiṣāṣ*. Those who upheld this are Abū Ḥanīfa, his disciples and Ibn Abī Laylā. Mālik and al-Layth said that he is not to be subjected to *qiṣāṣ*, unless he kills him by way of *ghīla* (treachery, deception). *Qatl al-ghīla* is committed when he catches him unawares and slaughters him, especially for his money.

The argument of the first group is what was related in the tradition of ʿAlī when he was asked by Qays ibn ʿUbāda and al-Ashtar whether the Messenger of Allāh (God's peace and blessings be upon him) had conveyed to him something that he did not convey to the people. He said, "No, except what is in this, my document". He then proceeded to extract it from the sheath of his sword and it was written there: "The blood of the Muslims is equal (in status) among them, the lowest of them creates an equal liability for them, but they are superior to those beside them. Beware! A believer is not to be subjected to *qiṣāṣ* because of a *kāfir*, nor one who has made a pact in the duration of his pact. He who innovates or supports an innovator, upon him is the curse of Allāh, of the Angels and of the people, all at the same time". It is recorded by Abū Dāwūd. It is also related from ʿAmr ibn Shuʿayb from his father from his grandfather that the Prophet (God's peace and blessings be upon him) said, "A believer is not to be killed for a *kāfir*". They argued in this, in agreement, that a Muslim is not to be executed because of a *ḥarbī* (one of the enemy at war) who sought sanctuary.

The disciples of Abū Ḥanīfa relied in this upon reports, among which is a tradition related by Rabīʿa ibn Abī ʿAbd al-Raḥmān from ʿAbd al-Raḥmān al-Salmānī, who said, "The Messenger of Allāh had one of the *Ahl al-Qibla* executed because of a person from the *Ahl al-Dhimma* and said, 'I have the greatest right, among those whose covenant should be accepted' ". They related this from ʿUmar saying that it restricts the generality of the Prophet's saying, "A believer is not to be executed because of a *kāfir*, that is, he meant by *kāfir* a *ḥarbī* and not a *kāfir* under a treaty". The traditionists declared the tradition of ʿAbd al-Raḥmān al-Salmānī and also what they related from ʿUmar as weak. By way of analogy, they relied on the consensus of the

Muslims that the hand of a Muslim is cut if he steals the wealth of a *dhimmī*. They said that if the sanctity of his property is the same as that of a Muslim, it is necessary that the sanctity of his blood be the same as a Muslim's. The reason for the disagreement is the conflict of traditions with analogy.

In the subjection of a group (of killers) to *qiṣāṣ* because of one man (victim), the majority of the jurists of the provinces said that the group is to be executed for one person, whatever the number of the group. Among these jurists are Mālik, Abū Ḥanīfa, al-Shāfiʿī, al-Thawrī, Aḥmad, Abū Thawr and others. This was the opinion of ʿUmar, who went to the extent of saying, "Had the people of Ṣanʿā conspired to do it, I would have put all of them to death". Dāwūd and the Ẓāhirites said that a group is not to be put to death for a single person, which is also the opinion of Ibn al-Zubayr, al-Zuhrī and it is also related from Jābir. Similarly, according to this group the hands, of the persons in the group, are not to be severed, if two or more participated in the cutting of one person's hand. Mālik and al-Shāfiʿī said that their hands are to be cut. The Ḥanafites made a distinction between life and limbs saying that lives are to be taken for one life, but only one limb is to be amputated for a limb. This will be discussed in the section of *qiṣāṣ* for limbs.

The reliance of those who execute a group for a single person is the consideration of *maṣlaḥa*. It is understood that *qiṣāṣ* has been decreed for the elimination of murder, as is pointed out by the Book in the words of the Exalted, "And there is life for you in retaliation, O men of understanding".[212] In such a case, if a group of persons is not put to death for one victim, people would find in it a means to get away with murder by conspiring to kill one person through a group. One objecting, however, has the right to say: this would be necessary if no one out of the group is executed, but if one of them is executed, the one whose execution is believed to be a deterrent, then, it is not likely that the *ḥadd* would be negated and become a means for widespread wasting of life.

The reliance of those who execute only one person for one victim are the words of the Exalted, "And We prescribed for them therein: The life for the life and the eye for the eye and the nose for the nose and the ear for the ear and the tooth for the tooth and for wounds retaliation".[213]

Ibn al-Mundhir and others beside him, who mentioned disagreement, said about the execution of the male for the female that there is consensus (ijmāʿ) on this point, except what has been related from ʿAlī from among the Companions and ʿUthmān al-Battī, that if a man is executed for a woman, the woman's *awliyāʾ* have to pay half of the blood money. Abū al-Walīd al-Bājī, the *qāḍī*, has related from al-Ḥasan al-Baṣrī in *al-Muntaqā* that a male is not to be put to death because of a female. This has also been related by al-Khaṭṭābī in the *Maᶜālim al-Sunan*. This is an isolated opinion, but it has strong evidence due to the words of the Exalted, "[A]nd the female for the female",[214] although the implication of the text here conflicts with the general meaning in the words of the Exalted, "And We prescribed for them therein: The life for the life".[215] The objection, however, is that the latter communication was laid down in a *sharīᶜa* other than ours, which is an issue that is disputed, that is, whether the law of those who preceded us is law for us. The reliance on the execution of a man because of a woman is on the consideration of the general interest.

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[212] Qurʾān 2:178

[213] Qurʾān 5:45

They disagreed in this topic about the case of a father and his son. Mālik said the father is not to be subjected to *qawad* (retaliation), except when he catches him unawares and slaughters him (kills him in cold blood), but if he restrains him with a sword or a stick and thereby kills him, he is not to be subjected to *qiṣāṣ*. Similarly, in the case of the grandfather with his grandson. Abū Ḥanīfa, al-Shāfiᶜī and al-Thawrī said that neither the father, because of his son, nor the grandfather, because of his grandson, is to be subjected to *qiṣāṣ*, whatever the form of malice with which he killed him. This was also the opinion of the majority of the jurists. Their reliance is on the tradition of Ibn ᶜAbbās that the Prophet (God's peace and blessings be upon him) said, "The *ḥudud* are not to be applied in mosques, nor is a father to be subjected to retaliation *qawad* because of his son". The basis for Mālik is the general application of *qiṣāṣ* among the Muslims.

The reason for their disagreement is what they relate from Yahyā ibn Saᶜīd from ᶜAmr ibn Shuᶜayb that a man called Qatāda, from the tribe of Mudlij, restrained his son with a sword and struck his leg. The wound (inflammation) spread and he died. Surāqa ibn Juᶜsham went up to ᶜUmar and mentioned this to him and ᶜUmar said, "Go to (their) potable water and count a hundred and twenty camels and lead them in front of you". When they reached ᶜUmar, he selected from them thirty *ḥiqqas* (three-year-old female camels entering the fourth year), thirty *jadhaᶜs* (in the fifth year) and forty *khalifas* (pregnant camels) and then called out, "Where is the victim's brother?" He said, "Here I am". He (ᶜUmar) said, "Take them for, verily, the Messenger of Allāh said, 'There is nothing for the murderer'". Mālik interpreted this tradition to show that it did not involve pure malice and verified the category of *shibh al-ᶜamd* as related to a father and his son. The majority read in it its apparent meaning to indicate malice, due to their consensus that anyone who strikes another with a sword and kills him is guilty of wilful homicide. Mālik, on the other hand, was of the view that as the father has authority of disciplining his son and bears love for him, the interpretation of homicide that occurs in these circumstances should not be considered intentional. He does not accuse the father, when the murder is not by way of *ghīla*, but considers the perpetrator of *ghīla* to have intended the homicide on the basis of predominant probability and strength of the accusation, for true intentions are known only to Allāh, the Exalted. Thus, Mālik does not accuse the father where he does charge a stranger, due to the strength of the love that exists between a father and his son. The majority deemed the cause of waiving the *ḥadd* penalty from the father due to his right over his son. The inference from the principles of the Ẓāhirites is that the father is to be subjected to *qiṣāṣ*. This, then, is the discussion of the cause.

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[214] Qurᵓān 2:178

[215] Qurᵓān 5:45

56.1.1.2. The Discussion of the Consequential Obligation

They agreed that the *walī al-dam* (heir entitled to exact *qiṣāṣ*) is entitled to one of two things: *qiṣāṣ*, or *ʿafw* (pardon)—either in return for *diya* or without it. They disagreed whether the conversion of *qiṣāṣ* into pardon by acquiring *diya* is the exclusive right of the heirs of the victim, without there being an option for the person subjected to *qiṣāṣ*; or whether the liability for *diya* is not established without the consent of both parties, that is, the heirs of the victim and the killer; and that if the killer does not wish to pay the *diya*, do the heirs have no choice but to retaliate or to pardon? Mālik said that the heir has no right to pardon for *diya*, unless the offender consents to pay the *diya*. This is a narration of Ibn al-Qāsim from him and was also the opinion of Abū Ḥanīfa, al-Thawrī, al-Awzāʿī and a group of jurists. Al-Shāfiʿī, Aḥmad, Abū Thawr, Dāwūd and the majority of the jurists of Medina from among the disciples of Mālik, said that the heir has an option, if he likes he can exact *qiṣāṣ* and if he likes he can impose *diya*, whether the killer agrees or he does not. This has been related by Ashhab from Mālik, though his well-known opinion is the former.

Mālik's reliance, for his well-known opinion, is on the tradition of Anas ibn Mālik about retaliation for the teeth of al-Rabīʿ that the Messenger of Allāh said, "The decree of Allāh is *qiṣāṣ*". It was understood by the indication of the text that he had no choice but to exact *qiṣāṣ*. The reliance of the second party is on the established tradition of Abū Hurayra, "One whose kin is killed may choose one of two alternatives, whichever he may prefer: the acquisition of *diya* or pardon". Both traditions are agreed upon for their soundness, but the implication of the first is weak as it leaves him (the *walī*) no choice but the option of *qiṣāṣ*. The second is explicit in granting him options. Their reconciliation is possible if the implication of the (first) text is avoided. Since reconciliation is necessary and it is possible then the adoption of the second tradition is inevitable and the majority maintain that reconciliation is obligatory, when it is possible and it is better than preference (of one over the other). In addition, Allāh, the Powerful and Glorious says, "[A]nd kill not one another (yourselves—*anfusakum*)".[216] If a responsible agent (*mukallaf*) is presented the choice of ransoming himself for wealth, then it is obligatory on him to accept. The basis is that if he finds food in a state of duress (starvation) for an exchangeable value and he has that with which he can buy it, I mean, he is ordered (by law) to buy it, so what about buying his own life?

On the basis of this opinion, if the victim has heirs who include majors as well as minors, it is necessary to postpone retaliation till the minors grow up to exercise their option, especially when the minors exclude the adults, like children along with brothers.

The Qāḍī (Ibn Rushd) says: This case came up in Cordoba, during the time of my grandfather (God bless him) and the jurists of his time issued the verdict according to the well-known narration (from Mālik), which requires that they should not wait for the minors (to grow up), but he, may Allāh have mercy on him, issued the verdict of waiting on the basis of analogy. His contemporaries declared this as abominable, due to the intensity of their *taqlīd*, so much so that he was compelled to issue a verdict in which he supported this school and this (decision) can be found with people.

The study of this section comprises two themes: pardon and retaliation. The study of pardon relates to two things. First, as to who possesses the right of pardon and who does not and the order of priority of heirs in this. Second, whether he has the right to pardon for *diya*. We have talked about whether he has the right to pardon for *diya*.

Those who possess the right to pardon are, on the whole, those who have the right to retaliate and those who have the right to retaliate are the residuaries, according to Mālik and all the legal heirs, according to the others. This is so, as they agreed that if the person killed intentionally has sons and some of them pardon (the offender), then the right to *qiṣāṣ* is annulled and *diya* becomes the remaining choice. They disagreed when there was a dispute between daughters and sons as to whether to pardon or to claim *qiṣāṣ*. Similarly, (in a case of disagreement) between a spouse (wife or husband) and the brothers. Mālik said that the opinion of the daughters as against that of sons and the opinion of sisters as against that of brothers has no significance in the taking of *qiṣāṣ*, or in doing the opposite (that is, pardon) and that their opinion is not considered along with that of men. It is the same in the case of disagreement between a wife and her husband. Abū Ḥanīfa, al-Thawrī, Aḥmad and al-Shafiʿī said that the opinion of each heir is taken into account in the waiving of *qiṣāṣ* and in the relinquishing of his share of the *diya*, as in the taking of *qiṣāṣ* or accepting the share of *diya*. Al-Shāfiʿī said that those absent and those present, the minors and the majors, are all equal in this matter.

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[216] Qurʾān 4:29

The reliance of these jurists is on holding equivalent the exacting of *qiṣāṣ* and the right to *diya*. The reliance of the first group is on the argument that *wilāya* belongs to the males and not to females.

The jurists differed about the person killed intentionally, when he pardoned the offender before dying, whether this is valid as against the rights of the *awliyāʾ*. Similarly, in the case of the person killed by mistake, when he waives the claim of *diya*. A group said that if the person killed had pardoned the claim for his blood in the case of wilful homicide, this is implemented. Those who upheld this were Mālik, Abū Ḥanīfa and al-Awzāʿī and it is also one of the two opinions of al-Shāfiʿī. Another group maintained that his pardon is not binding and the *awliyāʾ* have the right to retaliate or pardon (the offender). Among those who held this opinion were Abū Thawr and Dāwūd and it is also al-Shāfiʿī's opinion rendered in Iraq. The argument of this group is that Allāh has granted an option to the *walī* for three things—pardon, *qiṣāṣ* and *diya*—and this has a general application for each deceased, whether or not he pardoned the claim on his blood. The argument of the majority is that the thing passing on to the *walī* is the right of the deceased and he becomes his representative or stands in his place. The deceased had a right superior to the person who now stands in his place after his death. The jurists agreed that the meaning in the words of the Exalted, "But whoso forgoeth it (in the way of charity) it shall be expiation for him",[217] convey that the subject pronoun of the verb "forgoes", which is the same as the preceding relative pronoun, refers to the deceased, who forgoes his claim by way of charity. They disagreed as to whom the pronoun in "it shall be expiation for him" applies. Some said it applies to the murderer in so far as they saw repentance in it for him, while it was said that it applies to the deceased with respect to his sins and errors.

Mālik, al-Shāfiʿī, Abū Ḥanīfa and the majority of the jurists of the provinces said about the disagreement over the pardoning of *diya* by the person killed through error that his pardon is effective to the extent of a third of the claim, unless the heirs permitted the excess. A group said that it is valid for the entire claim. Those who maintained this are Ṭāwūs and al-Ḥasan. The argument of the majority was that he was donating his wealth, effective after his death and, therefore, it was not effective, except to the extent of a third, its basis being bequest (*waṣiyya*). The argument of the other group was that if he had a right to pardon a claim for blood, he had a better right to waive a claim for wealth. This issue is particularly related to the Book of *Diyāt*.

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[217] Qurʾān 5:45

The jurists differed when a wounded person forgives the offender for his wounds, but subsequently dies from them, whether the *awliyāʾ* had the right to make a demand for *qiṣāṣ*. Mālik said that they have a right to do so, unless he had said that he forgives the injuries and what may result from them. Abū Yūsuf and Muḥammad said that if he forgives the injuries and dies from them, they have no right at all and forgoing the injuries means forgoing the right to *qiṣāṣ* for life. A group said that they have right to *diya* if he forgave the infliction of injuries without qualification. These jurists then differ with some of them saying that the offender is bound to pay the entire *diya* (for life), which was preferred by al-Muzanī from among the opinions of al-Shāfiʿī, while others said that he is bound to pay the *diya* after discounting from it (the portion of) the *diya* related to the wounds, which were forgiven and this is the opinion of al-Thawrī.

There is no dispute, in the opinion of those who said that he cannot forgo the claim for life, that it does not discharge the right of the *walī* to claim the *diya* and as his forgiveness for *qiṣāṣ* for life does not negate the right of the *walī*, it will certainly not discharge the claim for injuries. They disagreed about the murderer, who had been forgiven, whether the *sulṭān* (state) still retained a right in the matter Mālik and al-Layth said that he is to be awarded a hundred stripes and imprisoned for a year, which was also the opinion of the jurists of Medina and is related from ʿUmar. A group—al-Shāfiʿī, Aḥmad, Isḥāq and Abū Thawr—said that the sulṭān does not have to do so. Abū Thawr added that unless he is known to be a hardened criminal in which case the *imām* awards him what he deems fit. There is no evidence with the first group, except for a weak tradition, while the evidence with the second group is the apparent meaning of the law and that fixation (of punishment) cannot take place without an authoritative source and there is no confirmed source for this.

56.1.1.3. The Discussion of *Qiṣāṣ*

The study of *qiṣāṣ* relates to its description, to the person who carries it out and the time of its execution. The jurists disagreed about the description of *qiṣāṣ* for life. Among them were those who said that it is to be exacted from the murderer in the way he committed the murder. Thus, one who killed by drowning is to be drowned and one who killed by hurling a stone is to be killed in the same way. This was Mālik's and al-Shāfiʿī's opinion. They said that it is to be so unless his agony is prolonged, in which case the sword is swifter for him. The disciples of Mālik differed about the person who burned another; is he to be burned too, on the basis of their agreement with Mālik about the implementation of the same method of death? Similarly, one who kills with an arrow.

Abū Ḥanīfa and his disciples said that whatever the mode in which the offender killed the victim, he is not to be put to death by anything but the sword. Their reliance is on what is related by al-Ḥasan from the Prophet (God's peace and blessings be upon him), who said, "There is no *qawad* (retaliation) except by the sword".

The reliance of the other group is on the tradition of Anas "that a Jew crushed a woman's head with a stone and the Prophet (God's peace and blessings be upon him) similarly crushed his head with a stone", or, as in another version it is said, "between two stones", and on the words of the Exalted, "Retaliation is prescribed for you in the matter of the murdered",[218] as retaliation (*qiṣāṣ*) demands similarity.

Regarding the person who is entitled to (physically) exact *qiṣāṣ*, the apparent answer is that it is the *walī al-dam*, but it is said that this is not possible due to the enmity that exists between them and he is likely to commit excesses. The time when *qiṣāṣ* is exacted is after all its requirements have been established. Rebuttal is upon the murderer if he has not confessed. They disagreed whether it is among the conditions of *qiṣāṣ* that the location should not be the *Ḥaram*. They agreed that a pregnant woman, if she has murdered, is not to be subjected to *qiṣāṣ* until she has delivered. They disagreed about the person who has murdered by poisoning. The majority upheld the obligation of *qiṣāṣ*, while some of the Ẓāhirites said that it is not to be exacted from him due to the reason that the Prophet and his companions were poisoned, but did not retaliate against the person who poisoned them. This completes the book of *qiṣāṣ*.

56.2. THE BOOK OF *JIRĀḤ* (INJURIES)

Injuries are of two kinds: those that involve *qiṣāṣ*, *diya*, or pardon; and those that have just *diya* or pardon. We begin with those in which there is *qiṣāṣ*. The study here concerns the conditions related to the offender inflicting the injuries, the conditions related to the injury itself and those related to the injured. It also covers the consequential obligation, that is, *qiṣāṣ* and its substitutes, if it has a substitute.

56.2.1. The Offender Inflicting the Injuries

It is stipulated for the offender that he must be a *mukallaf* (must have legal capacity), as is stipulated for the murderer, which means that he should be a *bāligh* (major) and sane. *Bulūgh* (puberty) is determined, without dispute, by sexual maturity (emission) and age, but they differed over the exact age. The highest is eighteen and the lowest is fifteen years. This was also al-Shāfiᶜī's opinion.

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[218] Qurʾān 2:178

There is no disagreement that if a person severs another's limb, *qiṣāṣ* is to be exacted from him if it is a limb that entails *qiṣāṣ*. They disagreed when a group of persons sever a single limb. The Ẓāhirites said that two hands (of different offenders) cannot be amputated in lieu of one hand. Mālik and al-Shāfiᶜī said that any number of hands can be amputated because of one hand, just as many lives can be taken in because of one. The Ḥanafites made a distinction between loss of life and limbs. They said that more than one limb cannot be amputated for a single limb, but (a number of) lives can be taken for loss of one life. According to them (liability for) limbs is divisible, while (liability for) life is not.

They differed about pubescence. Al-Shāfiᶜī said that it amounts to *bulūgh* without doubt, but the school (Mālik's) differed about it in the case of ḥudūd, irrespective of whether it qualifies as absolute puberty. The basis for all this is the tradition of Banū Qurayẓa, "the Prophet (God's peace and blessings be upon him) executed those minors who were *bāligh* and on whom the razor could be applied". The basis for age is the tradition of Ibn ᶜUmar "that he presented himself (for fighting) on the day of the Battle of Badr,[219] when he was fourteen years old, but he was not accepted, while he was accepted for the battle of Uhud when he was fifteen years old".

56.2.2. The Discussion of the Injured

They stipulate for the wounded person that he should be of the same legal status as that of the offender. The things that are effective in status are bondage and *kufr*. Regarding the slave and the free man they disagreed over the occurrence of *qiṣāṣ* between them in injuries, as in the case of loss of life. Among them were those who maintained that the *qiṣāṣ* cannot be exacted from the free man because of the slave, but the slave is to subjected to *qiṣāṣ* for a free man as is the case in loss of life. Among them were those who held that each one of them is subjected to *qiṣāṣ* for the other and they did not distinguish between life and limbs, for this purpose. Among them were also those who made a distinction saying that the superior is to be subjected to *qiṣāṣ* for the inferior in life and injuries, while others said that *qiṣāṣ* is exacted for life and not for injuries. From Mālik there are two narrations. The correct position, however, is that *qiṣāṣ* is to be exacted for injuries in the manner it is exacted for life. This is the situation of the slaves with respect to freemen.

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[219] The text says 'al-Khandaq' or the battle of the Trenches. Historically, this is not possible as Uhud was fought before al-Khandaq. The word Badr has, therefore, been substituted for it.

About the relationship of the slaves among themselves, the jurists have three opinions. First, that *qiṣāṣ* is applicable among them for life as well as injuries, which is the opinion of al-Shāfiʿī and a group of jurists and is also related from ʿUmar ibn al-Khaṭṭāb and is one opinion from Mālik. The second view is that there is no *qiṣāṣ* among them, either for life or for injuries and they are like chattel. This is the opinion of al-Ḥasan, Ibn Shubrama and a group of jurists. The third opinion is that there is *qiṣāṣ* among them, but for life and not injuries, which is the opinion of Abū Ḥanīfa and al-Thawrī and it is also related from Ibn Masʿūd. The reliance of the first group is on the words of the Exalted, "[A] slave for a slave". The reliance of the Ḥanafites is on what was related by ʿImrān ibn al-Ḥuṣayn "that a slave of some poor people cut off the ear of a slave of some rich people and they came up to the Messenger of Allāh (God's peace and blessings be upon him) who did not exact *qiṣāṣ* from him". This, then, is the *ḥukm* for *qiṣāṣ* among the slaves.

56.2.3. The Discussion of Injuries

It is stipulated for an injury that it be by way of malice (intent), that is, the injury in which there is liability for *qiṣāṣ*. Injuries may be caused by the destruction of the limbs of the injured person or they may not. If it is of the type where there is destruction of a limb, then intention is realized when a blow is struck in rage, in a manner that usually causes an injury. When he injures him by way of sport, or in a manner that does not usually result in injury, or by way of discipline, it appears that there is disagreement in it, of the same nature as was found in murder about the probable consequences of a blow that does not normally kill and is struck while playing or disciplining. Abū Ḥanīfa attaches considerable importance to the instrument, so much so that he says a murder cannot be committed with a blunt weapon (*muthaqqal*), which is an unusual opinion from him, that is, regarding the disagreement whether there is *qiṣāṣ* or *diya* in it if it is an injury that carries *diya*.

The condition for *qiṣāṣ* in injuries where the limb has been maimed is, without dispute, malice, but in the distinction of intentional from unintentional injuries there is a disagreement. If the offender struck at the limb itself, severing it with an instrument that is normally used for the purpose, or he had struck him in a rage, then, there is no dispute that there arises a liability for *qiṣāṣ*. If, however, he slapped him, or struck him with a whip or what resembles it, when it is obvious that he did not intend the loss of a limb, as in the case where he slaps him and his eye comes out of its socket, the majority maintain that this is quasi-wilful injury and there is no *qiṣāṣ* in it, but there is enhanced *diya* in it, charged to his wealth. This is the narration of the Iraqis from Mālik, while the well-known opinion in the school is that it is wilful and there is *qiṣāṣ* in it, except in the case of the father injuring his son. Abū Ḥanīfa, Abū Yūsuf and Muḥammad maintain that there is *shibh al-ʿamd* in homicide only and not in injuries.

When the offender injures him by way of sport, destroying his limb, there are two opinions in this. The first makes *qiṣāṣ* obligatory while the second negates it. What follows from these two opinions are two more opinions: one fixing enhanced *diya* and the other the *diya* of mistake, that is, in those cases where *diya* is invoked. Similarly, when the injury is caused while disciplining; there is disagreement in it.

The obligation in intentional injuries, when they occur according to the conditions that we have mentioned, is *qiṣāṣ* due to the words of the Exalted, "And for wounds retaliation".[220] This applies to those cases in which the exacting of *qiṣāṣ* is possible and where the exact area of amputation can be located, without there being fear of loss of life. They adopted this opinion on the basis of the report "that the Messenger of Allāh (God's peace and blessings be upon him) waived *qiṣāṣ* in the case of the *maʾmūma*, (a head injury) *munaqqala*, (splintered bones) and *jāʾifa* (facial or other cavities)". Mālik and those who adopted his opinion maintained that this is the *ḥukm* of all injuries that are within the meaning of the stated injuries that are fatal, like the splintering of the bones in the neck, spine, chest, or thighs and whatever is similar. Mālik's opinion wavered with respect to the *munaqqala* and he ruled for *qiṣāṣ* once and for *diya* another ime. The same is the case, according to Mālik, where a similarity in *qiṣāṣ* cannot be maintained, like the partial loss of sight or hearing. *Qiṣāṣ* is also prohibited, according to Mālik, in cases where there is an initial absence of similarity, like a blind man destroying the eye of one whose sight is sound.

Within this, they disagreed about the case of the one-eyed person, who intentionally destroys the sight of one in possession of both eyes. The majority maintained that if he prefers he has the right to retaliate, but they disagreed when he forgoes retaliation. A group said that if he likes he is entitled to full *diya* of one thousand *dīnārs*, which is the opinion of Mālik. It is also said that he is only entitled to half of the *diya*, which was the opinion of al-Shāfiʿī and is also related from Mālik. Ibn al-Qāsim held the same opinion as that of al-Shāfiʿī, while the other opinion was adopted by al-Mughīra, from among his disciples and also by Ibn Dīnār. The Kūfīs said that the person with the sound eyes, whose eye has been destroyed, is only entitled to retaliation or composition agreed to by both. It is also said that he does not exact *qiṣāṣ* from the one-eyed person and there is full *diya* for him. This is related from Ibn al-Musayyib and from ʿUthmān. The reliance of the jurist who maintains this opinion is on the argument that one eye of the one-eyed person is equal to two eyes, thus, the person who destroys it in retaliation is taking two eyes from him instead of one. The same argument was advanced by another jurist who said that if he relinquished retaliation he is entitled to full *diya*. It is binding upon the upholder of this opinion that he relinquish *qiṣāṣ* by necessity. The jurist who insisted on *qawad* in this case and ruled for half of the *diya* is consistent with his principle, so ponder over this as it is self-evident, Allāh knows best.

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[220] Qurʾān 5:45

Whether the injured person has a choice between *qiṣāṣ* and the taking of *diya*, or the only option he has is the exacting of *qiṣāṣ*, unless he settles for *diya* with the offender, there are two opinions in this from Mālik like his two opinions in murder and one of his opinions in the case of the one-eyed person destroying an eye of the person with sound eyes. The correct opinion is that he should be given the option to destroy the eye of the one-eyed person or to take the full *diya* of one thousand *dīnārs*—or five hundred on the basis of the disagreement.

When does he exact *qiṣāṣ* for the injury caused to him? According to Mālik, he does not exact *qiṣāṣ* till his injury is healed, but according to al-Shāfiᶜī he can do so at once. Al-Shāfiᶜī follows the apparent meaning, while Mālik considers what the injury may lead to fearing that it may cause loss of life.

The jurists differed when the offender subjected to *qiṣāṣ* dies from the act of exaction of *qiṣāṣ*. Mālik, al-Shāfiᶜī, Abū Yūsuf and Muḥammad said that the person exacting *qiṣāṣ* owes nothing. The narration from ᶜAlī and ᶜUmar is the same and it was also adopted by Aḥmad, Abū Thawr and Dāwūd. Abū Ḥanīfa, al-Thawrī, Ibn Abī Laylā and a group of jurists said that if he dies the *ᶜāqila* of the person exacting will pay up the *diya*. Some of them said that it will be charged to his personal wealth, while ᶜUthmān al-Battī said that the value of the injury is to be discounted from the *diya* paid to him, which is the opinion of Ibn Masᶜūd.

The argument of the first group is that the when the thief dies, on amputation of his hand, there is no claim upon the person who amputates his hand. The argument of the Ḥanafites is that it is a case of homicide through error (*khaṭaʾ*), which creates a liability for *diya*.

Qiṣāṣ is not to be exacted, according to Mālik, in extreme heat or extreme cold and is to be delayed lest the offender die from it. It is said that the location is also a condition for retaliation and it should be other than the *ḥaram*.

This, then, is the *ḥukm* of *ᶜamd* (intention) in offences against life and in offences against the limbs of the body. It is necessary that we turn to the *ḥukm* of *khaṭaʾ* in these and we begin with the *ḥukm* of *khaṭaʾ* in loss of life.

56.3. THE BOOK OF *DIYĀT* (BLOOD-MONEY) FOR LOSS OF LIFE

The basis of this law are the words of the Exalted, "He who hath killed a believer by mistake must set free a believing slave and pay the blood-money to the family of the slain, unless they remit it as a charity".[221] The *diyāt* differ in the *sharīʿa* depending upon the person whose life is lost, on whom it becomes obligatory and also the agreement of the parties, or in the case of murder on the consent of the person who has the right to exact *qiṣāṣ*, as has been mentioned earlier in their disagreement over it.

The study of *diya* is about its cause, that is, in what kind of homicide it becomes due, about its kinds and amount, about the time when it becomes due and about the issue on whom it is obligatory.

About homicide, for which it becomes payable, they agreed that it becomes binding in manslaughter and in murder by a person who does not have full legal capacity, like an insane person or a minor. It is also binding in intentional homicide where the protection accorded to the victim is less than that accorded to the murderer, like the case of the free man and slave.

Among the categories of *khaṭaʾ* are those about which they agreed, as to their being *khaṭaʾ* and those about which they disagreed, a short description of which has preceded. We shall also take up later the imposition of liability on the rider, the driver and the guide.

They agreed about its amounts and kinds that the *diya* of a Muslim free man is a hundred camels, for those whose mode of life is closely related to camels. In Mālik's opinion it has three kinds: *diya* for *khaṭaʾ*, *diya* for *ʿamd* and *diya* for *shibh al-ʿamd*, which according to Mālik is like the act of one restraining his son. *Diya* is of two types only in al-Shāfiʿī's view: reduced (*mukhaffafa*) and enhanced (*mughallaẓa*). Reduced *diya* is for cases of *khaṭaʾ*, while enhanced *diya* is for *ʿamd* and *shibh al-ʿamd*. There are two kinds of *diyāt* in Abū Ḥanīfa's view also, for *khaṭaʾ* and for *shibh al-ʿamd*. There is no *diya*, according to him, for *ʿamd*. The obligation in *ʿamd*, for him, is composition (value arrived at through settlement (*sulḥ*)), which is payable immediately and cannot be delayed. This meaning is also found in the well-known opinion of Mālik, because there is no point in calling it *diya* if he does not make it obligatory on him, except by settlement, though it is related from him that it can be delayed like the *diya* of *khaṭaʾ*, which excludes it from the category of amount arrived at through settlement.

The *diya* of *ʿamd*, according to Mālik, has four components: twenty-five *bint makhāḍ*, twenty-five *bint labūn*, twenty-five *ḥiqqa* and twenty-five *jadhaʿ*. This is also the opinion of Ibn Shihāb and Rabīʿa. The enhanced *diya*, according to him has three components: thirty *ḥiqqa*, thirty *jadhaʿ* and forty *khalifa*, which are pregnant. The enhanced *diya*, according to his well-known opinion, is paid only in an act like that of the person killing his son while restraining him. According to al-Shāfiʿī it has three components even for *shibh al-ʿamd*. This is also related from ʿUmar and Zayd ibn Thābit. Abū Thawr said that *diya* in *ʿamd*, when the *walī al-dam* has waived retaliation, is composed of five parts, like the *diya* of *khaṭaʾ*.

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[221] Qurʾān 4:92

They disagreed about the ages of camels in the *diya* for *khaṭaʾ*. Mālik and al-Shāfiʿī said that they are composed of five parts (with respect to age): twenty *bint makhāḍ*, twenty *bint labūn*, twenty male *ibn labūn*, twenty *ḥiqqa* and twenty *jadhaʿ*. This is related from Ibn Shihāb and Rabīʿa. It is also the opinion of Abū Ḥanīfa and his disciples, that is, its five-part composition, though they substituted male *ibn makhāḍ* for male *ibn labūn*. Both opinions are related from Ibn Masʿūd. It is related from our master ʿAlī that he determined it to be composed of four components, eliminating from it twenty-five *banī labūn*. This was adopted by ʿUmar ibn ʿAbd al-ʿAzīz. There is no tradition related from the Prophet for this and, thus, it indicates permissibility (*ibāḥa*)—Allāh knows best—as is stated by Abū ʿUmar ibn ʿAbd al-Barr. Al-Bukhārī and al-Tirmidhī have recorded a report from Ibn Masʿūd from the Prophet (God's peace and blessings be upon him), who said, "In the *diya* of *khaṭaʾ* there are twenty *bint makhāḍ*, twenty *ibn makhād* (male), twenty *banāt labūn*, twenty *jadhaʿ* and twenty *ḥiqqa*". Abū ʿUmar indicated a deficiency in this tradition in so far as it had been related by Ḥanīf ibn Mālik from Ibn Masʿūd and this person is unknown (that is, Ḥanīf). He said, "The report from ʿAlī in this is dearer to me as there is no dispute about the narration from ʿAlī but it is disputed in the case of Ibn Masʿūd". Abū Dāwūd has recorded a report from ʿAmr ibn Shuʿayb from his father from his grandfather "that the Messenger of Allāh (God's peace and blessings be upon him) decided that the person who is killed by mistake, his *diya* is a hundred camels: thirty *bint makhāḍ*, thirty *bint labūn*, thirty *ḥiqqa* and ten *ibn labūn* (male)". Abū Sulaymān al-Khaṭṭābī said that this is a tradition I have never known any of the famous jurists mentioning and most of the jurists have maintained that the *diya* for *khaṭaʾ* has five components, though they did disagree about the kinds of camels. It is related from some of the jurists that the *diya* of *khaṭaʾ* has four components. These are al-Shaʿbī, al-Nakhaʿī and al-Ḥasan al-Baṣrī. These jurists stated it to be: twenty-five *jadhaʿ*, twenty-five *ḥiqqa*, twenty-five *bint labūn* and twenty-five *bint makhād*, as has been related from ʿAlī and recorded by Abū Dāwūd.

The majority inclined toward *diya* of *khaṭaʾ* that had five components: twenty *ḥiqqa*, twenty *jadhaʿ*, twenty *bint makhāḍ*, twenty *bint labūn* and twenty *ibn makhād* male. They did not agree, however, about *ibn makhāḍ* as the age had not been mentioned in them. On the basis of analogy, those who adopted the tradition of five components for *khaṭaʾ* and of four components for *shibh al-ʿamd*, if this third category is established, would say that the *diya* for *ʿamd* is composed of three parts, as has been related from al-Shāfiʿī. Those who did not accept three components held *ʿamd* similar to the other categories. These, then, are their well-known opinions about *diya* that is composed of camels and is imposed on the owners of camels.

They disagreed about what was obligatory on those who deal in gold and silver. Mālik said that those who deal in gold have to pay a thousand *dīnārs*, while those who deal in silver have to pay twelve thousand *dirhams*. The jurists of Iraq said that those dealing in silver are to pay ten thousand *dirhams*. Al-Shāfiʿī said in Egypt that what is due from people dealing in gold or silver is the value of a hundred camels, whatever this amount, but his opinion in Iraq was the same as that of Mālik. Mālik's reliance is on the valuation of a hundred camels by ʿUmar ibn al-Khaṭṭāb for those dealing in gold at a thousand *dīnārs* and for those dealing in silver at twelve thousand *dirhams*. The reliance of the Ḥanafites is also related from ʿUmar that he fixed the value of one *dīnār* at ten *dirhams* and also on their consensus in the valuation of a *mithqāl* for purposes of *zakāt*. Al-Shāfiʿī said that the basis for *diya* is a hundred camels and ʿUmar fixed it at one thousand *dirhams* for those dealing in gold and at twelve thousand *dirhams* for those dealing in silver, as they represented the value of a hundred camels in his days. His proof lies in what was related from ʿAmr ibn Shuʿayb from his father from his grandfather, who said, "The *diya* in the days of the Messenger of Allāh (God's peace and blessings be upon him) was eight hundred *dīnārs* and eight thousand *dirhams*. The *diya* for the People of the Book was half of what it was for the Muslims". He said, "This continued until ʿUmar succeeded to the Caliphate, when he addressed the people saying that 'the price of camels has risen'. ʿUmar, then, fixed it for those dealing in silver at twelve thousand *dirhams* and for those dealing in gold at a thousand *dīnārs*. For those who possessed cows, he fixed it at two hundred cows, for the owners of sheep at two thousand sheep and for the owners of dresses at two hundred dresses, but he left alone the *diya* for the *ahl al-dhimma* not changing anything in it". Some jurists argued on behalf of Mālik that if the valuation by ʿUmar was a substitute (as claimed by al-Shāfiʿī) it would amount to the exchange of a debt for a debt, due to their consensus that *diya* in *khaṭaʾ* may be delayed for a period of three years.

Mālik, Abū Ḥanīfa and a group of jurists are in agreement that *diya* is only to be taken either in camels, or gold, or silver. Abū Yūsuf, Muḥammad ibn al-Ḥasan and the seven jurists of Madīna said that those dealing in cows owe two hundred cows, while those dealing in textiles owe two hundred dresses. Their reliance is upon the tradition of ʿAmr ibn Shuʿayb that has preceded and also on what has been transmitted by Abū Bakr ibn Abī Shayba from ʿAṭāʾ

that "the Messenger of Allāh (God's peace and blessings be upon him) imposed *diya* on people according to their wealth, whatever it was: on the possessors of camels, a hundred camels, on the possessors of sheep, one thousand sheep, on the possessors of cows, two hundred cows and on the possessors of textiles, a hundred dresses". They also rely on what is related from ʿUmar ibn ʿAbd al-ʿAzīz that he wrote to the military forces that the *diya* in the days of the Messenger of Allāh (God's peace and blessings be upon him) was a hundred camels. He said that if the offence is committed by one of the Bedouins, then, the *diya* is to be in camels and a Bedouin is not to be asked to pay in gold or silver, but if he does not have a hundred camels, he will pay its equivalent in sheep, a thousand sheep. The jurists of Iraq also relate as a text from ʿUmar what is similar to the tradition of ʿAmr ibn Shuʿayb from his father from his grandfather. The argument of the first group, however, is that if an equivalence in sheep or cows had been permitted, it would also be possible in food for the possessors of food and in horses for the possessors of horses, but this has not been asserted by any jurist.

The study of *diya*, as I said, relates to its kinds, its amount, on whom it is imposed, for what and when. We have already discussed its kind and amount for the case of male Muslim free men. About the question, on whom is it obligatory, there is no disagreement that the *diya* of *khaṭaʾ* is imposed on the *ʿāqila* and this is a specific *ḥukm* exempted from the general implication of the words of the Exalted, "Each soul earneth only on its own account, nor doth any laden bear another's load",[222] and from the general meaning of the words of the Prophet (God's peace and blessings be upon him) to Abū Zamna about his son: "He does not compensate offences on your behalf, nor do you pay for his". The majority maintain about the *diya* of *ʿamd* that it is not to be paid by the *ʿāqila*, on the basis of what is related from Ibn ʿAbbās and none of the Companions opposed him. He said, "The *ʿāqila* does not bear *ʿamd* (intentional offences), nor confessions, nor composition in *ʿamd*". The majority of them also maintain that the *ʿāqila* does not pay when a person kills himself by mistake. Alawzai differed saying that when a person strikes the enemy and kills himself (in error), the *ʿāqila* has to pay his *diya*. They have the same opinion in the case of severance of limbs. It is related from ʿUmar that once a person gouged out his eye accidentally and ʿUmar decided in his favour for the payment of its *diya* by the *ʿāqila*.

They disagreed about the *diya* for *shibh al-ʿamd*, the enhanced *diya*, into two opinions. They also disagreed about the *diya* of a victim attacked by an insane person or a minor, as to who would pay it. Mālik, Abū Ḥanīfa and a group of jurists said that all these are to be paid by the *ʿāqila*, while al-Shāfiʿī said that an intentional offence of a minor is to be on his own account. The reason for their disagreement is the vacillation of the act of the minor between malice and mistake. Those who viewed *shibh al-ʿamd* possible in his case imposed *diya* on his wealth, while those who considered it similar to *khaṭaʾ* made his *ʿāqila* liable. Similarly, they disagreed about the case where a minor participates with one premeditating the offence. Those who imposed *qiṣāṣ* on the murderer and *diya* on the minor, differed as to who would pay it. Al-Shāfiʿī, on the basis of his principle, said it is to be imposed on the wealth of the minor. Mālik said it is paid by the *ʿāqila*, while Abū Ḥanīfa held that there is no *qiṣāṣ* in this case.

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[222] Qurʾān 6:165

With respect to the time that it is due, they agreed that *diya* for *khaṭaʾ* is delayed over a period of three years, but the *diya* for *ʿamd* is immediate, unless they settle on delaying it.

Who are the *ʿāqila*? The majority of the jurists of Ḥijāz agreed that the *ʿāqila* are the close relatives on the paternal side and these are the residuaries, to the exclusion of the members of the *dīwān* (military unit). They also held that the clients bear the *diya*, in case the residuaries are unable to do so, except for Dāwūd, who did not consider clients as residuaries. There is no limit, according to Mālik, on the amount each one may have to bear. Al-Shāfiʿī said that the rich pay one *dīnār*, while the poor pay half a *dīnār*, which is imposed, in his view, in accordance with their nearness to the offender: first the children of his father, then the children of his grandfather, then the children of the children of his father. Abū Ḥanīfa and his disciples maintained that the *ʿāqila* is composed of the members of the *dīwān*, if he belonged to one. The argument of the jurists of Ḥijāz is that the people used to pay as an *ʿāqila* in the days of the Prophet and in the days of Abū Bakr and there was no *dīwān* at that time; it came into existence in the days of ʿUmar ibn al-Khaṭṭāb. The Kūfīs relied upon the tradition of Jubayr ibn Muṭʿim from the Prophet (God's peace and blessings be upon him), who said, "There is no grouping in Islam and any grouping that existed in the days of *jāhiliyya*, Islam only adds to its strength". On the whole, they accepted this in the way they accepted the obligation of clientage as a group.

They disagreed about the offence of the person who had no residuaries or clients. These are unaffiliated individuals. If they commit an offence by way of *khaṭaʾ*, do they have a liability for the payment of *diya*? If they do, then who is to pay? Those who do not assign them clients (by law) said that the unaffiliated persons do not pay *diya*. The same opinion is held by those who do not impose a duty on the clients (as members of the *ʿāqila*) to pay *diya*. These jurists were Dāwūd and his disciples. Those who assigned clientage to the person who emancipated him said that the liability is on the client, while those who assigned their *walāʾ* to the Muslims generally said that their *diya* is paid by the treasury (*bayt al-māl*). Those who said that the unaffiliated person may adopt the clientage of any person they like, assigned the liability for *diya* to the person who accepted the *walā*ʾ. All these opinions have been related from the earlier Muslims.

The *diyāt* vary in accordance with the status of the victim. The factors effective in the reduction of *diya* are the feminine gender, *kufr* and bondage. They agreed about the *diya* of a woman that it is half the *diya* of a man, for loss of life only and they differed about cases of injuries and loss of limbs, as will be discussed in the section on *diyāt* for wounds and maiming. The jurists disagree into three opinions about the *ahl al-dhimma* when they are killed by way of *khaṭa*ʾ. First, that their *diya* in the case of males is half of that for Muslim males, while their women have *diya* that is half of Muslim women. This was Mālik's opinion and also that of ʿUmar ibn ʿAbd al-ʿAzīz. On the same basis, the *diya* for their injuries is half that for the Muslims. The second opinion maintains that their *diya* is a third of the *diya* for Muslims. This was al-Shāfiʿī's opinion and is related from ʿUmar ibn al-Khaṭṭāb, ʿUthmān and was adopted by a number of the *Tābiʿūn*. The third opinion is that their *diya* is the same as that of the Muslims, which is the opinion of Abū Ḥanīfa, al-Thawrī and a group of jurists and is also related from Ibn Masʿūd and has been related from ʿUmar, ʿUthmān and from a number of the *Tābiʿūn*.

The reliance of the first group is on what has been related from ʿAmr ibn Shuʿayb from his father from his grandfather from the Prophet (God's peace and blessings be upon him) that he said, "The *diya* of a *kāfir* is half the *diya* for a Muslim". The reliance of the Ḥanafites is on the general implication of the words of the Exalted, "And if he cometh of a folk between whom and you there is a covenant, then the blood-money must be paid unto his folk and (also) a believing slave must be set free".[223] Their argument from the *sunna* is based on what has been related from Maʿmar from al-Zuhrī, who said, "The *diya* of a Jew, a Christian and any *dhimmī* is the same as the *diya* of a Muslim". He said that it was like this (full) in the days of the Messenger of Allāh (God's peace and blessings be upon him) and in those of Abū Bakr, ʿUmar, ʿUthmān and ʿAlī till the time of Muʿāwiya came and half of it was deposited in the treasury, the other half being given to the heirs of the deceased. It was later that ʿUmar ibn ʿAbd al-ʿAzīz fixed it at half the *diya*. About the amount that Muʿāwiya placed in the treasury, al-Zuhrī says that it appeared to him that ʿUmar ibn ʿAbd al-ʿAzīz did not recall it. He, then, informed him that the *ahl al-dhimma* were entitled to full *diya*.

If a slave kills by way of *khaṭa*ʾ or ʿ*amd* and the opinion of those who do not hold him liable to *qiṣāṣ* is taken into account, a group of jurists said that he is to pay his own value whatever the amount, even if that exceeds the amount of *diya* for a free man. This was the opinion of Mālik, al-Shāfiʿī and Abū Yūsuf. It was also the opinion of Saʿīd ibn al-Musayyib and ʿUmar ibn ʿAbd al-ʿAzīz. Abū Ḥanīfa and Muḥammad said that the *diya* is not to exceed the value of the slave. Some of the jurists of Kūfa said that there is *diya* in this case, but it is not to exceed the *diya* of a free man, in fact, something is to be reduced from it. The argument of the Ḥanafites is that bondage is a state of defective capacity and, therefore, the amount should not exceed the *diya* of a free man. The argument of those who imposed *diya* in this case, but rendered it less than the *diya* of the free man is that he possesses defective capacity and, therefore, the assigned *ḥukm* should be lesser in intensity, though it should be of the same category; the basis being the *ḥad* penalties in *zinā*, *qadhf*, *khamr* and *ṭalāq*. If it is said that his *diya* should be half of the free man, the assertion would have some basis, I mean, in the *diya* of *khaṭaʾ*, but none has claimed this. Mālik's argument is that he is chattel that has been destroyed, therefore, the value has to be paid, the basis being all other kinds of property. They differed in the case of the payment of *diya* for a salve, as to who is to pay it. Abū Ḥanīfa said that it is owed by the *ʿāqila* of the offender. This is also the well-known opinion from al-Shāfiʿī. Mālik said that it is paid by the killer himself. The argument by Mālik is based on the similarity of the slave with chattel, while that by al-Shāfiʿī is based on analogy drawn from a free man.

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[223] Qurʾān 4:92

Within the topic of the various kinds of *khaṭaʾ* is the *diya* for the *janīn* (unborn child; when the woman is "quick" with child, to be exact). This is so as miscarriage caused because of a blow is not pure malice, but is malice with respect to the mother and *khaṭaʾ* with respect to the *janīn*. The study of this topic relates to: the consequential obligation for different kinds of offences; the description of the *janīn* for which this obligation arises; the person liable for payment and to whom; and the conditions attached to the obligation.

They agreed about the different kinds of *janīn* that the obligation for the *janīn* of a free woman and for that of a slave-woman bearing the child of her master, is a *ghurra*, on the basis of what has been established from the Prophet (God's peace and blessings be upon him) in the tradition related by Abū Hurayra and others "that there were two women of Hudhayl, one of whom pushed the other thereby causing her to miscarry and lose her *janīn*. The Messenger of Allāh (God's peace and blessings be upon him) awarded a *ghurra* for a *janīn* male or a female". Those who upheld that the amount of *ghurra* is fixed in value, which is the opinion of the majority, agreed that the obligatory value of the *ghurra* is five per cent of the *diya* of the (*janīn's*) mother. Those who maintained that the full *diya* upon the possessors of *dirhams* is ten thousand *dirhams* said that the *diya* of the *janīn* is five hundred *dirhams*, while those who maintained that the full amount was twelve thousand *dirhams*, determined it to be six hundred *dirhams*. The jurists who did not fix any limit to it, or they did not fix it with respect to value and permitted the determination of its value from her value, said that the obligation is to pay the value of the *ghurra*,[224] whatever the limit that it may attain. Dāwūd and the Ẓāhirites said that anything to which the term '*ghurra*' can be applied is to be paid and, as far as I know, the payment of value in this is not permitted according to him.

They disagreed about the liability for the *janīn* of a slave-girl and a *kitābiyya* (Christian or Jewish woman). Mālik and al-Shāfiᶜī maintained that for the *janīn* of the slave-woman, it is a tenth of her value on the day of the offence, whether it was a male or a female. Some jurists made a distinction between a male and a female saying that if it is a female there is a tenth of the value of the slave-woman for it, but if it was a male the amount is a tenth of his value, even if the *janīn* was alive at the time. This is the opinion of Abū Ḥanīfa. There is no dispute among them that if the *janīn* of the slave-woman is alive at the time of the miscarriage, its value has to be paid. Abu Yusuf said that if the *janīn* of the slave-woman is stillborn, the decrease in the value of its mother has to be paid.

About the *janīn* of the *dhimmiyya*, Mālik, Abū Ḥanīfa and al-Shāfiᶜī said that there is a tenth of the *diya* of the mother in this case, but Abū Ḥanīfa's opinion is based on his principle that the *diya* of a *dhimmī* is the same as that of a Muslim. Al-Shāfiᶜī maintained his rule that the *diya* of the *dimmī* is one-third of the *diya* of a Muslim, whereas Mālik's rule is that it is one-half of a Muslim's *diya*.

In description of the *janīn*, because of which payment becomes obligatory, they agreed that among its conditions is that the *janīn* be delivered stillborn and that the mother should not die from the blow. They disagreed when the mother dies from the blow and thereafter the *janīn* is delivered stillborn. Mālik and al-Shāfiᶜī said that there is nothing in this case, while Ashhab said that a *ghurra* has to be paid, which was also the opinion of al-Layth, Rabīᶜa and al-Zuhrī. They disagreed in this issue about details, particularly the sign that indicates the state of being dead or alive of the *janīn* at the time of miscarriage. Mālik and his disciples maintained that the sign of life is hearing of a squall or cry. Al-Shāfiᶜī, Abū Ḥanīfa, al-Thawrī and the majority of the jurists maintained that any indication of what usually signifies life, like movement, sneezing, or breathing, will be assigned the *ḥukm* of life. This is more convincing.

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[224] The word *ghurra* has several literal meanings, the best known being the white spot on a horse's forehead. Technically, it is the compensation paid for causing miscarriage and may be said to be the value of the foetus. The details appear in the discussion which follows.

They disagreed about the state of the foetus that creates a liability for a *ghurra*. Mālik said that anything appearing at miscarriage in the nature of flesh or a clot from which it can be determined that it would have been a child gives rise to a *ghurra*. Al-Shāfiʿī said that nothing is to be paid unless it becomes manifest that it was a child and it is better to consider the presence of spirit in it, I mean, that a *ghurra* is payable in it if the presence of life is established.

They disagreed as to who is liable for the payment. One group from among them—Mālik, al-Ḥasan ibn Ḥayy and al-Ḥasan al-Baṣrī—said that the liability is imposed on the wealth of the offender, while others said that it is upon the *ʿāqila*. Those who maintained the latter opinion are al-Shāfiʿī, Abū Ḥanīfa, al-Thawrī and a group of jurists. Their argument is based on the fact that it is an offence by way of *khaṭaʾ* and raises an obligation upon the *ʿāqila* and is also based on what is related from Jābir ibn ʿAbd Allāh "that the Prophet (God's peace and blessings be upon him) determined a *ghurra*, in the case of the *janīn*, as a liability of the assailant's *ʿāqila*, beginning with her husband and her child". Mālik compared it to *diya* in the case of *ʿamd*, when the blow was intentional.

To whom is the payment due? Mālik, al-Shāfiʿī and Abū Ḥanīfa said that it is to be made to the heirs of the *janīn* and its *ḥukm* is to be the *ḥukm* of *diya* in so far as it is inherited. Rabīʿa and al-Layth said that it belongs exclusively to the mother, for they treated the *janīn* as one of her limbs.

The obligation about which they differed in the case of the *janīn*, along with the *ghurra*, was expiation (*kaffāra*). Al-Shāfiʿī held that there is obligatory expiation in it, while Abū Ḥanīfa held that there is no such obligation. Mālik recommended it, but did not make it obligatory. Al-Shāfiʿī declared it obligatory, as expiation is obligatory, according to him, in cases of *ʿamd* as well as *khaṭaʾ*, while Abū Ḥanīfa imposed upon it the *ḥukm* of *ʿamd*, which does not carry expiation in his view. As expiation is not obligatory in *ʿamd* for Mālik, but it is in *khaṭaʾ* and this case in his view vacillates between *ʿamd* and *khaṭaʾ*, he, therefore, recommended expiation in it not making it obligatory.

Among the categories of *khaṭaʾ* that are disputed is their disagreement about holding the rider, driver (of animals) and the guide liable. The majority said that they are liable for the injuries caused by the animals. They argue in this on the basis of the decision of ʿUmar imposing *diya* in the case where a person was leading his mare and it trampled upon another. The Ẓāhirites said that there is no liability upon anyone for injuries caused by dumb animals. They relied on the established tradition in it related from the Prophet (God's peace and blessings be upon him) by Abū Hurayra that the Prophet said, "Injuries by the dumb (animals) go uncompensated, as are those during the digging of a well or in mining (for metals). In the treasure-trove there is a fifth (as revenue)". The majority interpreted this tradition to imply that the animals neither have rider nor one who is driving them, nor one leading them, as they held that if the animals had a rider, driver, or a leader, he was liable, by way of *khaṭa*ʾ.

The majority disagreed about an animal when it injured someone with its hind-legs. Mālik said that there is no liability in this case, unless the owner of the animal does something that provokes it to strike with its hind-legs. Al-Shāfiʿī said the rider compensates what is hit by its fore-legs or by its hind-legs. This was also the opinion of Ibn Shubrama and Ibn Abī Laylā, who deemed equivalent what was damaged by legs or otherwise. This was Abū Ḥanīfa's opinion too, but he made an exception in the case of striking with hind legs or injuring with its tail. Perhaps, those who did not impose liability for injuries through legs, argued on the basis of what is related from the Prophet—"Injuries caused with legs go uncompensated"—but this tradition was not proved sound for al-Shāfiʿī and he rejected it.

Under the opinions of the jurists about the person digging a well (or pit) and a passer by falling in it, Mālik said that if he dug the pit in a spot where wells are usually dug, there is no liability, but if he transgresses in such digging, he is to compensate. Al-Layth said that if he digs it in land owned by him, he does not compensate, but if he digs in property not owned by him, he compensates. Compensation, according to him, is by way of *khaṭa*ʾ in such a case. They also disagreed about an animal brought to a halt in a particular place. Some of them said that if he brings it to a halt in a spot where he was bound to do so, but still causes damage, there is no compensation, but if it was otherwise he is to compensate, which was al-Shāfiʿī's opinion. Abū Ḥanīfa said that he compensates in any case and is not absolved if he ties it up in a place where he is permitted to tie it, just as he is not absolved from liability while he is riding it, in case it strikes something, even when such riding is permitted.

They disagreed about two riders colliding with each other, when both die from the collision. Mālik, Abū Ḥanīfa and a group of jurists said that on each is the liability for the *diya* of the other, which is paid by the *ʿāqila*. Al-Shāfiʿī and ʿUthmān al-Battī said that on each is half of the *diya* of the other, as each died due to his own act as much as he did from the other's. They agreed that the physician (surgeon) who makes an error is liable for *diya*, like injuring the penis in circumcision, or what resembles it, as he falls under the definition of an offender at fault. There is a narration from Mālik, however, that there is no liability for him, when he belongs to the medical profession. There is no disagreement that he is liable when he does not belong to the profession as in that case he is a tortfeasor. In this there is, along with *sijma* (consensus), the tradition of ʿAmr ibn Shuʿayb from his father from his grandfather that the Messenger of Allāh (God's peace and blessings be upon him) said, "One who indulges in medicine, when he has not been known to practise medicine prior to that, is to be held liable". The *diya* in the case of *khaṭaʾ* by a physician is to be paid by the *ʿāqila*, but there are jurists who assign this to his wealth. There is no dispute that if he is not a physician (and practises medicine), the *diya* is paid from his wealth, on the apparent meaning of ʿAmr ibn Shuʿayb's tradition.

There is no disagreement among them that the *kaffāra* (expiation) ordained by Allāh in the killing of a free man in the case of *khaṭaʾ* is obligatory. They disagreed about murder (*ʿamd*), whether it entails *kaffāra* and also the case of a slave through *khaṭaʾ*. Mālik made it obligatory in the case of killing of a free man through *khaṭaʾ*, to the exclusion of *ʿamd*, while al-Shāfiʿī considered it obligatory in *ʿamd* deeming it prior and evident. According to Mālik the *ḥukm* of the slave in this is the *ḥukm* of *khaṭaʾ* (for a free man).

They disagreed about the enhancement (*taghlīẓ*) of *diya* in the prohibited month and in the protected (sacred) city. Mālik, Abū Ḥanīfa and Ibn Abī Laylā said that there is no enhancement of *diya* in this case, while al-Shāfiʿī did enhance it in the case of death and bodily injuries. It is related from Ibn al-Qāsim, Muḥammad and Ibn Shihāb that it is to be increased by a third of its amount in such cases. This is related from ʿUmar. Similarly, for al-Shāfiʿī in the case of one killing a close relative.

The reliance of Mālik and Abū Ḥanīfa is on the general meaning emerging from the limitations of time set on *diyāt*. Thus, anyone claiming a restriction of this meaning has to come up with the evidence (*dalīl*), along with the fact that there is consensus on the point that there is to be no enhancement of *kaffāra* for anyone killed in the Ḥaram. The argument of al-Shāfiʿī is on the fact that this has been related from ʿUmar, ʿUthmān and Ibn ʿAbbās. If something is related from the Companions that opposes analogy, it is necessary to interpret it as a *ḥukm* based on an evidence in a revelationary source. The aspect from which this opposes analogy is that enhancement in a case that has occurred through mistake (*khaṭaʾ*) diverges widely from the principles of the law. The other party may say that analogy in this case is based on what has been established in the law about the reverence of the Ḥaram and the solitary case of imposition of liability for hunting within it.

56.4. THE BOOK OF *DIYĀT FĪ MĀ DUN AL-NAFS* (INJURIES NOT LEADING TO LOSS OF LIFE)

The injuries in which *diya* becomes payable are head and facial injuries (*shijāj*) and loss of limbs. We begin with the discussion of *shijāj*. The study of this topic, however, relates to the subject-matter of the obligation (for payment), its conditions, the amount payable, from who it is due, when it is due and to whom.

The subject-matter of the obligation are *shijāj* and the severance of limbs. *Shijāj* are ten, in the literal sense as well as in *fiqh*. The first one is called *dāmiya*, which bruises the skin causing it to bleed. Second is the *ḥārisa*, which ruptures the skin. This is followed by *bāḍiᶜa*, which exposes the flesh, that is, cuts it up. Fourth, the *mutalāḥima*, which severs a small part of the flesh. Fifth is the *simḥāq*, which reaches the thin (fibrous) membrane between the flesh and the bones (periosteum); it is also called *malṭāʾ*. Then comes the *mūḍiḥa* that uncovers the bones, that is, exposes them. It is followed by the *hāshima*, which crushes the bones. The eighth is the *munaqqila*, which causes the bones to splinter. Then comes the *māʾmūma*, which reaches the cerebral membrane. Finally, there is the *jāʾifa*, which descends into the internal cavities. The names of these *shijāj* are exclusively applied to the injuries that occur in the area of the head and the face and not the rest of the body; the name of the injuries afflicting the body is *jirāḥ* (pl. of *jurḥ*) and these pertain specifically to the body. These, then, are the names of such injuries (to the face and the head).

About their *aḥkām*, I mean, the liability arising from them, the jurists agreed that *diya* is to be paid for an intentional *mūḍiḥa* and for what is less than *mūḍiḥa*, as well as for *mūḍiḥa* arising from *khaṭaʾ*. They agreed that in the case of *khaṭaʾ*, for what is less than the *mūdia*, there is no *diya*, but there is *ḥukūma* (estimated damages). Some of them said that this is the amount of the wages of the physician; however, it is reported from ᶜUmar and ᶜUthmān that they awarded one-half *diya* for *simḥāq*. It is reported from ᶜAli that he awarded four camels in it. It is related from Zayd ibn Thābit that he said, "In the *ḍāmiya* is a camel, in the *bāḍiya* there are two, in the *mutalāḥima* there are three camels and in the *simḥāq* four". The majority of the jurists maintain, what we have already mentioned, that the principle in injuries is *ḥukūma*, except those in which the *sunna* has prescribed a limit. Mālik stipulates in the imposition of *ḥukūma* that the injuries, less than the *mūḍiḥa*, should heal beyond any disfigurement, while the other jurists impose *ḥukūma* in them irrespective of healing beyond disfigurement. These are the *aḥkām* for what is less than the *mūḍiḥa*.

All the jurists agree about *mūḍiḥa* that when it occurs by way of *khaṭaʾ* there are five camels in it. This has been established from the Prophet (God's peace and blessings be upon him) in his letter to ʿAmr ibn Ḥazm and also from the tradition of ʿAmr ibn Shuʿayb from his father from his grandfather that the Prophet (God's peace and blessings be upon him) said, "In the *mūḍiḥa* there are five", that is, camels.

The jurists disagreed about the location of the *mūḍiḥa* in the body, after their agreement over what we have mentioned, I mean, the liability in the case of *qiṣāṣ in ʿamd* and the liability of *diya* for *khaṭaʾ*. Mālik said that the *mūḍiḥa* is not inflicted, except in the area of the head, the forehead, cheeks and the upper jaw; it is not inflicted in the area of the lower beard (chin, lower jaw), as that takes the *ḥukm* of the neck, nor is it inflicted on the nose. For al-Shāfiʿī and Abū Ḥanīfa, the *mūḍiḥa* can be inflicted in the entire area of the head and the face. The majority, however, agree that it is not inflicted on the (remaining parts of the) body. Al-Layth and a group of jurists said that it is inflicted on the sides, while al-Awzāʿī said that if it is inflicted on the body, it carries one-half of the *diya* for the head and face. It is related from ʿUmar that he said, "If the *mūḍiḥa* is inflicted on the body, it will carry five per cent of the *diya* of the limb (upon which it is inflicted)".

Some of the jurists enhanced the *diya* for the *mūḍiḥa* when it caused disfigurement. Some upheld the award of an additional amount equal to half its *diya*. This is related by Mālik from Sulaymān ibn Yasār. Mālik's opinion wavered in this, for he upheld Sulaymān ibn Yasār's opinion once and said another time that the *diya* is not to be enhanced, which was the majority's opinion. It is also related from Mālik that he said, "If the face is disfigured there is *ḥukūma* in it without restrictions of precedent". The meaning of *ḥukūma*, according to Mālik, is the amount by which the person's value would go down had he been a slave.

The majority fix the *diya* for the *hāshima* at ten per cent. This is related from Zayd ibn Thābit and no one from among the Companions opposed him. Some of the jurists deviated from this saying that the *hāshima* is (like) the *munaqqila*. There is no disagreement that there is ten per cent *diya* in it and five per cent when it is inflicted by way of *khaṭaʾ*. When it is inflicted by way of *ʿamd*, the majority of the jurists maintain that there is no retaliation in it due to apprehension (of transgression). It is related from Ibn al-Zubayr that he used to grant the verdict for retaliation in this and also in the *māʾmūma*. About the *hāshima* by way of *ʿamd*, Ibn al-Qāsim related from Mālik that there is no retaliation in it. Those who permitted retaliation in the *munaqqila* should have first permitted it in the *hāshima*. There is no disagreement about the *māʾmūma*, that there is no retaliation in it and there is one-third *diya* in it, except what has been related from Ibn Zubayr.

They agreed about the *jāʾifa* that it is an injury inflicted on the body, not on the head and there is one-third *diya* for it. It amounts to *jāʾifa* when inflicted on the back and the stomach. They disagreed when it is inflicted on another part of the body, but extends to one of the internal cavities. Mālik has related from Saʿīd ibn al-Musayyib that each injury extending to a hollow part of the body, whatever part that is, carries one-third *diya* of that part. Ibn Shihāb has related that he did not go by this opinion, though it was this that Mālik had preferred, but construction of analogy here is not justified as its basis (*sanad*) is *ijtihād* without precedent. Saʿīd ibn al-Musayyib deduced it through analogy from the *jāʾifa* in the same manner as that related from ʿUmar about the *mūḍiḥa* inflicted on the body.

For the injuries inflicted upon the rest of the body, in the case of *khaṭaʾ*, there is nothing but *ḥukūma*.

56.4.1. The Discussion of *Diyāt* for the Limbs

The principle about the limbs in the body is that if they are severed by way of *khaṭaʾ*, there is fixed compensation for them, which is called *diya*. Similarly, in the case of loss of life and injuries, as in the tradition of ʿAmr ibn Ḥazm from his father about the letter that the Messenger of Allāh wrote to him regarding *diyat*, wherein he said, "For the loss of life there are a hundred camels, for the nose, when severed completely, a hundred camels, for the *māʾmūma* one-third *diya*, for the *jāʾifa* similar to it, for the eye fifty, for the forearm fifty, for the leg fifty, for each finger, as many as there may be (on a hand), ten camels and for the teeth and the *mūḍiḥa* five". All this is agreed upon, except the teeth and the thumb; they disagreed about them, as we shall be discussing.

Among the things that they agreed upon—which are not mentioned here (in the tradition)—by way of analogy upon those that are mentioned, we say: The jurists agreed that for the lips there is full *diya*, while the majority maintained that for each one of them separately is one-half *diya*. It is related from some of the Tābiʿūn that for the lower lip is two-thirds *diya* as it prevents food and drink from dripping out and, as a whole, its function and utility are greater than that of the upper lip. This is the opinion of Zayd ibn Thābit. The majority of the jurists and the leading *muftīs* are in agreement that for each part of the human being existing as a pair is full *diya*, except for the eyebrows and a man's breasts.

They differed about the ears as to when they carry full *diya*. Abū Ḥanīfa, al-Thawrī and al-Layth said that if they are cut from the base there is full *diya* in them, but they did not stipulate loss of hearing, on the other hand, they determined independently full *diya* for loss of hearing. The well-known opinion from Mālik is that he did not determine *diya* for the ears, unless it was accompanied by loss of hearing, if that was not lost they were to be compensated through *ḥukūma*. It is related from Abū Bakr that he rendered judgment for fifteen camels for the ears saying that it does not cause loss of hearing and they (the area) can be covered by the hair or a turban. It is related from ʿUmar, ʿAlī and Zayd that they rendered judgments for ears severed from the base as one-half *diya*. As for the majority of the jurists, there is no disagreement among them that there is full *diya* for loss of hearing. There is *ḥukūma* for the eyebrows, according to Mālik and al-Shāfiʿī, while Abū Ḥanīfa said that there is full *diya*; similarly, for the eyelashes, but there is nothing but *ḥukūma* in this, according to Mālik.

The reliance of the Ḥanafites is on what has been related from Ibn Masʿūd that he said, "For each pair that a man has is full *diya*". They held them (the ears) similar to the other double organs over which they were in complete agreement. Mālik's reliance is on the argument that analogy has no role to play in this issue and the method requires transmitted precedent; if nothing is established through transmission to the effect that there is *diya* in it, it acquires *ḥukūma* as its basis. Further, the eyebrows are not limbs that have utility or function, that is, necessary for creativity.

About the eyelids it is said that for each one of the them there is one-fourth *diya*, which was also the opinion of al-Shāfiʿī and the Kūfī, for there is no survival for the eye without the eyelids. According to others beside them, there is one-third *diya* for the lower eyelids, while there is two-thirds for the upper.

They agreed that one who becomes entitled to more than a full *diya* because of the loss of his limbs has a right to it, for example, one who loses his two eyes and his nose is entitled to two full *diyas*. With respect to the testicles also, they agreed that there is full *diya* for them and all of them said that for one of them there is one-half *diya*, except what is related from Saʿīd ibn al-Musayyib, who said that for the left one there is two-thirds *diya* as the child is conceived because of it and for the right one there is one-third. These, then, are the issues related to pairs of limbs.

In the case of the single organs, the majority of the jurists agreed that for the tongue, lost by way of *khaṭaʾ*, there is full *diya*; and this is related from the Prophet (God's peace and blessings be upon him). This is the case when the whole of it is cut or, at least, a part that prevents speech. If the part cut does not prevent speech, there is *ḥukūma* in it. They disagreed about retaliation in it, when cut by way of *ʿamd*. Among them were those who did not uphold retaliation in it and made *diya* obligatory; these were Mālik, al-Shāfiʿī and the Kūfī, but al-Shāfiʿī awarded *diya* from the wealth of the offender, while the Kūfī and Mālik imposed it on the *ʿāqila*. Al-Layth and others beside him said that for the tongue, cut intentionally, there is retaliation.

They agreed about the nose that if it is cut from the base there is full *diya* in it as is laid down in the tradition. It is the same for Mālik irrespective of the sense of smell having been lost. If one of these (the nose or the sense of smell) is lost, according to him, there is *diya* in it, but if one is lost after the other the *diya* becomes full. They agreed that in the case of a physically sound penis, capable of sexual intercourse (not impotent), there is full *diya*. They disagreed about the penis of the impotent or of one castrated, just as they differed about the tongue of the dumb and the forearm of one paralysed. There were among them those who determined a (full) *diya* for these (organs) and there were those who ruled for *ḥukūma*. Some of them said that for the penis of the impotent and the castrated is one-third *diya*, but the opinion adopted by the majority favours *ḥukūma*. The minimum part of it that entails *diya*, according to Mālik, is the glans penis (*ḥashafa*), in which case there is *ḥukūma* for the remaining penis.

About the eye of a one-eyed person, the jurists have two opinions. First, there is full *diya* in it, which was upheld by Mālik and a group of the jurists of Medīna; it was also the opinion of al-Layth, the verdict of ᶜUmar ibn ᶜAbd al-ᶜAzīz and the view of Ibn ᶜUmar. Al-Shāfiᶜī, Abū Ḥanīfa and al-Thawrī said that it carries one-half *diya* as in the case of one with two sound eyes. This is related from a group of *Tābiᶜūn*. The reliance of the first group is on the argument that one sound eye for a one-eyed person is like two sound eyes for one who has them. The reliance of the second party is on the tradition of ᶜAmr ibn Ḥazm, I mean, the general meaning in the words, "For an eye one-half *diya*". They also relied on analogy from the point of their consensus that one who cuts the forearm of a person with one arm is liable for only one-half *diya*. The reason for their disagreement in this is the conflict of the general meaning of the text with analogy and also the clash of an analogy with another analogy.

One of the best opinions in the case where a person loses his sight partially, because of a blow to the eye, is what has been related from ᶜAlī (God be pleased with him). He ordered the person, whose eye had been damaged, to bandage his sound eye and then gave a shield to another person, who moved away from him while the (hurt) person kept on looking at it till such time that he could not see it. He drew a line on the ground at the spot when he first stopped seeing it. He then ordered the person to bandage his hurt eye, the sound one being uncovered now and gave a shield to the person, who passed by his eye (into the distance). He drew a line again where he first stopped seeing it and worked out the difference between the first distance and the end of the second. He awarded him *diya* in the same ratio. In order to verify the truth of his statement about the extent of his vision for the bad and the sound eye, the process is to be repeated a number of times at different locations. If the distances come out to be similar, we will know that he is telling the truth.

The jurists differed about the offence against the eye which is without vision but retains its physical appearance. Mālik, al-Shāfiᶜī and Abū Ḥanīfa said that there is *ḥukūma* in it, while Zayd ibn Thābit said that in this case there is ten per cent *diya*: a hundred *dīnārs*. Al-Shāfiᶜī interpreted this saying that this was valuation on the part of Zayd and not fixation of a limit. It is related from ᶜUmar ibn al-Khaṭṭāb and ᶜAbd Allāh ibn ᶜAbbās that they issued the verdict, in each case of a blind eye retaining its appearance, an arm paralysed and a tooth dislocated (blackened), one-third *diya*. Mālik said that the *diya* becomes payable with dislocation and the extraction of a dislocated tooth leads to full *diya*.

They disagreed about the one-eyed person who damages another person's sound eye. The majority held that if he likes he can demand retaliation, but if he forgoes it there is *diya* for him. One group said it is to be full (*diya*), while another said it is one-half, which was the opinion of al-Shāfiᶜī and Ibn al-Qāsim, while Mālik has both views. Al-Mughīra, from among his disciples and Ibn Dīnār upheld full *diya*. The Kūfīs said that the person whose eye has been lost has the right to retaliate only, unless they settle for some amount. The reliance of those who upheld full *diya*, in case he forgoes retaliation, is on the argument that he becomes liable for what he has allowed him to retain, that is, his sole eye, which carries full *diya* according to the majority of the jurists. The opinion of ᶜUmar, ᶜUthmān and Ibn ᶜUmar about a solitary eye, when it is lost, is that the liability is one thousand *dīnārs*, as it is for this person equivalent to two eyes collectively, except that when the victim forgives him (the one-eyed person) the liability is for the *diya* of one eye. Their argument is that in such a case the rule reverts to its original basis, that is, for one eye there is one-half *diya*. Abū Ḥanīfa's argument is that there is no fixed *diya* in cases of ᶜ*amd*. This issue has been discussed in the topic of retaliation for wounds.

The majority of the jurists and the leaders of the *muftīs*—Mālik, Abū Ḥanīfa, al-Shāfiᶜī, al-Thawrī and others—said that for each finger there are ten camels and the fingers for this purpose are equal and for each phalange (*unmula*) is one-third of the tenth, except for fingers that have only two phalanges like the thumb, in which case there are five camels for each phalange. Their reliance in this is on what is laid down in the tradition of ᶜAmr ibn Ḥazm that the Messenger of Allāh (God's peace and blessings be upon him) said, "For each finger, as many as there may be (in the hand), are ten camels". ᶜAmr ibn Shuᶜayb has recorded from his father from his grandfather "that the Messenger of Allāh (God's peace and blessings be upon him) issued the verdict of one-tenth of ten camels for fingers", which is the opinion of ᶜAlī Ibn Masᶜūd and Ibn ᶜAbbās.

According to them (the jurists), for those who deal in silver, it will come to what each views to be the *diya* in silver. Thus, it is ten per cent in the opinion of those who consider it to be twelve thousand *dirhams*. It is also ten per cent in the opinion of those who consider it to be ten thousand *dirhams*.

A difference of opinion has been related from the earlier jurists about the compensation for fingers. It is related from ʿUmar ibn al-Khaṭṭāb that he held the compensation in the case of the thumb and the index finger to be one-half *diya*, for the middle finger ten prescribed camels, for the next finger nine and for the little finger six. It is related from Mujāhid that he determined fifteen camels for the thumb, for the index finger ten, for the middle finger ten, for the next finger eight and for the little finger seven.

For the collar bone and ribs, according to the majority of the jurists, there is *ḥukūma*, while it is related from some of the earlier jurists that there is fixed compensation. It is related from Mālik that ʿUmar ibn al-Khaṭṭāb awarded a load-bearing camel for a molar tooth, a rib, or the collar bone. Saʿīd ibn Jubayr said that there are two camels for the collar bone, while Qatāda said that there are four. The argument of the majority of the jurists of the regions is that if nothing fixed is established directly from the Prophet (God's peace and blessings be upon him), there is *ḥukūma* in it.

The majority of the jurists of the regions maintain that for each tooth from among the teeth in the mouth, there are five camels, which was Ibn ʿAbbās's opinion. Mālik has related from ʿUmar that he awarded a load-bearing camel in the case of molars, when the front teeth were missing. There is no disagreement about the front teeth that they are compensated with five camels. Saʿīd ibn al-Musayyib said that for the molars there are two camels for each. It is related from ʿAbd al-Malik ibn Marwān that Marwān ibn al-Ḥakam objected to the opinion of Ibn ʿAbbās saying, "Do you consider the molars similar to the front teeth?" Ibn ʿAbbās said that if they are to be compared with the fingers, their *diya* is the same. The reliance of the majority in such cases is what has been established from the Prophet (God's peace and blessings be upon him) that he said, "For the teeth there are five (camels)" and this is from the tradition of ʿAmr ibn Shuʿayb from his father from his grandfather. The term "tooth" applies equally to all teeth, those in the front of the mouth and those at the back. Further, the teeth are compared to the fingers that have the same *diya* though their utility varies. The argument of those who differentiated between them is that such excess in terms of *diyāt* can be witnessed in the law due to the greater utility of some of the limbs. It appears, however, that those, in the earlier period, who inclined toward this opinion did so on the basis of established precedent.

All these limbs for which *diya* is established in the case of *khaṭaʾ*, there is retaliation in them too, amputation for cutting and extraction for dislocation (in the case of *ʿamd*). They disagreed in the case of fractures, like that of the calf (bone) or the forearm, whether there is retaliation for them or not. Mālik and all his disciples maintained that there is retaliation for all fractures, except for the thigh bone and the spine. Al-Shāfiʿī and al-Layth said that there is no retaliation in bones that are fractured. This was also the opinion of Abū Ḥanīfa, except that he made an exemption in the case of teeth, which is reported from ʿUmar. Abū ʿUmar ibn ʿAbd al-Barr said that retaliation for broken teeth is established from the Prophet (God's peace and blessings be upon him) from the tradition of Anas. He said that it is related in another tradition from the Prophet where he did not permit retaliation in bones cut off; however, it does not have sufficient strength. It is related from Mālik that Abū Bakr ibn Muḥammad ibn ʿAmr ibn Ḥazm exacted *qiṣāṣ* for a broken thigh bone.

They agreed that the *diya* for a woman is one-half that for a man, in the case of loss of life. They disagreed in the case of *diyāt* for *shijāj* and limbs. The majority of the jurists of Medina said that a woman is equal to a man in the case of compensation for *shijāj* and limbs, when the amount is up to one-third *diya*, but when it exceeds this, her *diya* reverts to the rule of one-half that of a man, I mean, the *diya* for his various limbs. An example of this is that for each of her fingers is a *diya* of ten camels, for two it is twenty camels, for three thirty, but for four it is twenty. This was the opinion of Mālik and his disciples and also of al-Layth ibn Saʿd and ʿUmar ibn ʿAbd al-ʿAzīz. Another group said that the *diya* of a wound for a woman is like the *diya* of the wound of a man up to the *mūḍiḥa*, after which it is half of the *diya* for a man's wounds. This is the well-known opinion of Ibn Masʿūd; it is also related from ʿUthmān and was the opinion of Shurayḥ and a group of jurists. One group said that the *diya* for a woman's wounds and injuries is half that for a man in major and minor cases. This is the opinion of ʿAlī (God be pleased with him) and is also related from Ibn Masʿūd; however, his well-known opinion we have mentioned first. This was adopted by Abū Ḥanīfa, al-Shāfiʿī and al-Thawrī.

The reliance of the upholders of this (the last) opinion is on the principle that the *diya* of a woman be half that of a man. The adoption of this principle is, therefore, obligatory till futher evidence is furnished from the established transmission, as *qiyās* is not permitted in the case of *diyāt* (all crimes), especially in view of the fact that a distinction on the basis of more and less violates *qiyās* itself. It is for this reason that Rabīʿa said something to Saʿīd, which will be coming up in what follows. The second group, on the other hand, has nothing to rely upon except *mursal* traditions. It is related from Saʿīd ibn al-Musayyib, when Rabīʿa ibn Abī ʿAbd al-Raḥmān asked him as to what is the compensation for four fingers of a female, he said, "Twenty". "I (Rabīʿa) would say that when her wound inflamed and her affliction intensified, it decreased the compensation". He said, "Are you an ʿIrāqī?" I said, "On the contrary, I am an enquiring scholar, or an ignorant learner". He retorted, "It is a *sunna*". It is also related from the Prophet (God's peace and blessings be upon him) from the *mursal* of ᶜAmr ibn Shuᶜayb from his father and also from ᶜIkrima. One group of jurists was of the opinion that when the opinion of a Companion opposes analogy it is necessary to act according to it, as it is known that he would not depart from analogy unless it is due to an established source, but there is weakness in this for it is possible that he may relinquish analogy as he does not uphold it or because there is another analogy for it that opposes the first, or he may be following the opinion of another person on that issue.

This, then, is the situation about the *diyāt* for injuries inflicted upon free persons and of the offences against their limbs, whether they are male or female.

The jurists differed into two opinions about the injuries inflicted upon slaves and the maiming of their limbs. Among them were those who maintained that for their injuries and maiming the compensation is the decrease in their value. Among them were also those who said that the liability in this case is the decrease in the amount of his *diya*. Thus, in the case of a *mūḍiḥa*, it will be five per cent of his value and for his eye would be half his value. This was the opinion of Abū Ḥanīfa and al-Shāfiᶜī and is the opinion of ᶜUmar and ᶜAli. Mālik said that the consideration here is for whatever is the decrease in his price, except in the cases of the *mūḍiḥa*, the *munaqqila* and *maʾmūma*, for in these is compensation that is paid as the *diya* of a free man. The argument of the first group is based on the similarity of the slave to goods, while the argument of the second group is based on the comparison with free men, for they are Muslims and subject to the imposition of religious obligations (*taklīf*).

There is no disagreement among them that the *diya* of *khaṭaʾ*, in this case, if it exceeds a third, is to be paid by the *ᶜāqila*. They disagreed about what was less than this. Mālik and the seven jurists of Medina said that the *ᶜāqila* does not bear anything, in this case, a third or more. Abū Ḥanīfa said that it bears ten per cent or more of the full *diya*. Al-Thawrī and Ibn Shubrama said that the liability for the *mūḍiḥa* and beyond that is on the *ᶜāqila*, while al-Shāfiᶜī said that the *ᶜāqila* bears the *diya* of *khaṭaʾ*, in all cases, whether more or less. The argument of al-Shāfiᶜī is that the principle requires the *ᶜāqila* to bear the *diya* for *khaṭaʾ* and whoever restricts this bears the burden of proof. The first group has nothing to rely upon, except the argument that it is practised and well known.

Here this book comes to an end. Praise be to Allāh as is His due.

56.5 THE BOOK OF *QASĀMA*[225] (MULTIPLE OATHS)

The jurists disagreed about *qasāma* on four issues that work like principles for the cases in this topic. The first issue is whether the *ḥukm* of *qasāma* is obligatory. Second, if we concede that it is obligatory, do *qiṣāṣ*, *diya*, or the elimination of criminal proceedings become obligatory through it? Third, do the complainants commence oath-taking or is it done by the defendant, and what is the number of the *awliyā*ʾ (victim's heirs) who take oath? Fourth, what is it that constitutes *lawth* (suspicion), by virtue of which the complainants commence with oath proceedings?

56.5.1. Issue 1: The obligation of its *ḥukm*

About the obligation of its *ḥukm*, generally, the majority of the jurists of the regions—Mālik, al-Shāfiʿīh, Abū Ḥanīfa, Aḥmad, Abū Sufyān, Dāwūd, and their disciples—upheld it. A group of jurists—Sālim ibn ʿAbd Allāh, Abū Qalāba, ʿUmar ibn ʿAbd al-ʿAzīz, and Ibn ʿUlayya—said that it is not permitted to adjudicate through it. The reliance of the majority is on what has been established from the Prophet (God's peace and blessings be upon him) through the tradition of Ḥuwayyiṣa and Muḥayyiṣa, which is a tradition agreed upon for its soundness among the traditionists, except that they disagreed about its words, as will be discussed in what follows.

The reliance of the group denying the obligation of its *ḥukm* is on the argument that *qasāma* is opposed to the principles of law that are agreed upon for their soundness. Among them is the principle of law that no one is to take an oath, unless he knows about the facts with certainty or he has physically witnessed them. If that is the case, then, how can the victim's heirs swear, when they have not witnessed the homicide; in fact, they may be in one town and the homicide may have occurred in another town. It is for this reason that al-Bukhārī has related from Abū Qalāba "that one day ʿUmar ibn ʿAbd al-ʿAzīz sat on his chair outside his residence and summoned the people. When they had come he said, 'What is your opinion about *qasāma*?' The people cautiously said, 'It is said that retaliation on the basis of *qasāma* is lawful and the Caliphs have ordered retaliation because of it'. He said, 'What do you say O Abū Qalāba, while I am facing the people'. I said, 'O *Amīr al-Muʾminīn*, you have with you the Arab nobility and the leaders of the forces, what do you say if fifty of them render testimony in front of you that a man has committed unlawful intercourse in Damascus, but they did not actually see it, would you subject him to *rajm*?' He said, 'No!' I said, 'If fifty of them render testimony in front of you that a man committed theft in Ḥumṣ, but they did not see it, would you amputate his hand?" He said, "No!" "In some narrations it says, "What is their position if they render testimony that a certain person killed another, while they were here with you, would you order retaliation by their testimony?" He said that ʿUmar ibn ʿAbd al-ʿAzīz, after this, had a decree recorded that if they could produce two *ʿadl* witnesses that such and such a person killed him, retaliation may be ordered, but the person is not to be subjected to *qiṣāṣ* on the testimony of fifty persons who merely swear to it.

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[225] *Qasāma* has been called 'a kind of compurgation' by some. The distinction is that compurgation works to clear the name of the accused or to prove his innocence, while *qasāma* is a procedure through which the guilt of the accused is established.

They also maintain that one of the principles requires that "the (burden of proof) evidence is upon the plaintiff and the oath is upon the person who denies (the charge or claim) (defendant)". They also advance the argument that they do not find the Messenger of Allāh (God's peace and blessings be upon him) approving the *ḥukm* of *qasāma* in these traditions. It was a *ḥukm* of the days of *jāhiliyya* and the Messenger of Allāh gently pointed out to them how its *ḥukm* could not be binding according to the principles of Islam. It was for this reason that he said to them, that is the heirs of the victim, who were from among the Anṣār, "Will you undertake fifty oaths?" They said, "How can we swear when we did not witness it?" He said, "Then will the Jews swear for you?" They said, "How can we accept the oaths of a people who do not believe?" These jurists said that had the undertaking of oaths, without witnessing, been a *sunna* the Messenger of Allāh (God's peace and blessings be upon him) would have said to them that it is a *sunna*. They maintained that as these traditions are not explicit with respect to adjudication on the basis of *qasāma*, and as the texts are open to interpretation, it is better to refer them (the traditions) to the general principles.

Those who upheld it, particularly Mālik, maintained that the *sunna* of *qasāma* is a *sunna* independent in itself, restricting the general principles like all other restricting *sunan*. He thought that the underlying cause for it was the prevention of bloodshed, as homicide is rampant and there is very little evidence available due to the murderer having taken care to commit it in a secluded spot. The *sunna*, therefore, instituted this practise for the security of life. This *ʿilla* is rejected, however, as it can apply to highway robbers and thieves, as evidence is difficult to procure against thieves, so also the highway robber. It is for this reason that Mālik makes admissible the evidence of those plundered against the plunderers, despite its opposition to the general principles, because those plundered are complainants due to their being plundered—Allāh knows best.

56.5.2. Issue 2: The liability arising from it

The jurists who upheld *qasāma* disagreed about the liability arising from it. Mālik and Aḥmad said that it leads to the entitlement of *qiṣāṣ* in the case of *amd* and *diya* in *khaṭaʿ*. Al-Shafiʿī, al-Thawrī and a group of jurists said that it gives rise to the liability for *diya* only. Some of the Kūfīs said that there is no right flowing from it, except that it acts as a defence in a complaint, as the principle entitles only the defendant to take the oath. Some of them (the Kūfīs) said that the defendant takes the oath and pays up the *diya*, according to which it merely acts as a defence against retaliation. There are, thus, with respect to entitlement, four opinions.

Mālik's reliance and the reliance of those who adopted his opinion is on what has been related of the tradition of Ibn Abī Laylā from Sahl ibn Abī Ḥathma, which says, "The Messenger of Allāh (God's peace and blessings be upon him) said to them, 'You take the oath and become entitled to the blood of your comrade'". Similarly, what Mālik has related from the *mursal* of Bushayr ibn Yasār, which says, "The Messenger of Allāh (God's peace and blessings be upon him) said to them, 'Would you swear fifty oaths and be entitled to the blood of your comrade or your killer'".

The reliance of those who imposed only *diya* through it is upon the argument that oaths are effective in determining entitlement to wealth, that is, in the law, like the *ḥukm* of restitution of property through an oath and a witness and also like the obligation arising from the refusal of the defendant to take the oath or by his refusal and the transference of the oath to the plaintiff, according to those who uphold the transference of oath in case of refusal. In addition (they said), the tradition of Mālik from Ibn Abī Laylā is defective, for he is an unknown person, no one else having related from him beside Mālik. It is also said about him that he did not transmit (directly) from Sahl. The tradition of Bushayr ibn Yasār varies in its chains of transmission, Mālik transmitted it as *mursal*, while others had complete chains. The Qāḍī (Ibn Rushd) said: It appears that this was the underlying reason why al-Bukhārī did not record these two traditions. Analogy also supported them in this, because of what has been reported from ʿUmar (God be pleased with him) that he said, "There is no retaliation through *qasāma*, but it leads to the entitlement for *diya*".

Those who said that the only right arising from it is that of defence in a complaint argue that oaths are sworn by the defendant alone. In addition, there are traditions that we shall be quoting in what follows.

56.5.3. Issue 3: The prior right to the oath

The upholders of *qasāma*, that is, those who said that it gives rise to the entitlement of *qiṣāṣ* or *diya*, disagreed as to who is to commence the swearing of fifty oaths, as is laid down in the traditions. Al-Shāfiʿī, Aḥmad, Dāwūd ibn ʿĀli and others said that the complainants begin taking the oaths, while the jurists of Kūfa, Baṣra and a number of the jurists of Medīna said that, on the contrary, it is the defendants who begin with the oath first. The reliance of those who commence the proceedings with the plaintiffs is on Mālik's tradition from Ibn Abī Laylā from Sahl ibn Abī Ḥathma and also on his *mursal* tradition from Bushayr ibn Yasār. The reliance of those who begin with the defendants, is on the tradition recorded by al-Bukhārī from Saᶜīd ibn ᶜUbayd al-Ṭāʾī from Bashīr ibn Yasār from a man from the Anṣār, called Sahl ibn Abī Ḥathma, which says, "The Messenger of Allāh (God's peace and blessings be upon him) said, 'Will you come up with evidence as to who killed him?' They said, 'We do not have any evidence'. He said, 'Will they undertake an oath for you?' They said, 'We cannot agree to an oath by the Jews'. The Prophet disliked that his killing should go unpunished and gave for him a hundred camels from the *ṣadaqa*". The Qāḍī (Ibn Rushd) said: This is explicit in its meaning that fifty oaths are only effective in the rebuttal of the allegation.

They also argued on the basis of what is recorded by Abū Dāwūd from Abū Salama ibn Abī ᶜAbd al-Rahmān and Sulaymān ibn Yasār on the authority of a number of men from amongst the Anṣār "that the Messenger of Allāh (God's peace and blessings be upon him) called upon the Jews and commenced with them, saying, 'Will fifty of you swear fifty oaths'. When they declined, he said to the Anṣār, 'Take the oath'. They said, 'Do we swear about the unseen, O Messenger of Allāh?' The Messenger of Allāh (God's peace and blessings be upon him) then fixed *diya* as the liability for the Jews", as he (the victim) was found among them. This tradition is relied upon by those who declared that the oath was a duty for the defendant and yet despite that they impose *diya* on him. It is a tradition with sound chains of transmission and has been related by reliable reporters from al-Zuhrī from Abū Salama. The Kūfīs relate it from ᶜUmar, that is, he issued the verdict of oaths and *diya* for the defendants. Similar traditions, about the commencement of oaths with the Jews, have also been related from Rāfiᶜ ibn Khadīj.

These jurists argued against Mālik on the basis of what has been related from Ibn Shihāb al-Zuhrī from Sulaymān ibn Yasār and ᶜArāk ibn Mālik that ᶜUmar ibn al-Khaṭṭab said to al-Juhanī (a member of the tribe of Juhayna), who claimed the blood of his *walī* (ward) from a man from Banī Saᶜd. He was leading his horse when it trampled upon the feet of another member of the tribe. (The wound) thus, spread and killed him. ᶜUmar called upon the defendants, saying, "Do you swear an oath by Allāh that he did not die from it?" They refused to take the oath and made excuses. He then said to the complainants, "Take the oath". When they refused, he awarded them part of the *diya*. They said that these traditions of ours are preferable to those related about the commencement of oaths with the complainants, as the principle supports the tradition that the oath is upon the defendant. Abū ᶜUmar said that there are many conflicting yet widely circulating traditions on this issue.

56.5.4. Issue 4: The cause invoking *qasāma*

The majority of those jurists who upheld *qasāma* said that *qasāma* does not come into operation except in the case of suspicion (*shubha*). They disagreed about what constituted *shubha*. Al-Shāfiʿī said that it comes into operation if the *shubha* is of the same kind due to which the Messenger of Allāh rendered judgment on the basis of *qasāma*, which exists when the person killed is found in the locality of a people who do not mingle with others and between these people and the people of the deceased there is enmity, like the enmity that existed between the Anṣār and the Jews. Thus, Khaybar was the exclusive residence of the Jews and the victim, one of the Anṣār, was found there. He said (it becomes obligatory) also when the person suspected of homicide is found next to, or in the vicinity of, the deceased smeared with blood, or when a group of people are found in a place with a murdered person, or any other similar suspicion that persuades the authorities that the complainants are justified in raising such a suspicion. Mālik said something similar to this, that is, *qasāma* does not become obligatory without suspicion (*lawth*).

A single *ʿadl* witness, according to Mālik along with the agreement of his disciples, is sufficient to raise the required suspicion, but they differed when this witness was not reliable (*ʿadl*) by law. He also agreed with al-Shāfiʿī about circumstantial evidence that makes it probable, like a dead man covered with his blood is found and next to him is a person holding a blood-smeared iron club. Mālik, however, was of the view that the existence of the deceased in a residential locality does not amount to *lawth* (suspicion), even when there is enmity between the people of the deceased and the residents of the locality. If this is the case, then, there is nothing left that can form the basis for the stipulation of *lawth* for the obligation of *qasāma*. It is for this reason that many jurists did not uphold it.

Abū Ḥanīfa and his disciples said that if the deceased is found in the residential locality of a people and his tracks lead up to it, then, the imposition of *qasāma* becomes obligatory upon the residents of the locality. Some of the jurists imposed *qasāma* merely on the basis of the existence of the deceased in a locality, without the imposition of all the conditions laid down by al-Shāfiʿī and without the condition of the existence of a clue that was laid down by Abū Ḥanīfa. Such an opinion is related from ʿUmar, ʿAlī and Ibn Masʿūd. It was also upheld by al-Zuhrī, a group of the Ṭābiʿūn and is the opinion of Ibn Ḥazm, who said, "*Qasāma* becomes obligatory when a murdered person is found, wherever this may be and it is not known who killed him. If the heirs of the victim accuse someone and fifty of them take oaths, retaliation is imposed if they swore that it was *ʿamd*, but if they swear that it is *khaṭaʾ*, then, *diya* is to be imposed". According to him, less than fifty persons are not sufficient to take the oath, but according to Mālik there may be two or more from among them. Dāwūd said that *qasāma* is not be invoked, except in circumstances similar to those of the cases decided by the Prophet (God's peace and blessings be upon him).

Mālik and al-Layth were unique, among the jurists of the regions in upholding *qasāma*, merely on the basis of the dying declaration of the deceased—"so and so killed me"—as *lawth* that would give rise to *qasāma*.

Each one of the jurists, that is, those among them who maintained such views, declared what constituted suspicion according to his own conviction and each maintained that the complainants should begin with the oaths because of their being suspect. According to Mālik, suspicion transfers the *yamīn* from the defendant to the complainant, as the basis in the law for assigning the defendant the oath is the existence of strong suspicion about what he is denying. It was as if he compared this to an oath plus a witness, as in the case of property.

The opinion that the complaint itself constitutes sufficient suspicion is weak and contrary to the principles and texts, due to the words of the Prophet, "If the people were to be granted their unsubstantiated claims there would be some who would make claims on the blood of men as well as their property, but (in the absence of evidence) the burden of oath (*yamīn*) is upon the defendant". This is an established tradition from among the traditions of Ibn ʿAbbās. It has been recorded by Muslim in his *Ṣaḥīḥ*. The citing of the case of the cow of the Banī Isrāʾīl, as proof by the Mālikites, is weak, as the verification in that case has been attributed to a miraculous act.

Those who imposed retaliation on the basis of *qasāma* differed whether more than one person can be executed because of it. Mālik said that *qasāma* is only valid against one person, which was also the opinion of Aḥmad ibn Ḥanbal. Ashhab said that *qasāma* can be applied against a group, but only one of them identified by the victim's heirs is to be executed. This is weak. Al-Mughīra al-Makhzūmī said that all those against whom *qasāma* has been applied are to be put to death. Mālik and al-Layth said that if two *ʿadl* witnesses testify that a person struck another and the victim survived for some days after the blow and then died and if the heirs swear that he died because of the blow, the assailant is to be subjected to *qiṣāṣ*. All this, however, is weak.

They disagreed about *qasāma* in the case of a slave. Some confirmed it, which was the opinion of Abu Ḥanīfa based on a comparison with a free man. Some of them rejected it drawing a comparison with animals, which was Mālik's opinion.

The *diya* imposed after *qasāma* is to be derived from the wealth of the killer, for which no less than fifty person take fifty oaths, according to Mālik. According to him, no less than two persons are to take the oath for the accusation of killing and no less than one for the cases of *khaṭaʿ*. If any one of the heirs refuses to take the oath, *qasāma* is rendered invalid, according to him, for purposes of *qiṣāṣ*, but remains valid for *diya* in respect of those who did not refuse, that is, their share (is due). Al-Zuhrī has said that if one of them refuses to take the oath, *diya* is invalidated with respect to all of them. The details in this chapter are many.

The Qāḍī says: The discussion of *qasāma* forms part of the ways in which homicide is proved, but it is, in fact, a part of the Book of Litigation and we have mentioned it here according to what is customary with the jurists. If a case specific to one of the categories of law is brought up, they are of the view that it is better to mention it within that category.

Litigation that pertains to more than one category of the different legal categories is to be discussed in the Book of Litigation, though you will find them doing both the things, as Mālik did in his *al-Muwaṭṭa*ʾ, for he has drawn into it cases from all books.

56.6. THE BOOK OF THE *AḤKĀM* OF *ZINĀ* (UNLAWFUL INTERCOURSE)

The study of the fundamentals of this book relates to the *ḥadd* of *zinā*, [226] the kinds of fornicators, the punishments for each category of crime (within it), and the mode of proof of this immoral offence (*fāḥisha*).

56.6.1. Chapter 1: The *Ḥadd* of *Zinā*

Zinā is (defined as) all sexual intercourse that occurs outside of a valid marriage, the semblance (*shubha*) of marriage, or lawful ownership (*milk yamīn*). This is agreed upon, as a whole, among the scholars of Islam, though they did differ about what constitutes doubt that is sufficient to waive the *ḥadd* penalty. In this topic there are a number of issues, out of which we shall mention those well known.

Among these is the case of the slave-woman with whom a man has intercourse, but he has joint ownership in her. Mālik said that *ḥadd* will be waived in this case; if the slave-woman gives birth to a child, it will be ascribed to him and he will have to pay her value (to the co-owner for his share). This was also Abū Ḥanīfa's opinion. Some of them said that he is to be awarded *tʿazīr*. Abū Thawr said that he is to be awarded *ḥadd* without mitigation if he was aware of the prohibition.

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[226] The term "unlawful intercourse" is being used here to describe the offence of *zina*. The term "adultery" has different connotations and cannot be a substitute for the term "*zinā*". It is confined to cases of married persons. On the other hand, terms like "sex offenders" are too general and may include categories not intended by some to be part of the term "*zinā*". The term proposed to be used here for "*zānī*" is "fornicators", though this term has its problems too, as it may include the case of sexual relations with slaves.

The legal basis, for the majority, are the words of the Prophet (God's peace and blessings be upon him), "Waive the (fixed) penalties because of doubt". Those who did waive the penalties, disagreed about the offender's obligation to pay reasonable dower (*ṣadāq al-mithl*) in proportion to his share in the (slave-woman). The reason for the disagreement was whether the *ḥukm* to be applied would be based on the share owned by him or on the share not owned by him, as the *ḥukm* of what he owned yields permissibility, while the *ḥukm* of what he does not own requires prohibition.

Another issue relates to their disagreement over the soldier who has had intercourse with a woman captured as part of the spoils. One group said that *ḥadd* is to be applied to him, while another group waived the *ḥadd*, which appears sound. The reason for disagreement in this is the same as the previous issue—Allāh knows best.

When a man permits another to have intercourse with his slave-girl, Mālik is of the view that *ḥadd* is to be waived, while the others said that he is to be awarded *tʿazīr*. Some of them said that this is a case of a gift accompanied by delivery and the corpus (of the slave-woman) is subservient to utilization for intercourse.

One of the issues is about a man who has intercourse with his son's, or his daughter's, slave-girl. The majority said that there is no *ḥadd* in this case, because of the saying of the Prophet (God's peace and blessings be upon him), "You and your wealth belong to your father", and his saying, "A father is not subject to *qiṣāṣ* because of his son", and also because of their consensus (*ijmāʿ*) that he is not subject to amputation of the hand for what he stole from his son. It is, however, said that he is to be asked to pay her value, irrespective of her conceiving of him, for she is now prohibited for his son, and it is as if he had "consumed" her. One of the proofs is their consensus that if the father kills his grandson, his son has no right to claim *qiṣāṣ* from him; so also in the case of the person for whom his son acts as *walī*.

Among the issues is the case of a man who has intercourse with his wife's slave-girl. The jurists differed about it into four opinions. Mālik and the majority said that he is liable to unmitigated *ḥadd*. One group of jurists said that there is no *ḥadd* on him and he is to be considered a debtor for her value, in case the slave-girl voluntarily participated in the act, but if he coerced her he is to pay her value and she is free. This was the opinion of Aḥmad, Isḥāq, Ibn Masʿūd and the first opinion of ʿUmar related from him by Mālik in *al-Muwaṭṭaʾ*. Another group said that he is liable to a hundred lashes only, whether he is a *muḥṣan* or a *thayyib* (non-virgin). The fourth group said that he is liable to *tᶜazīr*.

The reliance of those who held him liable to *ḥadd* is that he indulged in intercourse without valid ownership, joint ownership, or valid marriage, therefore, *ḥadd* becomes obligatory. The reliance of those who waived the *ḥadd* is on the established tradition "that the Messenger of Allāh (God's peace and blessings be upon him) decided, in the case of a man who had intercourse with his wife's slave-girl, that if he had coerced her into it she is free and he owes, in lieu of her, a reasonable value to her mistress, but if she participated voluntarily, she belongs to him and he owes her reasonable value to her mistress". Further, they agreed that there exists a doubt (of ownership) in his case about her (his wife's) wealth, on the evidence found in the words of the Prophet (God's peace and blessings be upon him), "A woman is taken into wedlock for three things"—and he mentioned one of these as her wealth. This is supported by the principle, of those who accept it, that a woman is interdicted by the husband in what is over a third her wealth; it is Mālik's opinion.

Abū Ḥanīfa is of the opinion that the *ḥadd* from a person who has sexual intercourse with a hired woman is waived. The majority oppose this. His opinion is weak and objectionable. It is as if he held that such a benefit is similar to all other benefits for which he may hire her, thus doubt intervenes and it begins to resemble the marriage of *mutᶜa*.

Among these issues is also the waiving of *ḥadd* from a person who confines a woman and they differed about this too. On the whole, void marriages are all included in this topic and in most of them, according to Mālik, *ḥadd* is waived, except in the cases where marriage takes place within the permanently prohibited degrees, like marriage with one's mother or a similar case, in which an excuse of ignorance is not acceptable.

56.6.2. Chapter 2: The Categories of Fornicators and Their Punishments

Fornicators, for whom punishments vary according to their categories, are of four kinds: *muḥṣan* (married) or *thuyyab* (non-virgins); *abkār* (virgins); free or slave; and male or female. The Islamic *ḥudud* are of three kinds: *rajm* (stoning to death); *jald* (whipping); and *taghrīb* (exile). The Muslim jurists agreed about free *thayyib muḥṣans* that the *ḥadd* for them is *rajm*, except that a group of those who follow their own whims held that the punishment for every fornicator is a hundred lashes. The majority inclined toward *rajm* because of the authentic traditions supporting it. They restricted the (general meaning in the) Book with the *sunna*, that is, the words of the Exalted, "The adulteress and adulterer, scourge ye each one of them (with) a hundred stripes. And let not pity for the twain withhold you from obedience to Allāh, if ye believe in Allāh and the Last Day. And let a party of believers witness their punishment".[227] They differed on two points. First, whether stripes are to be awarded along with stoning. Second, about the conditions of *iḥṣān*.

56.6.2.1. Issue 1: Stripes with stoning?

The jurists disagreed whether stripes are to be awarded to the person who has become liable to *rajm*, before *rajm* is applied. The majority said that there are no stripes for a person liable to *rajm*. Al-Ḥasan al-Baṣrī, Isḥāq, Aḥmad and Dāwūd said that a *muḥṣan* fornicator is to be awarded stripes before he is subjected to *rajm*.

For the majority the legal basis is "that the Messenger of Allāh (God's peace and blessings be upon him) awarded *rajm* to Māʾiz, to a woman from Juhayna, to the Jews and a woman from (the tribe of) Ghāmid from al-Azad". All this has been recorded in the *Ṣaḥīḥs* and it is never related that he awarded stripes to any of these people. As a rational argument, the minor *ḥadd* is included in the major *ḥadd*, for *ḥadd* has been laid down as a deterrent and stripes are not effective as a deterrent along with stoning. The reliance of the other group is upon the general meaning of the words of the Exalted, "The adulteress and the adulterer, scourge ye each one of them (with) a hundred stripes", which did not distinguish between the *muḥṣan* and the non-*muḥṣan*.

They also argued on the basis of the tradition of ʿAli (God be pleased with him) as recorded by Muslim and others, that ʿAli (God be pleased with him) subjected Shurāḥah al-Hamdāniyya to stripes on Thursday and to *rajm* on Friday, saying, "I awarded her stripes by the Book of Allāh and subjected her to *rajm* by the *sunna* of His Messenger". There is also the tradition of ʿUbāda ibn al-Ṣāmit, which says "that the Prophet (God's peace and blessings be upon him) said, 'Take from me, take from me, verily, Allāh has ordained for them a way: the virgin with the virgin, a hundred stripes and exile for a year; the *thayyib* (non-virgin) with the *thayyib*, a hundred stripes and pelting with stones'".

They agreed about *iḥṣān* that it is one of the conditions of *rajm*, but differed about the conditions of *iḥṣān* itself. Mālik said that these are puberty, Islam, freedom and sexual intercourse through a valid marriage. Intercourse for this purpose should be permissible intercourse and not intercourse prohibited during menstruation or while fasting. If a person commits unlawful intercourse after having fulfilled the conditions of valid intercourse, the punishment for him is *rajm* according to Mālik. Abū Ḥanīfa agreed with Mālik about these conditions, except about intercourse that is not temporarily prohibited and he also stipulated that freedom should exist on both sides, that is, the *zānī* and the *zāniya* should both be free persons. Al-Shāfiʿī did not stipulate Islam as one of the conditions.

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[227] Qurʾān 24:2

Al-Shāfiʿī's reliance is on what has been related by Mālik from Nāfiʿ from Ibn ʿUmar, which is a tradition agreed upon for its soundness, "that the Prophet (God's peace and blessings be upon him) awarded *rajm* to the Jews, man and woman, who had committed unlawful intercourse, when the Jews referred their affair to him". Allāh, the Exalted, says, "But if thou judgest, judge between them with equity".[228] Mālik's argument, by way of reason, is that *iḥṣān* is a matter of honour and there can be no honour in the absence of Islam. It is one of his principles that intercourse in a valid marriage is recommended. This, then, is the *ḥukm* of the (free) *thayyib* (non-virgin).

The Muslim jurists agreed that the *ḥadd* for the virgin (one never married) for ẓinais a hundred stripes due to the words of the Exalted, "The adulteress and the adulterer, scourge ye each one of them (with) a hundred stripes". They disagreed about exile (*taghrīb*) along with stripes. Abū Ḥanīfa and his disciples said that there is essentially no exile whatsoever (as *ḥadd*), while al-Shāfiʿī said that exile is a must for each fornicator, male or female, free or slave. Mālik said that men are exiled, but not women, which was also the opinion of al-Awzāʿī. There is no exile for slaves according to Mālik. The reliance of those who imposed exile without qualifications is the tradition of ʿUbāda ibn al-Sāmit that has preceded, which says, "A virgin with a virgin, hundred stripes and exile for a year". The compilers of the *Ṣaḥīḥ* have likewise recorded a tradition from Abū Hurayra and Zayd ibn Khālid al-Juhanī both of whom said, "A Bedouin came up to the Prophet (God's peace and blessings be upon him) and said, 'I beseech you to decide my case by the Book of Allāh alone'. His rival, who was more knowledgeable than him, said, 'Yes, judge between us by the Book of Allāh, but permit me to plead (my case)'. The Prophet said, 'Speak'. He (the other Bedouin) said, 'My son was his servant and committed intercourse with his woman. I had been told that my son was liable to *rajm*, so I offered as ransom a hundred goats and a young slave-girl. I, then, asked the learned people, who have informed me that my son is liable to a hundred stripes and exile for a year and the woman of this man is liable to *rajm*'. The Messenger of Allāh said, 'By Him, in whose hands is my life, I will certainly decide your case according to the Book of Allāh. As for the slave-girl and the goats, they are returned to you and upon your son are a hundred stripes and exile for a year. (He added) Go, O Unays, to this man's woman, if she confesses subject her to *rajm*'. Unays went up to her and she confessed.

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[228] Qurʾān 54:2

The Prophet (God's peace and blessings be upon him), then, issued the order and she was stoned (to death)".

Those who made an exemption for a woman from this general command (of exile) did so on the basis of analogy, as exile exposes a woman to greater opportunity for *zinā*. This analogy belongs to the category of *mursal*, I mean, it pertains to *maṣlaḥa*, which is often adopted by Mālik. The reliance of the Ḥanafites is upon the apparent meaning of the Book. This is based on their opinion that an addition to (the *hukm*) of the explicit text amounts to *naskh* (abrogation) of the text and the Book of Allāh cannot be abrogated through individual narrations. They also related from ʿUmar and others that he awarded the *ḥadd*, but did not award exile. The Kūfīs related from Abū Bakr and ʿUmar that they did award exile.

For purposes of the *ḥukm* of the slaves in this offence, the slaves are divided into two kinds: male and female. The jurists agreed in the case of females that a slave woman, if she marries and then indulges in unlawful intercourse, her *ḥadd* is fifty stripes due to the words of the Exalted, "And if when they are honourably married they commit lewdness they shall incur the half of the punishment (prescribed) for free women (in the case)".[229] They disagreed when a slave-girl was not married. The majority of the jurists of the regions said her *ḥadd* is fifty stripes. One group said that there is no *ḥadd* for her, but there is *tʿazīr*, while another group said that there is essentially no *ḥadd* for a slave-woman. The reason for their disagreement is the equivocality of the term *iḥṣān* in the words of the Exalted (translated as), "honourably married". Those who understood it to mean "marriage" and looked at the implication of the text said that the unmarried slave-woman is not subjected to *ḥadd* at all. Those who understood the meaning of *iḥṣān* to be 'Islam' applied it generally to the married and the unmarried. Those who did not maintain *ḥadd* for the unmarried slave-woman, argued on the basis of the tradition of Abū Hurayra and Zayd ibn Khālid al-Juhanī "that the Prophet (God's peace and blessings be upon him) was asked about the slave-woman committing fornication when she was not a *muḥṣana* and he said, 'If she commits *ẓina* whip her, if she commits *ẓina* again whip her and if she does it again sell her, even if it is for a trifle' ".

The jurists of the regions maintain that the *ḥadd* of a male slave is half that of a free man on the analogy of the slave-woman. The Ẓāhirites said that, on the contrary, his *ḥadd* is a hundred stripes, as they inclined toward the general meaning of the words of the Exalted, "scourge each one of them (with) a hundred stripes", which do not distinguish a slave from a free man. There are jurists who waived *ḥadd* in his case on the analogy of the (unmarried) slave woman, which is a deviant view and is related from Ibn ᶜAbbās.

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[229] Qurʾān 4:25

This, then, is the discussion about the kinds of *ḥudud* (in the case of *zinā*), the kinds of persons liable to *ḥadd* and conditions related to each one of the *ḥudud*. To these is related the discussion of the mode of application of *ḥadd* and its time.

The best-known issue about the mode of implementation relates to the digging of a pit for the person to be subjected to *rajm*. One group said that a pit is to be made for the person and this is related from ᶜAlī in the case of Shurāḥah al-Hamdāniyya, when he ordered her to be stoned. It is also related from Abū Thawr. Part of the report says, "On Friday he brought her out and had a pit dug for her. When she had entered the pit, the people surrounded her and began to stone her. He said, 'This is not the way to execute *rajm*, I am afraid some of you will be hitting each other, but make rows as you would for prayer'. He then said that *rajm* is of two kinds: concealed from view and in the open. Out of these, in the one proved by confession, the first person to commence stoning is the *imām* followed by the public, while in the case proved by testimony, it is the witnesses who begin followed by the *imām* and then the public. Abū Ḥanīfa and Mālik said that no pit is to be dug for the person stoned, while al-Shāfiᶜī made a distinction saying that it is only dug for a woman. Their reliance is upon what has been recorded by al-Bukhārī and Muslim about the tradition of Jābir. Jābir said, "We stoned him (Māᵓiz) in the place of prayer and when the stones enveloped him, he bolted, but we took him by the stony (volcanic) area and crushed him". It is, however, recorded by Muslim that a pit was dug for him on the fourth day. The traditions generally vary on this issue. Aḥmad said that most of the traditions imply that there is no pit.

(In the case of stripes) Mālik said that the *ḥadd* is to be applied to the back and the proximate areas. Abū Ḥanīfa and al-Shāfiᶜī said that all parts of the body are to be touched; however, the sex organs and the face are to be protected. To this Abū Ḥanīfa added the skull also. The person, if male, is to be stripped of his clothes, according to Mālik, in all applications of the *ḥudud*, while the exception, according to Abū Ḥanīfa and al-Shāfiᶜī, is the case of *qadhf* (false accusation of sexual intercourse) as will be coming up in what follows. Stripes are to given in the sitting posture, not while standing, as against the opinion of those who say they are applied while standing, according to the apparent meaning of the verse.

It is considered recommended by all that the *imām* should bring as witnesses a number of people at the time of execution, due to the words of the Exalted, "And let a party of the believers witness their punishment". They disagreed about the exact implication of the term "party". Mālik said that four persons constitute a party, but (figures like) three, two, seven or more are also claimed. About the time of execution, the majority maintain that it should not be in the time of extreme heat, or of extreme cold and that it is not to be applied to a sick person. A group said that it may be (applied to a sick person), which was the opinion of Aḥmad and Isḥāq. They argued on the basis of a report from ʿUmar that he applied *ḥadd* to Qudāma, who was ill. The reason for the disagreement is the clash of the apparent meaning with the idea behind *ḥadd* that it is to be applied when there is no likelihood of the person, subjected to it, dying from it. Those who looked at the unqualified meaning of the execution of *ḥadd*, without any exceptions, said that it is to be applied to the sick person, while those who took into account the inherent meaning said that the sick person is not to be punished till he recovers. There is similar disagreement about extreme heat or cold.

56.6.3. Chapter 3: Identification of the Methods of Proving This Offence

The jurists agreed that *zina* is proved through confession and testimony. They disagreed about its proof through the appearance of pregnancy in unmarried women, when they claim to have been coerced (raped). They also disagreed about the conditions of confession and testimony.

They disagreed about a confession on two points. First, the number of confessions that give rise to the liability for *ḥadd*. Second, whether it is a condition that confession should not have been retracted till the time of the application of *ḥadd*.

56.6.3.1. Issue 1: Number of confessions.

Regarding the number of confessions giving rise to the liability for *ḥadd*, Mālik and al-Shāfiʿī said that for purposes of liability for *ḥadd* just one confession is sufficient. This was also the opinion of Dāwūd, Abū Thawr, al-Ṭabarī and a group of jurists. Abū Ḥanīfa, his disciples and Ibn Abī Laylā said that *ḥadd* is not proved except by four confessions made one after the other. This was also the opinion of Aḥmad and Isḥāq. Abū Ḥanīfa and his disciples, however, added that these should have been made in separate sessions.

The reliance of Mālik and al-Shāfiʿī is upon what is reported in the tradition of Abū Hurayra and Khālid about the saying of the Prophet (God's peace and blessings be upon him), " 'Go, O Unays to his woman and if she confesses stone her (to death)'—she confessed and he stoned her". Here the number (of confessions) were not mentioned. The reliance of the Kūfīs is on what is reported in the tradition of Saʾīd ibn Jubayr from Ibn ʿAbbās from the Prophet (God's peace and blessings be upon him) "that he turned Māʾiz away till he had confessed four times and then ordered him to be subjected to *rajm*. Regarding the other traditions, they said that what is laid down in some reports about his confessing once, twice or three times is deficient reporting and that which is deficient cannot be held up as proof against the complete report.

56.6.3.2. Issue 2: Retraction of confession

The majority of the jurists, except for Ibn Abī Laylāʾ, said that retraction is admissible. Mālik made a distinction saying that if he retracts with a supporting *shubha* it is acceptable, but when he withdraws without *shubha*, there are two opinions from him. First, that it is acceptable, which is the well-known opinion, while the second maintains that it is not. The majority inclined toward the effectiveness of retraction of confession because of the practise of the Prophet (God's peace and blessings be upon him) in the case of Māʾiz, and others of them ask time and again to reconfirm that they might retract. It is for this reason also that those who waive *ḥadd* due to retraction, do not insist that the maintenance of a confession for a long duration is a condition for the imposition of *ḥadd*. It is related through a number of narrations "that when Māʾiz was being stoned, he ran as the stones hit and with the people in pursuit he said to them, 'Take me back to the Messenger of Allāh,' but they killed him with the stones. They mentioned this to the Prophet (God's peace and blessings be upon him), who said, 'Would that you had let him go, perhaps he would have repented and Allāh would have forgiven him'". It is from here that al-Shāfiʿī made the stipulation that repentance removes liability for *ḥadd*, but the majority maintain the contrary. It is also from this that the absence of repentance becomes the third condition for the liability for *ḥadd*.

The jurists agreed about the proof of *ẓina* through testimony that it is proved through testimony and the stipulated number of witnesses is four as distinct from the testimony for the rest of the rights, because of the words of the Exalted, "And those who accuse honourable women but bring not four witnesses, scourge them (with) eighty stripes and never (afterward) accept their testimony—They indeed are the evildoers".[230] The condition for the witnesses is that they should be *ʿadl*. A condition for the quality of the testimony is that it should describe the contact of the sex organs and that it should be rendered in explicit, not figurative (insinuating), language. The majority maintain that such testimony should not be contradictory with respect to time or place, except for the well-known issue raised by Abū Ḥanīfa about the angles, which requires that each of the witnesses should have seen them from a separate corner of the room (for example) and it should not be the same corner from where another witness has viewed the offence. The reason for the disagreement is whether testimony relating to different locations can be combined into one as is the testimony relating different times. They agreed that it cannot for a dissimilar location is the same as dissimilar timing and the apparent purpose of the law is to achieve greater certainty in the proof of this *ḥadd* more than any other.

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[230] Qurʾān 24:4

Regarding their disagreement about the application of *ḥadd* due to the appearance of pregnancy along with a claim of rape, a group of jurists imposed *ḥadd* in such a case as is recorded by Mālik in his *al-Muwaṭṭa*ʾ in the tradition of ʿUmar. This was the opinion of Mālik, unless she could provide evidence of coercion, as in case she was a virgin and complained while she was bleeding, or shows on her body the signs of coercion. The case is the same, according to him, when she claims to be married; she has to prove it. The exception is the one on an unexpected visit. Ibn al-Qāsim said that when she claims marriage on a sudden visit, her statement will be accepted. Abū Ḥanīfa and al-Shāfiʿī said that *ḥadd* is not to be applied to her due to the appearance of pregnancy accompanied by the claim of coercion, or the claim of marriage, even if she does not come up with the evidence of coercion in a claim of coercion or of marriage in a claim of marriage, as she is in the position of one who has confessed and then claims coercion. One of the proofs for them is what is related in the tradition about Shurāḥa that Alī (God be pleased with him) said to her, "Were you coerced?" She said, "No!" He said, "Maybe someone came upon you while you were asleep?" They said that proof is related from ʿUmar in so far as he accepted the statement of a woman who claimed that she was a sound sleeper and a man came upon her and went away, but she did not come to know who it was.

There is no disagreement among the Muslim jurists that there is no *ḥadd* for a woman coerced. They differed about the obligation of paying dower to her. The reason for the disagreement is whether *ṣadāq* is compensation for utilization or a gift. Those who said that it is compensation for utilization, imposed it in lawful as well as prohibited cases, while those who said that it is a gift required exclusively for marriage did not impose it in this case.

This exposition is sufficient for this book and with Allāh is the granting of reward.

56.7 THE BOOK OF *QADHF* (FALSE ACCUSATION OF UNLAWFUL INTERCOURSE)

The discussion in this book is about the accuser (*qādhif*), the accused (*maqdhūf*), the punishment obligatory in this offence and how the offence is proved. The legal basis of this law is in the words of the Exalted, "And those who accuse honourable women but bring not four witnesses, scourge them (with) eighty stripes and never (afterward) accept their testimony—They indeed are the evildoers". They agreed that two attributes must be found in the accuser, as a condition. These are puberty and sanity, irrespective of whether the accuser is a male or a female, free or slave, Muslim or non-Muslim. They agreed about the accused that five attributes must be gathered in him. These are puberty, freedom, chastity, Islam and the possession of a sound sex organ. If any of these attributes is missing *ḥadd* will not become obligatory. The majority, generally, are inclined toward the stipulation of freedom as a condition for the accused. It is likely that there may be disagreement in this. Mālik takes into account the age of a woman so that she may be capable of sexual intercourse.

They agreed on two points relating to the false accusation giving rise to the liability for *ḥadd*. First, that the accuser makes a false allegation of *zinā* against the accused. Second, that he denies his descent (from his father), when his mother is a Muslim free woman. They disagreed when she was a non-believer or a slave. Mālik said that whether she is free, slave, Muslim, or a non-believer *ḥadd* becomes obligatory. Ibrāhīm al-Nakhaʿī said that there is no *ḥadd* for the accuser if the accused's mother is a slave or a *kitābiyya*. This is analogous to the opinions of Abū Ḥanīfa and al-Shāfiʿī.

They agreed that the accusation, when it made in either of these two ways (direct accusation or denial of parentage), creates a liability for *ḥadd*, if it is explicit. They differed when it is by way of insinuation. Al-Shāfiʿī, Abū Ḥanīfa, al-Thawri and Ibn Abī Laylā said that there is no *ḥadd* for insinuation, but Ābu Ḥanīfa and al-Shāfiʿī maintained that there is *ataʿzir* in such a case. A similar opinion was expressed, among the Companions, by Ibn Masʿūd. Mālik and his disciples maintained that there is *ḥadd* for insinuations and it is an issue that occurred in the time of ʿUmar. ʿUmar consulted the Companions about it, but they differed, so he upheld *ḥadd* for it.

Mālik's reliance is on the argument that metaphorical language is based on usage and such use is a substitute for explicit designation, though the word is used for something other than its normal designation by way of metaphor. The argument of the majority is that the ambiguity surrounding the use of a metaphor leads to a doubt and the *ḥudud* are waived because of doubts. The truth is that metaphorical use is sometimes similar to explicit expressions, but at other times it is not, particularly when the word is not in common use.

The liability for *ḥadd* is waived, by consensus, for the accuser if he can prove, with the help of four witnesses, the commission of unlawful intercourse by the accused. When the witnesses are fewer than four they are equally guilty, according to Mālik, of *qadhf*, but they are not according to other jurists. There is disagreement in the school about the witnesses who testify about the testimony of the original witnesses. The reason for the disagreement is whether transmission of testimony requires the same number of witnesses as prescribed for the original testimony, where their number cannot be reduced, or two witnesses are sufficient, as is the case in other matters beside *qadhf*.

The discussion of *ḥadd* pertains to its category, limitations and discharge. They agreed that eighty stripes are awarded to the accuser, who is a free man, because of the words of the Exalted, "eighty stripes". They disagreed about the *ḥadd* of the slave who accuses a free man. The majority of the jurists of the regions said that his *ḥadd* is half that of the free man, which is forty stripes and this has been related from the four Caliphs and from Ibn ʿAbbās. A group of jurists said that his *ḥadd* is the same as that of the free man, which is the opinion of Ibn Masʿūd, from among the Companions, of ʿUmar ibn ʿAbd al-ʿAzīz and of a group of jurists of the regions—Abū Thawr, al-Awzāʿī and Dāwūd and his disciples from among the Ẓāhirites.

The reliance of the majority, for purposes of *qadhf*, is upon the analogy of his *ḥadd* in the case of *zinā*. The *Ahl al-Ẓāhir* held on to the general meaning (of the verse) and to the consensus that the *ḥadd* for a *kitābī* is eighty stripes; it was as if the slave deserves it more.

They agreed about its limitations that if the accuser accuses the same person a number of times he is to be subjected to *ḥadd* only once if he has not been subjected to *ḥadd* before, but if he makes an accusation and is subjected to *ḥadd* for it and makes the accusation again he will be subjected to it a second time. They disagreed when he accuses a group of persons. One group of jurists said that he is liable to a single *ḥadd*, whether he made a single collective accusation or made several separate accusations. This was the opinion of Mālik, Abū Ḥanīfa, al-Thawri, Aḥmad and a group of jurists. Another group of jurists said that he is to be awarded (a separate) *ḥadd* for each person, which was the opinion of al-Shāfiʿī, al-Layth and a group. Al-Ḥasan ibn Ḥayy went to the extent of saying that if a person says, "Anyone who enters through this door is a fornicator", he is to be awarded (eighty) stripes as *ḥadd* (separately) for each person who enters the door. A third group said that if he addresses them collectively saying, "O, fornicators", he is to be awarded a single *ḥadd*, but if he addresses each one of them individually, calling them fornicators, he is to be awarded punishment for each individual.

The reliance of those who do not impose on an accuser of a group more than a single *ḥadd* is the tradition of Anas and others, "that Hilāl ibn Umayya accused his wife of having intercourse with Shurayk ibn Samḥā᾽. This was reported to the Prophet (God's peace and blessings be upon him) who instituted *li᾽ān* proceedings among them, but did not award him *ḥadd* because of (the accusation against) Shurayk". This has come to be a point of consensus among the jurists in the case of a husband who accuses his wife of having intercourse with another man. The argument of those who hold that he is liable separately for each individual is that it is a category of the rights of individuals, thus, if some of them forgive him while others do not, the *ḥadd* is not waived. Those who distinguished between collective and individual accusations, or between accusations in a single session and in several sessions, argued that it is obligatory that *ḥadd* should increase in proportion to the number of accusations, as a number of accusations made separately against a number of persons would lead to *ḥadd* being awarded the same number of times.

They differed about the discharge of liability, as to when the accused person forgives him. Abū Ḥanīfa, āl-Thawri and āl-Awzā῾ said that forgiveness is not valid, that is, the *ḥadd* is not to be waived. Al-Shāfi῾ī said that forgiveness is effective and *ḥadd* is waived, irrespective of the matter having been reported to the *imām*. One group said that if the complaint is filed with the *imām* forgiveness is not permitted, but it is if the matter has not been reported to the *imām*. Mālik's opinion differed in this; he held one opinion similar to al-Shāfi῾ī's and said another time, which is his well-known opinion, that it is permitted if information has not reached the *imām* and it is not if it has, unless the accused wishes to cover up his personal affair.

The reason for their disagreement is whether the offence affects the right of Allāh or the rights of individuals, or both. Those who said that it relates to the right of Allāh did not permit forgiveness, as in the case of *zinā*. Those who held that it pertains to the right of individuals permitted forgiveness. Those who said that it affects both rights, but the right of the *imām* becomes predominant when information reaches him, made a distinction on the basis of information received and not received, which in itself is based on analogy from the established tradition laid down in the case of theft (*sariqa*). The reliance of those who said that it relates to the right of the individuals, which is the outstanding opinion, is that if the accused confirms what was alleged in the accusation *ḥadd* would be waived from accuser.

There is no dispute that the person who undertakes the application of *ḥadd* is the *imām* who does this in the case of false accusation of unlawful intercourse. They agreed that along with liability for *ḥadd* the testimony of the accuser is no longer acceptable, as long as he does not repent. They disagreed when he does repent. Mālik said that in such a case his testimony would be admissible, which is also al-Shāfiʿī's opinion. Abū Ḥanīfa said that his testimony is not admissible, ever. The reason for their disagreement is whether the exception (*istithnāʾ*) (proviso) in the verse extends backwards to the entire preceding sentence or to the immediately preceding category. This refers to the words of the Exalted, "[A]nd never (afterward) accept their testimony— They indeed are the evildoers—[s]ave those who afterward repent and make amends". Those who maintained that the exception extends to the immediately preceding category said that repentance merely does away with the imputation of "evildoers (*fāsiqūn*)", but testimony is still not acceptable. Those who held that the exception includes both categories collectively said that repentance does away with the imputation and the rejection of testimony. The removal of the imputation of "evildoers" along with the rejection of testimony is (an opinion) incompatible with the *sharīʿa*, that is it is inconsistent with the principles, as the removal of the imputation of "evildoers" makes testimony admissible. They agreed that repentance does not discharge the liability for ḥadd.

How is it proved? They agreed that it is proved by the testimony of two free male *ʿadl* witnesses. There is a disagreement in Mālik's school whether it is proved with one witness and an oath, by the testimony of women and whether proof through an oath has a binding effect; or if he refuses to take the oath, is he to be awarded *ḥadd* because of his refusal supported by the oath of the complainant?

These are the principles of this topic upon which the various individual cases are constructed.

The Qāḍī (Ibn Rushd) said: If Allāh were to grant me a long life, I will compile a book about the cases in the school of Mālik ibn Anas, arranging them in an organized manner, as that is the school followed in this peninsula, the peninsula of Andalus, so that the reader may attain the status of a *mujtahid* within Mālik's school. The enumeration of all the narrations, I think, is a task in which life terminates before it (the task) can come to an end.

56.7.1 Chapter on *Khamr* (The Drinking of Wine)

The discussion of this offence relates to the cause, the obligation and the mode of proof of the offence. They agreed that the cause is the drinking of *khamr*, without coercion, in large or small quantities. They disagreed about other intoxicants. The jurists of Ḥijāz said that their *ḥukm* is the same as that of *khamr*, with respect to prohibition and the liability for *ḥadd*, upon those who consume them in large or small quantities, irrespective of intoxication. The jurists of Iraq said that in case of these (other intoxicants), only the act of intoxication is prohibited and it invokes *ḥadd*. We have already mentioned the evidences of both groups in the Book of Food and Beverages.

The consequential obligation is the application of *ḥadd* and the imputation of *fisq*, unless followed by repentance. The imputation of *fisq* is made for every person drinking *khamr*, even if he is not intoxicated, but in the case of other intoxicants it is made upon actual intoxication.

Those who upheld the prohibition of even small quantities of intoxicating beverages, differed about the consequential *ḥadd*, though most of them maintain that it becomes obligatory. They differed, however, about the magnitude of obligatory *ḥadd*. The majority said that the *ḥadd* in this case is eighty stripes, while al-Shāfiʿī, Abū Thawr and Dāwūd said that the *ḥadd* in this case is forty stripes; and this is the *ḥadd* for the free man. They differed about the *ḥadd* of the slave, with the majority saying that it is half of the *ḥadd* of the free man. The Ẓāhirites said that the *ḥadd* of the free man and the slave is the same, which is forty stripes, while according to al-Shāfiʿī it is twenty stripes and for those who upheld eighty it is forty.

The reliance of the majority is upon the consultation of ʿUmar with the Companions, when the drinking of *khamr* became excessive in his times and the observation of ʿAlī that the *ḥadd* should be fixed at eighty on the analogy of the *ḥadd* of *qadhf*. It is reported about him (God be pleased with him) that he said, "When he drinks he is intoxicated, when he is intoxicated he raves and when he raves he makes false accusations". The reliance of the other group is on the argument that the Prophet did not fix a *ḥadd* for this and he used to award unnumbered strokes with whatever was available, like shoes, and that Abū Bakr (God be pleased with him) consulted the Companions of the Prophet (God's peace and blessings be upon him) as to what were the maximum number of strokes awarded by the Prophet and they fixed it at forty. It is related from Abū Saʿīd al-Khudrī "that the Messenger of Allāh awarded forty strokes with two (pair) of shoes", thus, ʿUmar substituted a stripe for each shoe. A more authentic report is related, through another chain, from Abū Saʿīd al-Khudrī "that the Messenger of Allāh awarded forty". As this is a more authentic narration from the Prophet (God's peace and blessings be upon him) and a similar more reliable report from ʿAlī is also available, al-Shāfiʿī maintained it at forty.

They agreed the person who applies this *ḥadd* is the *imām* as is the case in all the other *ḥudud*. They disagreed about the masters applying the *ḥadd* to their slaves. Mālik said that the master applies, to his slave, the *ḥadd* of unlawful intercourse and of false accusation of intercourse, if the witnesses render testimony before him, but he does not apply it on the basis of his own knowledge and no one except the *imām* is to undertake the amputation of the hand for theft. This was also the opinion of al-Layth. Abū Ḥanīfa said that no one but the *imām* is to apply the *ḥudud* to slaves. Al-Shāfiʿī said that the master applies all the *ḥudud* to his slaves, which was also the opinion of Aḥmad, Isḥaq and Abū Thawr.

Mālik's reliance is upon the well-known tradition "that the Messenger of Allāh (God's peace and blessings be upon him) was asked about the slave-woman who committed unlawful intercourse, but was not a *muḥṣana*, to which he said, 'If the slave-woman of any one of you commits *zinā*, he should give her the stripes'". The Prophet (God's peace and blessings be upon him) also commanded, "Should the slave-girl of any of you commit *zinā*, give her the stripes". Al-Shāfiʿī relied on these traditions as well as on what is related from the Prophet (God's peace and blessings be upon him) in another tradition that he said, "Apply the *ḥudud* to those whom your right hands possess". In addition, he maintained that this point is also related from the Companions and none had opposed them; among them are Ibn ʿUmar, Ibn Masʿūd and Anas. The reliance of Abū Ḥanīfa is on the consensus stating the principle that the application of the *ḥudud* is the right of the *sulṭan*. It is related from al-Ḥasan, ʿUmar ibn ʿAbd al-ʿAzīz and others that they said, "*Jumuʿa* (Friday prayers), *zakāt*, *fayʾ* and the *ḥukm* are the right of the *sulṭan*".

56.7.1.1. *Section: Proof*

About the manner of proof of this *ḥadd*, the jurists agreed that it is established through confession or the testimony of two *ʿadl* witnesses. They disagreed over its proof through smell. Mālik, his disciples and the majority of the jurists of Ḥijāz said that *ḥadd* becomes obligatory on the basis of smell if two *ʿadl* witnesses render testimony to the effect before the judge. He was opposed in this by al-Shāfiʿī, Abū Ḥanīfa, the majority of the jurists of Iraq, a group of jurists from Ḥijāz and the majority of the jurists of Baṣrah, who said that the offence is not proved for purposes of *ḥadd* through smell. Those who permitted testimony about smell did so because of its similarity to testimony about voices and features. The reliance of those who did not permit proof by smell is on the existence of similarity in smells and that the *ḥadd* is waived because of doubt.

56.8. THE BOOK OF *SARIQA* (THEFT)

The discussion in this book relates to the *ḥadd* for theft (*sariqa*), the conditions of the stolen property, because of which *ḥadd* becomes obligatory, the attributes of the thief (*sāriq*), who is liable to *ḥadd*, the punishment and the procedures through which this offence is proved.

Theft is the taking of the property of another by way of stealth, when the thief has not been entrusted with it. We have said this as they (the jurists) agreed that there is no liability for amputation of the hand in breach of trust or in embezzlement, except for (the opinion of) Iyyās ibn Muʿāwiya, who imposed the penalty of amputation on the person guilty of *khilsa*. And, a group of jurists subjected to amputation any person who borrowed jewellery or goods and then denied taking them, because of the renowned tradition about the Makhzūmiyya woman "who used to borrow jewellery and the Messenger of Allāh ordered that her hand be amputated on the basis of her denial". This was also the opinion of Aḥmad and Isḥāq and is based on the tradition of ʿĀʾishah, who said, "A Makhzūmiyya woman used to borrow goods and then denied taking them. The Prophet (God's peace and blessings be upon him) ordered the amputation of her hand. Her family came to Usāma and talked to him about it. Usāma brought the matter up with the Prophet (God's peace and blessings be upon him), who said, 'O Usāma, I do not expect you to interfere in the *ḥudud* of Allāh'. The Prophet then began addressing the people, saying, 'Those before you were destroyed (for the reason) that if one of their élite committed theft they let him go, but when a person of low status stole something they cut off his hand. By Him, in Whose hands is my soul, had it been Fāṭima, the daughter of Muḥammad, I would surely have cut her hand'".

The majority rejected this tradition as it is opposed to the principles, in so far as the thing borrowed is a trust and is not taken without permission, beyond the fact that it is not taken from a place of safe custody. They said that in the tradition there are some omissions, for it says that she stole and then states the denial of borrowed property. This is evident from the words of the Prophet, "Those before you were destroyed (for the reason) that if one of their élite committed theft they let him go". They maintained that this tradition is related by al-Layth ibn Saʿd from al-Zuhrī, with its chain, in which he says that the Makhzūmiyya committed theft. They claimed that this indicates she committed both offences, denial of borrowed property as well as theft. They also agreed that there is no amputation for the usurper or the quarrelsome dominating person, unless he is a highway robber bearing arms against the Muslims and threatening the highways, for his *ḥukm* is then the same as that of the brigand (*muḥārib*), as will be coming up in the discussion of the *ḥadd* of the *muḥarib*.

In the case of the thief for whom the *ḥadd* of *ṣariqa* becomes obligatory, they agreed that one of the conditions is that the thief should have legal capacity (be a *mukallaf*), whether free man or a slave, male or female, Muslim or *dhimmī*, except the dispute that is related since the earlier period about the amputation of the hand of the runaway slave when he commits theft. This was related from Ibn ʿAbbās, ʿUthmān, Marwān and ʿUmar ibn ʿAbd al-ʿAzīz; it was not disputed in the following period. Those who held that consensus can occur in the later period after the existence of disagreement, considered the matter as definitive, but those who did not consider it as such favoured the general meaning in the command for purposes of amputation. The opinion of those, who did not rule for the amputation of the hand of the runaway slave, is not supported by any argument except the analogy that waiving of half the penalty from him causes the entire penalty to be waived, that is, in the case of those penalties that are halved for the slaves, which is a weak argument.

The conditions for stolen property are disputed. The best-known condition among these is the stipulation of the *niṣāb* (the minimum scale). The majority are inclined to stipulate it, except what is related from al-Ḥasan al-Baṣrī, who said that amputation is invoked for small as well as larger amounts due to the general implication of the words of the Exalted, "As to the thief, both male and female, cut off their hands. It is the reward of their own deeds, an exemplary punishment from Allāh. Allāh is Mighty, Wise".[231] Perhaps he also argued on the basis of the tradition of Abū Hurayra, recorded by al-Bukhārī and Muslim, related from the Prophet that he said, "The curse of Allāh is on the thief, he steals a shield (could be an egg) and his hand is cut, he steals a rope and his hand is cut". This was also the opinion of the Khārijites and a group of the *Mutakallimūn.*

Those who upheld the imposition of the *niṣāb* for invoking the liability for amputation and these are the majority, differed extensively over its amount, though the best-known opinions among them are based upon established evidence and these are two. First, the opinion of the jurists of Ḥijāz, Mālik, al-Shāfiʿī and others. Second, the opinion of the jurists of Iraq.

The jurists of Ḥijāz invoked amputation for (property worth) three silver *dirhams* or one-fourth of a gold *dīnār*. They disagreed about the currency with which stolen property is to be evaluated. Mālik, in his well-known opinion, said that such valuation is to be undertaken by means of *dirhams* and not with one-fourth of a gold *dīnār*. This is in case the value of three *dirhams* becomes different from one-quarter of a gold *dīnār*, as, for example, when a quarter of a gold *dīnār*s drops to two and one-half *dirhams*. Al-Shāfiʿī said that the basis for valuation is one-fourth of a gold *dīnār*, which is also the basis for *dirhams* according to him; thus, amputation is not invoked for three *dirhams*, unless they are equivalent to one-fourth *dīnār*. Both *dīnārs* and *dirhams* are considered as independent bases by Mālik. Some jurists of Baghdad have related from him that for purposes of goods he takes into account the prevalent currency of the concerned land; if the prevalent currency is the *dirham*, valuation is in *dirhams*, but if the prevalent currency is the *dīnār*, valuation is by means of one-fourth of a *dīnār*. I believe that there are also those within the school who fix the value of a quarter *dīnār* by means of three *dirhams*. Abū Thawr, al-Awzāʿī and Dāwūd had the same opinion, for purposes of valuation, as that of al-Shāfiᶜī, while Aḥmad adopted Mālik's well-known opinion, that is, valuation with *dirhams*.

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According to the jurists of Iraq the value of the *niṣāb*, because of which amputation becomes obligatory is ten *dirhams* and it does not become obligatory in an amount less than this. One group and among them are Ibn Abī Laylā and Ibn Shubrama said that the hand is not to be amputated for less than five *dirhams*, while it is also said four *dirhams*. ᶜUthmān al-Battī was of the view that it (the amount) is two *dirhams*.

The reliance of the jurists of Ḥijāz is on what has been related by Mālik from Nāfiᶜ from Ibn ᶜUmar "that the Prophet (God's peace and blessings be upon him) ordered amputation for the theft of a shield (*mijann*) valued at three *dirhams*" and on the tradition of ᶜĀʾisha, related as *mawqūf* by Mālik and by al-Bukhārī and Muslim with chains reaching up to the Prophet (God's peace and blessings be upon him), that he said, "The hand is amputated for a quarter of a *dīnār* or more". The reliance of the jurists of Iraq is on the tradition of Ibn ᶜUmar mentioned above, but they said that the value of the shield was ten *dirhams*, a fact reported in some versions of the tradition. In addition, a number of Companions, like Ibn ᶜAbbās and others, those who were of the view that the hand was cut because of a shield, went against Ibn ᶜUmar regarding the value of the shield. Muḥammad ibn Isḥāq has related from Ayyūb ibn Mūsā from ᶜAṭāʾ from Ibn ᶜAbbās, who said that the price of a shield, in the days of the Prophet (God's peace and blessings be upon him), was ten *dirhams*. They said that when a disagreement exists about the price of the shield, it is necessary that the hand should not be amputated except in cases of certainty. This opinion that they expressed would be the best, but for the tradition of ᶜĀʾisha, which was relied upon by al-Shāfiᶜī in this issue fixing the basis as one-quarter of a *dīnār*.

The tradition of Ibn ᶜUmar found support with Mālik from the tradition of ᶜUthmān that he related, which states that amputation was carried out because of a citron valued at three *dirhams*. Al-Shāfiᶜī explains away the tradition of ᶜUthmān on the basis that the exchange value in those days was twelve *dirhams* (to the gold *dīnār*). Amputation because of three *dirhams* seeks to preserve smaller amounts of wealth, while amputation for ten *dirhams* passes over and overlooks trivial amounts attaching importance to the integrity of the limb. A reconciliation between the tradition of Ibn ᶜUmar, that of ᶜĀʾisha and the act of ᶜUthmān is possible through al-Shāfiᶜī's opinion and is not possible through the opinions of others. If reconciliation is better than preference, then al-Shāfiᶜī's opinion is the best.

This is one of the conditions stipulated for amputation. Within it they disagreed about the well-known case, which relates to that of a group of thieves and the amount giving rise to amputation, that is, the *niṣāb* without the share of each amounting to a *niṣāb*—this would happen when they bring out together from the place of safe custody an amount equal to the *niṣāb* at the same time. For example, when they carried out together an amount or a box that was equal to the *niṣāb*. Mālik said that each will be subjected to amputation, which was also the opinion of al-Shāfiʿī, Aḥmad and Abū Thawr. Abū Ḥanīfa said that they are not liable for amputation, unless each one of them took out an amount equal to the *niṣāb*. Those who upheld amputation for all were of the view that the penalty is related to the amount of stolen property, that is, the amount of stolen property giving rise to the liability for amputation because of preservation of property. Those who were of the view that amputation relates to this amount, no less, for the protection of the hand, said that a number of hands cannot be amputated for an amount that the law has determined as the basis of liability for cutting one hand.

They disagreed about the time of valuation of the stolen property. Mālik said that this is the day of theft, while Abū Ḥanīfa said that it is the day judgment is delivered against him for amputation.

The second condition for the obligation of this *ḥadd* is the place of safe custody (*ḥirz*). All the jurists, whose opinions are widely respected and their disciples are agreed upon the stipulation of *ḥirz* for the obligation of amputation, though they did differ about what constitutes *ḥirz* and what does not. It will be fairly accurate to say about the definition of *ḥirz* that it is a place or a condition in which wealth is preserved in a manner that its taking is made difficult, like a covering, or a fence, or what is similar. The act committed by the thief is described as taking of property from the *ḥirz*, as we shall be discussing.

Those who upheld its stipulation include Mālik, Abū Ḥanīfa, al-Shāfiʿī, al-Thawrī and their disciples. The Ẓāhirites said that amputation is invoked for the person who steals the *niṣāb* even if this is not from the *ḥirz*. The legal basis for the majority is the tradition of ʿAmr ibn Shuʿayb from his father from his grandfather from the Prophet (God's peace and blessings be upon him) that he said, "There is no amputation for fruit hanging from the tree nor for that in rope nets, but when gathered at the threshing floor or the place for drying, amputation will be applied for what reaches the price of a shield" and also the *mursal* tradition of Mālik from ʿAbd Allāh ibn ʿAbd al-Raḥmān ibn Abī Ḥusayn al-Makkī conveying the same meaning as the tradition of ʿAmr ibn Shuʿayb. The reliance of the Ẓāhirites is on the general meaning of the words of the Exalted, "As to the thief, both male and female, cut off their hands".[232] They maintained that it is necessary to interpret the verse for its general meaning unless restricted by an established *sunna* and the established

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sunna restricts it only to the extent of the amount for which amputation is to be applied. They rejected the tradition of ʿAmr ibn Shuʿayb on the grounds of the dispute over the soundness of his traditions. Abū ʿUmar ibn ʿAbd al-Barr said that the traditions of ʿAmr ibn Shuʿayb must be acted upon when related by reliable narrators.

Those who deemed *ḥirz* an obligatory stipulation agreed upon certain things and disagreed about others, like the door of a room and the covering of a place of safe custody and their disagreement about utensils, or their agreement about not applying amputation to one stealing from a room not jointly owned for residence, unless he moves it out of the room, or their disagreement about a room with shared residence. Mālik and most of those who stipulated *ḥirz*, said that the thief's hand is cut if he moves the property out of the room, while Abū Yūsuf and Muḥammad said that amputation is not applied unless he moves it out of the house. They also disagreed about the grave, whether it is a *ḥirz*, so that amputation may be applied to the *nabbāsh* (shroud-snatcher). Mālik, al-Shāfiʿī, Aḥmad and a group of jurists said that it constitutes a *ḥirz* and the *nabbāsh* is liable to amputation. This was also the opinion of ʿUmar ibn ʿAbd al-ʿAzīz. Abū Ḥanīfa said that there is no amputation for him. The same was upheld by Sufyān al-Thawrī and is related from Zayd ibn Thābit.

Ḥirz generally, according to Mālik, is each place where the stolen property in question could customarily be placed for safe custody. Thus, the place where animals are tied is a *ḥirz* for him, as are utensils, or the clothes worn by humans. A human being is a *ḥirz* for each thing worn or carried by him. Anything used, by one sleeping, as a pillow is a *ḥirz*, on the basis of what is related in the tradition of Ṣafwān ibn Umayya, which will come up shortly. Whatever is taken in view of a vigilant person amounts to *ikhtilās* (misappropriation). According to Mālik, amputation is not applied to a person who pilfers jewellery worn by a minor, unless there is someone who is guarding him. There is no amputation for one who steals from the Kaʿba, according to Mālik; similarly, in the case of mosques. It is said in the Mālik's school, however, that if the thief steals from these places during the night, his hand is to be cut. The cases, in this topic, pertaining to the question as to what constitutes *ḥirz* and what does not are numerous.

Those who upheld the stipulation of *ḥirz* agreed that any person who can be designated as one removing something from a *ḥirz*, irrespective of his having entered it, becomes liable for amputation. There is disagreement when such designation vacillates, like the disagreement within the school in the case of two thieves, one inside a room and the other outside it, with the one inside moving the property close to a hole in the wall and the other taking it. It is said that the person outside the room, who takes the property, is liable for amputation, while it is said that there is no *ḥadd* for either. It is also maintained that *ḥadd* is applied to the person who moves the property close to the hole. The disagreement in all this refers to the application of the designation of a certain person as the remover from *ḥirz*.

This, then, is the discussion of *ḥirz* and its stipulation for the liability of amputation. The person who throws property out of the *ḥirz*, taking it later, is subjected to amputation. Mālik reserved his view about the person who is arrested after he has thrown the property out of the *ḥirz*, but before he could take it; Ibn al-Qāsim said his hand is to be cut.

56.8.1. Chapter 1: The Categories of Stolen Property

The jurists agreed about the categories of stolen property (that lead to amputation), saying that it is each thing (legally) owned, lacking speech (not human), whose sale and acquisition of compensation, in lieu thereof, is permitted. Amputation becomes obligatory for the theft of such a thing, except for fresh (moist) eatables and things that are essentially *mubāḥ* (free; *res nullius*)—about which they differed. The majority maintained that amputation is invoked for the theft of each thing of value that can be sold and for which compensation can be taken. Abū Ḥanīfa said that there is no amputation for (the theft of) food, nor for things that are essentially *mubāḥ* like game, firewood and grass.

The reliance of the majority is upon the general meaning of the verse imposing amputation and on the general meaning of the traditions laying down the condition of *niṣāb*. The reliance of Abū Ḥanīfa for the prevention of amputation in the case of fresh (moist) food is on the words of the Prophet (God's peace and blessings be upon him), "There is no amputation for (theft of) food or of *kathar* (edible tuber on top of the palm tree)". This tradition was related without qualifications or additions. He also relied on the argument that there exists for the thief a doubt of ownership in things *mubāḥ*. They disagreed about what constitutes *shubha* (doubt) for waiving the *ḥadd*, which is also a condition stipulated for stolen property and relates to three things: genus, quantity and conditions. This issue will be taken up in what follows.

They disagreed within this topic about categories of stolen property like the *muṣḥaf* (whether stealing them leads to amputation). Mālik and al-Shāfiʿī said that the thief's hand is cut off, while Abū Ḥanīfa said it is not; perhaps, this is based on Abū Ḥanīfa's view that its sale is not permitted, or that each person has a right in it in so far as it is not property. They also disagreed within this topic about the person who abducts a minor non-Arab slave, who cannot talk or comprehend speech. The majority said that his hand is to be cut. When the abducted non-Arab slave was old enough to understand, Mālik said that the abductor's hand is to be cut, while Abū Ḥanīfa said it is not. They disagreed about (the abduction of) a minor who is free. According to Mālik, his abductor's hand is to be cut off, but not so according to Abū Ḥanīfa, which is also the opinion of Ibn al-Mājishūn from among the disciples of Mālik.

They agreed, as we have said, that a substantial doubt with respect to ownership has the effect of waiving this *ḥadd*; however, they disagreed about what constitutes doubt sufficient to waive this *ḥadd*. Among the cases is that of the slave pilfering his master's property. The majority of the jurists maintain that his hand is not to be cut off, but Abū Thawr said that it is to be cut and he did not stipulate any conditions for it. The Ẓāhirites said that it is to be cut, unless the master had entrusted the property to him. Mālik stipulated for the servant, in whose case the *ḥadd* is to be waived, that he should be performing services directly for his master personally. Al-Shāfiᶜī stipulated this condition in one opinion, but on another occasion he did not. ᶜUmar, may Allāh be pleased with him, and Ibn Masᶜūd upheld waiver of punishment in this case and none of the Companions opposed them.

Another case is that of one spouse stealing from another. Mālik said that if they reside in separate rooms where their property is stored, then amputation is obligatory for one who stole from the other spouse. Al-Shāfiᶜī said that caution requires relief from amputation due to the doubt that their property is mixed up and also the doubt of joint-ownership, but an opinion similar to that of Mālik is related from him, which was adopted by al-Muzanī. Among the issues is also that of close relatives. Mālik's view in this is that only the father's hand is not to be cut for what he stole from his son, due to the words of the Prophet (God's peace and blessings be upon him), "You and your wealth belong to your father", but all other relatives are liable to amputation. Al-Shāfiᶜī said that all ascendants and descendants—that is, fathers, grandfathers, sons, son's sons—are exempt form the liability of amputation. Abū Ḥanīfa said that all blood relations within the prohibited categories are exempt from liability. Abū Thawr held that each person is liable to amputation except those exempted through consensus. One of the issues is about the person who steals from the common booty or from the *bayt al-māl*. Mālik said his hand is to be cut, but ᶜAbd al-Malik, one of his disciples, said that it is not.

This ends the discussion of the things (stolen, *al-masrūq*) that give rise to liability in this offence.

56.8.2. Chapter 2: Consequential Liability

When the offence is committed in accordance with the description we have given, that is, about the attributes of the thief, of the stolen property and of the act of theft, then, the jurists agree that the consequential liability for the offence is amputation, in so far as it amounts to an offence and when the liability is not for amputation, the obligation is to compensate (the loss caused). They disagreed whether compensation could be combined with amputation. One group said that the thief is liable for compensation as well as amputation, which is the opinion of al-Shāfiʿī, Aḥmad, al-Layth, Abū Thawr and a group of jurists. Another group said that he is not to compensate if the owner cannot find his property among the (recovered) goods. Among those who upheld this opinion are Abū Ḥanīfa, al-Thawrī, Ibn abī Laylā and a group of jurists. Mālik and his disciples made a distinction and said that if the thief is in financial ease he is to pay the value of the stolen property, but if he is in financial straits he is not to pay the price even when his situation improves. Mālik stipulated the continuance of financial ease up to the time of amputation, according to what is related from him by Ibn al-Qāsim.

The reliance of those who combined the two penalties is that there exist two kinds of rights in the offence of theft, the right of Allāh and the right of men, with each right requiring its own liability. Further, if they (the contenders) agreed upon the recovery of the property when it is found in the possession of the thief, then it follows that (in case of its loss) it should become a financial liability due from him on the analogy of all other financial obligations. The reliance of the Kūfīs is upon the tradition of ʿAbd al-Raḥmān ibn ʿAwf that the Messenger of Allāh said, "The thief is not liable for compensation once the *ḥadd* has been applied to him". This tradition is weak according to the traditionists; Abū ʿUmar said that it is *maqṭūʿ*, according to them, but some narrated it with a complete chain and it is recorded by al-Nasāʾī. The Kūfīs say that the operation of two claims through one right is against the principles and they add that amputation is a substitute for compensation. It is for this reason that they maintain that if the thief steals property and is awarded *ḥadd* for it, he is not to be awarded *ḥadd* again if he steals the same property a second time. The distinction drawn by Mālik is based on *istiḥsān*, as a breach from analogy.

The study of amputation relates to the object of amputation and to the case of the thief whose limb to be cut is missing. The object of amputation is the right hand, to be severed from the wrist, by agreement of the jurists. This is upheld by the majority. One group said that only the fingers are to be severed. If a thief, whose right hand has already been amputated for a previous theft, steals again, they disagree, with the jurists of Ḥijāz and Iraq saying that the left foot is to be severed after the right hand. Some of the Ẓāhirites and also some of the *Tābiʿūn*, said that the left hand is to be amputated after the right hand and nothing more is to be amputated after this.

Mālik, al-Shāfiʿī and Abū Ḥanīfa, after their agreement about amputation of the left foot following the right hand, disagreed about the suspension of sentence if he steals a third time. Sufyān and Abū Ḥanīfa said that amputation is suspended for the third theft and the thief is made to compensate the stolen property. Mālik and al-Shāfiᶜī said that if he steals a third time, his left hand is to be severed followed by his right foot for the fourth theft. Both opinions are related from ᶜUmar and Abū Bakr, that is, the opinions of Mālik and Abū Ḥanīfa.

The reliance of those who do not uphold multiple amputations, except for the hands, is upon the words of the Exalted, "As to the thief, both male and female, cut off their hands",[233] the feet being mentioned in the case of brigands only. The reliance of those who uphold the cutting of the foot after the hand is upon the report "that the Prophet (God's peace and blessings be upon him) was brought a slave who had committed theft and he ordered the amputation of his right hand. He was brought a second time and he ordered amputation of his left foot. When brought the third time, he ordered amputation of the left hand and the fourth time the (remaining) foot was amputated". This is related in the tradition of Jābir ibn ᶜAbd Allāh, which states that "he was brought a fifth time and was ordered by the Prophet to be executed". This tradition, however, is of the category of *munkar* (rejected) according to the traditionists and is opposed by the words of the Prophet, "These are abominations for which penalties are prescribed", but he did not mention execution. Reliance is also placed on the tradition of Ibn ᶜAbbās "that the Prophet (God's peace and blessings be upon him) ordered amputation of the foot after the hand". According to Mālik, the thief is subjected to correction the fifth time.

When the object of amputation is missing, due to a reason other than amputation for theft, for example, the hand is paralysed, the view of the school is that amputation is transferred to the other hand, while it is said that it is transferred to the foot.

They disagreed about the location of amputation, with respect to the foot. It is said that it is severed from the joint connecting the foot with the leg; it is also said that the ankles are to be included in amputation, while it is said that they are not; and it is further maintained that severance is from the joint that is in the middle of the foot.

They agreed that it is the right of the owner of stolen property to forgive the thief as long as the matter has not been brought to the notice of the *imām*, because of what has been related from ᶜAmr ibn Shuᶜayb from his father from his grandfather that the Messenger of Allāh (God's peace and blessings be upon him) said, "Pardon the *ḥudud* among yourselves, for when a *ḥadd* is reported to me it becomes obligatory" and his words, "Even if it was Fāṭima, the daughter of Muḥammad, I would have applied the *ḥadd* to her" and also because of what he said to Ṣafwān, "Would that this had taken place before you brought him to me".

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They disagreed when the thief had stolen something that gave rise to the liability of amputation, after having been reported to the *imām*, but the owner of the property had gifted it to him or did so after the complaint and before amputation. Mālik and al-Shāfiʿī said that he is liable for *ḥadd*, as the matter has been reported to the *imām*. Abū Ḥanīfa and a group of jurists said that there is no *ḥadd* for him. The reliance of the majority is upon the tradition of Mālik from Ibn Shihāb from Ṣafwān ibn ʿAbd Allāh ibn Ṣafwān ibn Umayya that it was said to him, "One who has not migrated is at a loss. Ṣafwān ibn Umayya, then, travelled to Madina and slept in a mosque. He had a cloak, which he placed under his head. A thief came and stole this cloak, but Ṣafwān caught him and brought him up to the Messenger of Allāh (God's peace and blessings be upon him). The Messenger of Allāh ordered the amputation of his hand, upon which Ṣafwān said, 'I did not intend this, O Messenger of Allāh and it is donated to him as charity'. The Messenger of Allāh said, 'Would that this had been before you brought him to me'".

56.8.3. Chapter 3: The Proof of Theft

They agreed that theft is proved through two *ʿadl* witnesses and that it is also proved through a confession by a free man. They disagreed about the confession of a slave. The majority of the jurists said that a confession by him against himself renders *ḥadd* obligatory, but does not make him liable for compensation. Zufar said that the confession of a slave against himself is not valid for matters leading to his execution or amputation of his hand, because of his being the property of his master. This was the opinion of Shurayḥ, al-Shāfiʿī, Qatāda and a group of jurists, when the slave retracts his confession due to a doubt pertaining to a period prior to his retraction. If he retracts without the existence of any doubt, there are two opinions about it from Mālik. This is what the jurists of Baghdad have related from the school, but the later jurists go into details that are not useful for the present purpose, but are suitable for the (detailed discussion of) cases within the school.

56.9. THE BOOK OF *ḤIRĀBA* (BRIGANDAGE)

The source for this book are the words of the Exalted, "The only reward of those who make war upon Allāh and His Messenger and strive after corruption in the land will be that they will be killed or crucified, or have their hands and feet on alternate sides cut off, or will be expelled from the land".[234] This is so, as the majority maintain that this verse was revealed in the case of brigands. Some said that it was revealed in the case of persons who became apostates in the period of the Prophet (God's peace and blessings be upon him) and drove the camels away.[235] The Messenger of Allāh (God's peace and blessings be upon him) issued the verdict and their hands and feet were cut (from alternate sides) and their eyes were gouged. The correct view is that it relates to the *muḥāribūn* (brigands), due to the words of the Exalted, "Save those who repent before ye overpower them. For know that Allāh is Forgiving, Merciful", as the inability to overpower is not stipulated for the repentance of the non-believers, which confirms that it pertains to the brigands.

56.9.1. Chapter 1: The Discussion of *Ḥirāba*

They agreed that *ḥirāba* is a show of armed force and the obstruction of the highways outside the city. They disagreed about the brigands inside the city. Mālik said that they are the same inside or outside the city. Al-Shāfiʿī stipulated power (*shawka*), though he did not stipulate numbers. The meaning of *shawka*, according to him, is the strength to overpower, because of which he stipulated remoteness from settlements, as overpowering is usually from outside the settlements. Likewise, al-Shāfiʿī maintained that if (the political) authority weakens and domination by another is found in the city, it amounts to *muḥaraba*. In cases other than this, according to him, it amounts to misappropriation. Abū Ḥanīfa said that *muḥaraba* does not take place within a city.

56.9.2. Chapter 2: The Discussion of the *Muḥārib*

A *muḥārib* is each person whose life is protected before the commission of *ḥirāba*, that is, a Muslim and a *dhimmī*.

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[234] Qurʾān 5:33

[235] The reference is to a group of Bedouin who stayed with the Prophet and then complained of the climate of Medina. He advised them to go to the desert where his own camels were kept, tended by some shepherds. After staying on for some time, during which they ate the meat of camels and drank their milk, thus, becoming quite healthy, they killed the shepherds, drove away the camels and became apostates.

56.9.3. Chapter 3: The Consequential Liability of the *Muḥārib*

They agreed that he is liable for the right of Allāh and the right of human beings. The right of Allāh, they agreed, requires execution, crucifixion, the cutting off of hands and feet from alternate sides and exile as has been ordained by Allāh. They disagreed about these punishments whether there is a choice between them or they are to be applied through a gradation corresponding to the gravity of the offence by the *muḥārib*. Mālik said that if he commits murder, he must be put to death and the *imām* has no option between amputation and exile, but there is an option between his execution and crucifixion. If he has misappropriated property, but has not murdered, there is no discretion about his exile; however, there is discretion regarding execution, crucifixion and amputation from alternate sides. When he obstructs the highways only, the *imām* has the choice between his execution, crucifixion, amputation and exile. The meaning of discretion, according to him, is that the matter depends upon the *ijtihād* of the *imām*. Thus, if the *muḥārib* is one of those who have a doctrine and organization, *ijtihād* would require his execution or crucifixion, as amputation would not do away with his menace. In case he does not have a doctrine, but is strong and powerful, his limbs are to be amputated from alternate sides. If none of these two traits is found in him, the least punishment is adopted, which is lashing and exile.

Al-Shāfiʿī, Abū Ḥanīfa and a group of jurists maintained that these penalties are dependent upon the offences, which lead to the punishment as determined by the *sharʿ*, thus, none of the brigands is to be executed unless he has slain someone, none is to be subjected to amputation unless he has misappropriated property and only those are to be exiled who have neither killed nor misappropriated property. A group of jurists said that, on the other hand, the *imām* has absolute discretion in their affair, irrespective of their having killed or misappropriated property.

The reason for the disagreement is whether the word "or" (*aw*) indicates discretion or the details of gradation in proportion to the gravity of the offence. Mālik interpreted it to mean detailed gradation for some offenders and discretion in the case of others. They disagreed about the meaning of the words "or crucified", with some saying that he is to be crucified till he dies of starvation, while others said that it means he is to be executed and crucified at the same time. Among the latter were those who said that he is to be executed first and then crucified, which is the opinion of Ashhab, but it is said that he is to be crucified first and then put to death on the wooden prop, which is the opinion of Ibn al-Qāsim and Ibn al-Mājishūn. Those who said that he is to executed first and then crucified, maintain that funeral prayers be said for him before crucifixion. Some of those who said that he is to be executed upon the prop, maintained that funeral prayers are not to be said for him as a sign of his rejection, but it is said that they should assemble behind the prop and pray. Saḥnūn maintained that if he is executed upon the prop, he is to be taken down and then prayers are to be said. Is he to be returned to the wooden prop? There are two opinions about this. Abū Ḥanīfa and his disciples maintained that he is not to be left on the prop for more than three days.

The words of the Exalted, "[O]r have their hands and feet on alternate sides cut off", imply that his right hand and left foot should be cut off, but if he repeats the offence, his left hand and right foot are to be cut off. They disagreed when he does not have the right hand. Ibn al-Qāsim said that his left hand and right foot are to be cut off, while Ashhab maintained that his left hand and left foot are to be cut off.

They also disagreed about the words of the Exalted, "[O]r will be expelled from the land". Some said that exile here means imprisonment, while it is said that exile means that he be expelled from one area to another and imprisoned there till such time that his repentance is manifest. This is the opinion of Ibn al-Qāsim related from Mālik. The distance between the two areas, at a minimum, should be one in which prayers are to be shortened while travelling. Both views are related from Mālik, with Abū Ḥanīfa adopting the first one. Ibn al-Mājishūn said that exile is their fleeing from the land of the *imām* before the application of *ḥadd* to them. Exile after capture, however, is not allowed. Al-Shāfiʿī said that exile is not the objective, but if they flee we keep pursuing them in the land; it is said that it is an intended penalty, therefore, they have to be exiled and imprisoned forever. All this is from al-Shāfiʿī. It is also said that the meaning of "expelled from the land", is from the land of Islam to that of the land of war (enemy). The meaning that is manifest indicates that expulsion is their exile from their own area, because of the words of the Exalted, "And if We had decreed for them: Lay down your lives or go forth from your dwellings, but few of them would have done it"[236]—that equate execution and exile, which is a well known form of punishment customarily awarded like stripes and execution. All that has been said about this issue, besides this, is not known either through practise or custom.

56.9.4. Chapter 4: Discharging the Obligation through Repentance

The basis for the question, what are the factors that lead to the waiving of the punishment, is to be found in the words of the Exalted, "Save those who repent before you overpower them".[237] They differed about this on several points. The first is whether *tawba* (repentance) is acceptable. Second, if it is accepted, then, what are the attributes of the *muḥārib* from whom it is accepted? The jurists have two opinions about this. One opinion, which is better known, states that repentance from each offender is acceptable, due to the words of the Exalted, "Save those who repent before you overpower them". The second opinion is that his repentance is not acceptable, which is upheld by those who maintain that the verse was not revealed because of the *muḥāribūn*.

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[236] Qurʾān 4:66

[237] Qurʾān 5:34

They disagreed into three opinions about the description of repentance by virtue of which the *ḥukm* is discharged. First, that *tawba* takes place in two ways. One of these is that he relinquish his activities, even if he does not appear before the *imām*, while the second way is that he cast away his weapons and surrender to the *imām*, which is the opinion of Ibn al-Qāsim. The Second opinion is that he relinquish his activities and come to his place of residence and socialize with his neighbours. If he is brought to the *imām* before his repentance becomes manifest, he will apply the *ḥadd* to him. This is the opinion of Ibn al-Mājishūn. The third opinion maintains that repentance is attained through a recourse to the *imām*. If he relinquishes his activities it will not absolve him from the application of one of the different *aḥkām* to him when he is captured before surrendering to the *imām*. The gist of all this is that repentance is attained if he presents himself before the *imām* prior to his capture; it is said that it is sufficient if only his repentance becomes manifest prior to his arrest; and it is said that it is accomplished by both ways together.

They disagreed about the situation of the *muḥārib* whose repentance is accepted into three opinions also. First, that he must be one who crossed over to the enemy. Second, that he must have a following. Third, that (his repentance is accepted) whatever his situation, irrespective of his having a following or having crossed over to the *dār al-ḥarb*. They disagreed about the *muḥārib* who refuses to surrender and the *imām* offers him asylum on the condition that he crosses back and surrenders. It is said that the *amān* is valid and he is absolved from the *ḥadd* of *ḥirāba*. It is also said that there is no *amān* for him as *amān* may be granted only to the Polytheists. They disagreed into four opinions about the question what is discharged by virtue of the repentance. First, that repentance discharges the *ḥadd* of *ḥirāba* only, but he is liable for all other claims based on the right of Allāh and the rights of human beings. This is Mālik's opinion. The second opinion maintains that repentance discharges the *ḥadd* of *ḥirāba* as well all rights of Allāh, like unlawful intercourse, drinking *khamr* and the liability for amputation due to theft, but he is to settle the financial claims of the people and those arising from murder, unless the heirs of the victim forgive him. Third, that repentance removes all claims related to the right of Allāh and they are liable for killing and financial claims to the extent of whatever resources are found in their possession, but no delayed liability is imposed on them. The fourth opinion is that repentance absolves him from all claims based on the right of Allāh or on the rights of human beings pertaining to wealth or killing, except for the property still existing in their possession.

56.9.5. Chapter 5: The Mode of Proof for this *Ḥadd*

How is this *ḥadd* proved? It is proved through confession and testimony. Mālik accepts the testimony of those plundered against those who plundered them. Al-Shāfiʿī said that the testimony of the troops is admissible against them if they do not claim for themselves or their acquaintances wealth that was misappropriated. According to Mālik, *ḥirāba* is proved through hearsay testimony.

56.9.6. *Section on* Muḥāribūn *with a Cause based on Interpretation*

The antagonist of the *muḥāribūn* who are pursuing a cause based on interpretation is the *imām*. If he takes any one of them captive, he is not to execute him unless the warfare is still continuing. Mālik said that the *imām* has the right to execute him if he fears that not doing so would support his companions against the Muslims. If, however, he is taken captive after the cessation of hostilities, his *ḥukm* is the same as that of an innovator who does not invite others to follow his innovation. It is said that he is asked to repent; if he does so (he is released) otherwise he is executed, while it is said that he is asked to repent and if he refuses he is to be subjected to correction, but is not to be executed.

Most of the innovators are imputed with *kufr*, implicitly. Mālik's opinion differed about attributing *kufr* by implication of the categorical claims. Consequential *takfīr* (means) that the innovators do not make categorical utterances that amount to *kufr*, but make statements which imply disbelief, though they do not believe in such an implication. The *ḥukm* of what is to be done with such people when they are taken captive is that the *ḥadd* of *ḥirāba* is not applied to them if they repent and they are not liable for the wealth that they took, unless it exists in their possession (in the same form), in which case it is returned to the owners.

They disagreed whether they are to be subjected to *qiṣāṣ* for those whom they killed. It is said that they are, which is the opinion of ʿAṭāʾ and Aṣbagh. Muṭarrif and Ibn al-Mājishūn, relating from Mālik, said that they are not, which was also the opinion of the majority, as each person who fights for a cause based on some sort of interpretation is not a disbeliever, the legal basis being the wars of the companions; similarly, an actual disbeliever, for he is one who rejects (a part of the basic creed) without a basis for interpretation.

56.10. Chapter on the *Ḥukm* of the *Murtadd* (Apostate)

An apostate, if taken captive before he declares war, is to be executed by agreement in the case of a man, because of the words of the Prophet (God's peace and blessings be upon him), "Slay those who change their *dīn*". They disagreed about the execution of a woman and whether she is to be required to repent before execution. The majority said that a woman (apostate) is to be executed. Abū Ḥanīfa said that a woman is not to be executed and compared her to an originally non-believing woman. The majority relied upon the general meaning implied (in the tradition). One group held a deviant opinion saying that she is to be executed even if she reverts to Islam.

Asking the apostate to repent was stipulated by Mālik as a condition prior to his execution, on the basis of what is related from ᶜUmar. One group of jurists said that his repentance is not acceptable. If the apostate becomes a *muḥārib* first and then an apostate, he is to be executed because of *ḥirāba* and is not required to repent, whether his *ḥirāba* occurs in the Muslim territory or later when he crosses over to the *dār al-ḥarb*, except when he becomes a Muslim again. When the apostate *muḥārib* converts to Islam after he is captured or before it, they differ about his *ḥukm*. If his *ḥirāba* has occurred in the *dār al-ḥarb*, then, according to Mālik, his situation is like that of any *ḥarbī* who converts to Islam, he is not held liable for what he did during his apostasy. If his *ḥirāba* has occurred in the *dār al-Islām*, then his conversion to Islam absolves him of the liability to the *ḥukm* of *ḥirāba* only and his *ḥukm* is like that of an apostate for the offences committed by him during his apostasy in the *dār al-Islām* prior to conversion to Islam. The disciples of Mālik, however, differed in this with some, who took into account the day of offence, saying that his *ḥukm* is the *ḥukm* of the apostate, while others, who took into account the time of the *ḥukm*, said that his *ḥukm* is like that of a Muslim.

They disagreed within this topic about the *ḥukm* of the magician, with Mālik saying that he is to be executed as a disbeliever, while others said that he is not to be executed. The principle is that he is not to be executed, unless he becomes an apostate.

LVII

THE BOOK OF *AQḌIYA* (JUDGMENTS)

The principles of this book are covered in six chapters. First, the identification of persons whose judgments are permitted. Second, the identification of matters in which judgment is valid. Third, identification of procedures on the basis of which judgment is rendered. Fourth, identification of persons for, or against, whom judgment is rendered. Fifth, the mode of judgment. Sixth, the time of judgment.

57.1. Chapter 1: On the Identification of Persons whose Judgments are Permitted

The study in this chapter relates to those persons whose judgments are permitted, and to the qualifications that enhance their merit. The conditions stipulated for permissibility are that the person be a free, Muslim, major, male, sane, and *ᶜadl*. It is said in the school that *fisq* leads to removal, but his judgments remain valid. They disagreed about his (the *qāḍīʾs*) being one of those qualified for *ijtihād*. Al-Shāfiᶜī said that it is necessary that he be a *mujtahid*. An identical opinion is related, in the school, by ᶜAbd al-Wahhāb. Abū Ḥanīfa said that the judgment of a layman is valid. The Qāḍī (Ibn Rushd) said that this is also apparent from what my grandfather related, may Allāh have mercy on him, in the *Muqaddimāt* about the school, for he deemed the existence of the qualification of *ijtihād* as recommended.

They differed about the condition of being a male. The majority said that it is a condition for the validity of the judgment. Abū Ḥanīfa said that it is permitted for a woman to be a *qāḍī* in cases involving financial claims. Al-Ṭabarī said that it is permitted to a woman to be a judge in all things without any restrictions. ᶜAbd al-Wahhāb said, "I do not know of any dispute among them about the qualification of freedom".[238]

Those who denied the right of a woman to be a judge compared it (the office of the *qāḍī*) to the office of the head of state, and also compared a woman to the slave due the deficiency in her legal capacity. Those who permitted her judgment in cases of financial claims, did so comparing it to the permissibility of her testimony in such claims. Those who considered her judgment as executed in each thing said that the principle is that any person who is able to render judgment among people his decision is valid, except in matters restricted by consensus, like the office of head of state.

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[238] This appears to be a gloss that was incorporated into the text; it relates to material that follows two paragraphs later.

There is no dispute about the stipulation of freedom. There is no disagreement in Mālik's school that hearing, sight, and speech are stipulated for the continuance in office, but are not conditions for the permissibility of appointment. This is so, as there are qualifications of the judge that are stipulated as conditions of permissibility in the school—and if a person lacking them assumes office he is dismissed and all the judgments he rendered are abrogated—while there are others that are conditions for continuing in office, but are not conditions for permissibility—if such a person assumes office, he is removed, but the judgments he rendered are executed, unless these were unjust. In this category, then, they stipulate these three qualifications.

One of the conditions, according to Mālik, is that the judge should be single. Al-Shāfiʿī permits that there be two judges in a city, but he does not permit the stipulation that their judgments be identical. If complete independence is stipulated for each judge, it is viewed from two aspects: permissibility and prohibition. He (al-Shāfiʿī) said that if a dispute occurs between two litigants in the jurisdiction in the choice of the judge, they draw lots.

The merits of the judicial office are many and scholars have mentioned these in their books. They disagreed about an illiterate person, however, whether he can be a *qāḍī*. Its permissibility is more likely because of the Prophet (God's peace and blessings be upon him) being an *ummī*. One group of jurists said that it is not permitted, and from al-Shāfiʿī both views are related, as it is probable that the Prophet's case was specific to him and was related to the miraculous nature of his office. There is no disagreement about the head of state rendering judgments; his delegation of authority to the *qāḍī* is a condition for the validity of the judgments of the latter, and I know of no disagreement about this.

They disagreed about a person selected by the parties to the dispute, a person who has not been appointed to judicial office (an arbitrator). Mālik said that this is permitted, while al-Shāfiʿī said, in one of his opinions, that it is not permitted. Abū Ḥanīfa said that it is permitted if his verdict is in conformity with the rulings of the city judge.

57.2. Chapter 2: The Identification of Matters in which Judgment is Valid

Regarding matters in which he renders judgment, the jurists agreed that the *qāḍī* adjudicates each right, whether it pertains to the right of Allāh or to the right of human beings. He is the representative of the head of state for this purpose, registering marriages and appointing executors. About the question whether he appoints the *imāms* in the *jāmiʿa* (congregational) mosques there is disagreement. Does he appoint his successors in case of absence caused by illness or a journey? There is disagreement over this too, unless he has been authorized to do so. He does not oversee public life nor the other various offices, but he supervises interdiction of the prodigal, according to those who interdict them.

One of the issues in this topic is whether a judge can grant relief to a petitioner, on the strength of the evidence, when the thing (such relief) is not permissible in reality. They agreed that the judgment of the *ḥākim* based on the apparent evidence cannot make lawful a prohibited thing or prohibit something that is lawful, this applies particularly to financial matters, because of the words of the Prophet (God's peace and blessings be upon him), "I am a human being like you; when you bring your disputes to me it is possible that one of you may present a more persuasive proof than the other and I would decide for him on the basis of what I hear from him. If I have granted a right to a person that actually belongs to his brother, he should not take anything from it, for surely I have carved out for him a share in the Fire".

They disagreed about the dissolution of the contract of marriage or its valid conclusion on the basis of the *prima facie* evidence—which the judge considers correct but is not in fact so, for the prohibited does not become lawful, nor the lawful prohibited, on the basis of the judgment of the judge, without actually being so—whether it is to be considered lawful. The majority said that property and sex are the same for this purpose, the ruling of the judge does not make the lawful among these prohibited or the prohibited lawful. For example, if two perjuring witnesses were to testify about strangers, a man and a woman, that she is the man's wife, when she is actually not, the majority said that she does not become his lawful wife, even if the judgment of the judge has declared her to be so. Abū Ḥanīfa and the majority of his disciples said that she is his lawful wife.

The reliance of the majority is on the generality of the preceding tradition. The impression of the Ḥanafites is that (in a similar situation) the *ḥukm* of *liʿān* is established by the law, though it is known that one of the parties is lying, and *liʿān* results in separation prohibiting the wife for her accusing husband, making her lawful for someone else (who may marry her). If he (the husband) is lying, she has become prohibited for him only by the judgment of the *hākim*. Similar is the case when she is lying (that is, the prohibition is caused by the *hākim*), for her unlawful intercourse does not give rise (by itself) to dissolution according to the opinion of a majority of the jurists. The majority of the jurists, however, maintain that dissolution in this case occurs as a penalty for the knowledge that one of them is a liar.

57.3. Chapter 3: The Identification of the Basis for the Judgment

A judgment may be based on (one or more of) four things: testimony, oath, refusal to take an oath and confession. It may also be based on a combination of these things. In this chapter, therefore, there are four sections.

57.3.1. *Section 1: Testimony* (Shahāda)

The discussion of witnesses relates to three things: qualifications, gender and number. The number of qualifications considered for the acceptance of a witness are five: *ʿadāla*, puberty, Islam, freedom and the absence of an accusation. Some of these are agreed upon, while others are disputed. The Muslim jurists agreed about *ʿadāla* and its stipulation for the acceptance of testimony, because of the words of the Exalted, "[O]f such as ye approve as witnesses",[239] and His words, "[A]nd call to witness two just men among you".[240]

They disagreed as to what was meant by *ʿadāla*. The majority maintained that it was a qualification in addition to Islam, which requires that the witness abide by the prescribed obligations as well as recommendations, avoiding prohibited and disapproved acts. Abū Ḥanīfa said that apparent adherence to Islam is sufficient for *ʿadāla* as long as no vile act is known of the witness.

The reason for disagreement, as we have noted, is that there is vacillation about the meaning of the term *ʿadāla* as against *fisq*, as they agreed that the testimony of a *fāsiq* is not acceptable due to the words of the Exalted, "O ye who believe! If an evil-liver bring you tidings, verify it, lest ye smite some folk in ignorance and afterward repent of what ye did".[241] They did not disagree, however, that a *fāsiq*'s testimony is acceptable after he is known to have repented, except the person whose *fisq* arises from the offence of *qadhf*, as Abū Ḥanīfa says that his testimony is not acceptable even if he repents, while the majority say it is. The reason for the disagreement is whether the exception—in the words of the Exalted, "And those who accuse honourable women but bring not four witnesses, scourge them (with) eighty stripes and never (afterward) accept their testimony—They indeed are the evildoers—Save those who afterward repent and make amends. (For such) lo! Allāh is Forgiving, Merciful"[242]—is effective for the nearest-mentioned category or for the whole (preceding) sentence, except what is restricted by consensus, that is, repentance does not discharge his liability for *ḥadd*. This discussion has preceded.

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[239] Qurʾān 2 : 282
[240] Qurʾān 2 : 282
[241] Qurʾān 2 : 282

They agreed that puberty is stipulated on the basis of *ʿadāla*. They disagreed about the testimony of minors against each other in bodily injuries and homicide. The majority of the jurists of the regions rejected it on the basis of what we have said about the occurrence of consensus that a condition for testimony is *ʿadāla*, and the condition for *ʿadāla* is puberty. Therefore, according to Mālik, it (the testimony of minors) does not, in fact, amount to testimony, but is circumstantial evidence. It is for this reason that Mālik stipulates that they testify together so that they do not cower. The disciples of Mālik differed whether their testimony is admissible when there is a major among them.

They did not differ about the stipulation of the prescribed number of witnesses who render testimony, but they did differ whether the stipulation of being male is to be made. They also differed whether their testimony is permitted for purposes of a homicide committed among them. Mālik has no reliance in this except that it is related from Ibn al-Zubayr. Al-Shāfiʿī said that if the contender gives an argument based on this, it is to be said to him that Ibn ʿAbbās had rejected it and the Qurʾān indicates its invalidity. The same opinion as Mālik's was expressed by Ibn Abī Laylā and by a group of the *Tābiʿūn*. Mālik's acceptance of such testimony belongs to the category of permissions based on the analogy of *maṣlaḥa*.

They agreed about Islam that it is a condition for the acceptance of testimony, and that the testimony of a disbeliever is not permitted, except for their disagreement regarding its permissibility in bequests made on a journey, because of the words of the Exalted, "O ye who believe! Let there be witnesses between you when death draweth nigh unto one of you, at the time of bequest—two witnesses, just men from among you, or two who are not from among you".[243] Abū Ḥanīfa said that it is permitted upon the conditions mentioned by Allāh, while Mālik and al-Shāfiʿī said that it is not permitted, and considered the verse as abrogated.

The majority of the jurists of the regions inclined toward stipulating freedom for the acceptance of testimony, while the Ẓāhirites said that the testimony of a slave is valid as the fundamental condition is *ʿadāla*; and bondage is not effective in the rejection of testimony, unless this can be established from the Book of Allāh or from *sunna* or consensus. It was as if the majority maintained that bondage was a relic of the times of disbelief and, therefore, must be effective in the rejection of testimony.

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[242] Qurʾān 24 : 4,5

[243] Qurʾān 5 : 106. Pickthall's translation has been changed slightly where he uses the words "another tribe" for *min ghayrikum*.

About the impeachment of a witness on the basis of affection for the litigant, the jurists were unanimous that it was effective in the rejection of testimony. They disagreed about the rejection of the testimony of an *ʿadl* witness through impeachment on the basis of feelings of love or hate, which causes worldly enmity. The jurists of the regions upheld its rejection, but they agreed about the points of operation of impeachment and points where it is invalidated, and on other points they disagreed with some accepting its operation and others rejecting it. The case about which they agreed is the testimony of a father in favour of his son or of the son in favour of his father; similarly, in the case of a mother for her son and that of the son for his mother. The point where they disagreed about the effectiveness of impeachment is that of spouses rendering testimony one for the other, with Mālik and Abū Ḥanīfa rejecting it and al-Shāfiʿī, Abū Thawr and al-Ḥasan accepting it. Ibn Abī Laylā said that the testimony of a husband for his wife is acceptable, but not that of the wife for her husband, which was also the opinion of al-Nakhaʿī. The case in which they agreed about the ineffectiveness of impeachment is the testimony of a brother, unless he is casting suspicion away from himself, according to Mālik, and as long as he is not completely dependent on his brother. The exception is al-Awzāʿī for he said it is not permitted. Within this topic is their disagreement about the acceptance of the testimony of an enemy against his enemy. Mālik and al-Shāfiʿī said that it is not acceptable while Abū Ḥanīfa said that it is.

The reliance of the majority, in the rejection of testimony on the basis of impeachment, is upon what has been related from the Prophet (God's peace and blessings be upon him) that he said, "The testimony of a rival or of a suspect person is not acceptable", and also upon what has been recorded by Abū Dāwūd of the words of the Prophet (God's peace and blessings be upon him), "The testimony of a Bedouin is not acceptable against a town-dweller", because of the rare occasions that a Bedouin can witness what happens in a city. These are their proofs by way of transmission. A rational argument relates to impeachment itself, and the majority agreed about its effectiveness in the *aḥkām sharʿiyya*, for example, a murderer will not inherit from the victim and that the wife divorced thrice during his death-illness will inherit, though it is disputed. The other group, who are Shurayḥ, Abū Thawr, and Dāwūd, maintained that even the testimony of a father favouring his son is acceptable, when he is *ʿadl*, as is that of others beside him. Their reliance is upon the words of the Exalted, "O ye who believe! Be staunch in justice, witnesses for Allāh, even though it be against yourselves or (your) parents or (your) kindred".[244] A command for a thing, they say, implies its validity, except what has been restricted by consensus regarding the testimony of an individual on his own behalf. By way of a rational argument, they are likely to say that the rejection of testimony as a whole is on the point of suspicion of falsehood, which the law has made operative in the case of the *fāsiq* and has suspended in the case of an *ʿadl* witness, and *ʿadāla* cannot mingle with suspicion.

About the discussion of number and gender, the Muslims agreed that the offence of *zinā* cannot be proved with less that four male *ʿadl* witnesses. They agreed that all claims, with the exception of *zinā*, are proved by two male *ʿadl* witnesses. Al-Ḥasan al-Baṣrī disagreed saying that no right is to be acknowledged with less than four witnesses on the analogy of *rajm*, but this is weak because of the words of the Exalted, "And call to witness, from among your men, two witnesses".[245] All are agreed on the point that a judgment becomes obligatory with testimony of two witnesses without the oath of the plaintiff, except that Ibn Abī Laylā said he must take an oath (as well). They agreed that financial claims are established through one male *ʿadl* witness and two female witnesses, because of the words of the Exalted, "And if two men be not (at hand) then a man and two women, of such as ye approve as witnesses".

They disagreed about their testimony for purposes of *ḥudūd*. The opinion that is adopted by the majority is that the testimony of women is not admissible in *ḥudūd*, with men or independently. The Ẓāhirites said that it is admissible, when accompanied by the testimony of a man and if there is more than one woman, for all kinds of litigation on the basis of the apparent meaning of the verse. Abū Ḥanīfa said that their testimony is accepted in financial claims and in matters other than the *ḥudūd* related to the personal law, like divorce, retraction of divorce, marriage, and emancipation. It is not accepted, according to Mālik, for any issue affecting the person. The disciples of Mālik differed about the acceptance of their testimony in financial claims related to the law of persons, like agencies and bequests that are related to financial matters only. Mālik, Ibn al-Qāsim and Ibn Wahb said that in these matters a male and two female witnesses are acceptable, while Ashhab and Ibn al-Mājishūn said that only two men can testify in such matters.

The independent testimony of women, that is, women unaccompanied by male witnesses, is acceptable according to the majority in matters of personal law that are usually not accessible to men, like birth, consummation, and the defects of women. There is no dispute about any of these, except in suckling, about which Abū Ḥanīfa said that the testimony of women alone is not acceptable unless accompanied by that of a man, for according to him it is a matter of non-financial human rights that is accessible to women as well as men. Those who permitted the independent testimony of women (in these matters) differed about the number of women stipulated. Mālik said that two women are sufficient; it is said that this is so after the matter has been made public, and it is said that it may be without making it public. Al-Shāfiʿī said that no less than four are sufficient for this purpose, as Allāh, the Mighty and Powerful, has declared two women as equivalent to one male witness; he (al-Shāfiʿī) also stipulated rendering of testimony in pairs. One group of jurists said that at least three women is a number considered sufficient, which is a meaningless opinion.

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[244] Qurʾān 4 : 135

[245] Qurʾān 2 : 282

Abū Ḥanīfa permitted the testimony of women (about women) for the area that is between the navel and the knees, and I think that the Ẓāhirites, or at least some of them, do not permit the independent testimony of women in any thing just as they allow it with men in everything, which seems to be the case. They disagreed over the testimony of a single woman about suckling, because of the words of the Prophet (God's peace and blessings be upon him) regarding the single woman, who rendered testimony about suckling, "How is that when she has nursed both of you". The apparent meaning here indicates rejection, therefore, Mālik's opinion was firm about it that it is disapproved.

57.3.2. *Section 2: Oaths* (Aymān)

They agreed about oath that the claim against the defendant is dismissed because of it, when the plaintiff does not have evidence. They disagreed whether the claim of the plaintiff can be established through it. Mālik said that the right of the plaintiff in what was denied by the defendant is established, and the rights established against him are extinguished if claimed by a person against whom their cancellation stands proved, in a case where the plaintiff has a stronger cause of action a *prima facie* chance of success. Other jurists said that a claim by the plaintiff cannot succeed on the basis of an oath, whether it is for the denial of a right established against him or for the securing of a right that is denied to him by the defendant.

The reason for their disagreement is the vacillation about the meaning of the words of the Prophet (God's peace and blessings be upon him)—"Evidence (testimony) is to be produced by the plaintiff and the (defendant) one who denies is to take the oath"—whether they are common for all defendants and plaintiffs, or whether the plaintiff is always required to produce testimony and the defendant always to take the oath, as the plaintiff usually has a weaker *prima facie* case than the defendant. Those who said that this *ḥukm* is general for all defendants and plaintiffs, and that the general meaning is not restricted, said that a claim cannot be established with an oath, nor can an established claim be annulled through it. Those who said that the defendant alone has been given this *ḥukm* on the basis that he has a stronger *prima facie* case, said that if there appears a case in which the position of the plaintiff, on the face of it, is stronger, his statement would be accepted. These jurists argued on the basis of the cases over which the majority have expressed agreement that the acceptable statement is that of the plaintiff, along with his oath. For example, in the plaintiff's claim that a deposit entrusted to him was destroyed, and in other similar cases, his claim is accepted with an oath. These jurists may say that the principle is as we have stated it, except what is restricted by agreement.

All of them are in agreement that the oath refuting a claim or establishing it, is an oath upon the name of Allāh, and that there is no god but He. The opinions of the jurists of the regions are similar in its description. According to Mālik it is, "By Allāh, The One beside Whom there is no god", without further additions. Al-Shāfiʿī adds to this, "He Who knows what is hidden, just as He knows what is declared".

Whether it is to be enhanced in solemnity by undertaking it in a special place where it is sworn, they disagreed about this. Mālik held that it is enhanced, but it relates to a determined amount. Al-Shāfiʿī had the same view, but they differed about the amount. Mālik said that if he (the plaintiff) makes a claim against him for three *dirhams* or more, the swearing of the oath has to be in the congregational mosque. If it is the Prophet's Mosque (in Medina), it is necessary that he swear it after mounting the pulpit, but when it is another mosque there are two narrations from him about it: first, wherever it may take place; second, it is to be (sworn) by the pulpit. It is related from him by Ibn al-Qāsim that the defendant swears the oath about important claims in any congregational mosque, and he did not determine a spot for this. Al-Shāfiʿī said that he is to swear the oath in Medina by the pulpit, but in Mecca he swears it between the corner of the House and the station (*maqām*) of Abraham; similarly, he is to swear it by the pulpit, according to him, in other towns. The minimum scale (*niṣāb*) for this purpose, according to him, is twenty *dīnārs*. Dāwūd said that he swears by the pulpit for all small and large amounts. Abū Ḥanīfa said that the solemnity of an oath is not to be enhanced with the location.

The reason for disagreement is whether the solemnity of swearing an oath at the pulpit of the Prophet's Mosque (in the tradition) implies an obligation of swearing at the pulpit. Those who said that it does imply an obligation said that if this was not the case the enhancement of solemnity would have no meaning. Those who attributed to the enhancement of solemnity a meaning other than the obligation of taking the oath at the pulpit said that it is not obligatory to swear at the pulpit. The tradition laid down about such enhancement is that of Jābir ibn ʿAbd Allāh al-Anṣārī that the Messenger of Allāh said, "One who swears falsely at my pulpit prepares a place for himself in the Fire". They also argued on the basis of judicial precedent (*ʿamal*) saying that it was the practice of the Caliphs. Al-Shāfiʿī said that judicial practice, about it, did not cease in Medina and Mecca. They said that if enhancement had not implied the obligation of swearing the oath at the place of enhancement there would have been no use for it, except the avoidance of an oath at that spot. They (these jurists) said that if the ordainment of enhancement for the oath in the words of the Prophet (God's peace and blessings be upon him), "One who demolishes (or takes away) the right of a Muslim with his oath, Allāh will prohibit *janna* for him and make the Fire obligatory for him", makes it obligatory to render judgment on the basis of an oath, then the case of enhancement laid down in the case of location must be similar. The other group said that the enhancement of solemnity of the oath does not imply the obligation of rendering judgment on the basis of an oath. And if enhancement of the oath does not imply the rendering of the judgment on the basis of the oath, enhancement of location does not imply the undertaking of the oath in a special place. There is no consensus of the Companions supporting it. On the other hand, disagreement is implied in it through the case concerning Zayd ibn Thābit. The oath was enhanced for solemnity through location, by Mālik, in the case of *qasāma* and *liʿān*, so also by the prescription of time, for he said that the oath of *liʿān* is to be sworn after the afternoon prayer, on the basis of reports indicating enhancement when it is sworn after the afternoon prayer.

They disagreed about a judgment based upon oath along with a supporting witness. Mālik, al-Shāfiʿī, Aḥmad, Dāwūd, Abū Thawr, the seven jurists of Medina and a group said that a judgment may be rendered on the basis of an oath and a supporting witness in cases of financial claims. Abū Ḥanīfa, al-Thawrī, al-Awzāʿī and the majority of the jurists of Iraq said that no judgment can be based upon an oath and a supporting witness. This was also the opinion of al-Layth from among the disciples of Mālik. The reason for disagreement in this issue is based upon the conflict of texts. Those who support it argue on the basis of a number of traditions, which include the tradition of Ibn ʿAbbās, the tradition of Abū Hurayra, the tradition of Zayd ibn Thābit and the tradition of Jābir. The tradition related from Ibn ʿAbbās which reads, "The Messenger of Allāh rendered verdicts on the basis of an oath and a witness", is recorded by Muslim, but has not been recorded by al-Bukhārī. Mālik relied for this purpose upon his *mursal* report from Jaʿfar ibn Muḥammad from his father "that the Messenger of Allāh rendered judgments based on an oath and a witness", as acting upon *mursal* traditions is obligatory according to him.

The text opposing these comprises the words of the Exalted, "And if two men be not (at hand) then a man and two women, of such as ye approve as witnesses".[246] They said that this imposes a limitation, thus, any addition to it would amount to abrogation, and the Qurʾān cannot be abrogated by a *sunna* that is not related by countless number of Companions (*mutawātir*). For the contenders, this does not amount to abrogation, but is an addition that does not alter the *ḥukm*. From the *sunna* they seek support from what has been recorded by al-Bukhārī and Muslim from Ashʿat ibn Qays, who said, "There was between me and a man a dispute over something. We took up the matter with the Prophet (God's peace and blessings be upon him), who said, 'Your two witnesses or his oath'. I said, 'Then let him swear, I do not mind'. The Prophet (God's peace and blessings be upon him) said, 'One who swears an oath devouring thereby the wealth of a Muslim is a perjurer, he will be meeting Allāh when He is angry with him' ". They said that this is the imposition of a limitation from the Prophet (God's peace and blessings be upon him) and is a rejection of the evidence adduced by each litigant, and the Prophet (God's peace and blessings be upon him) had to exhaust all legitimate forms of evidence. Those who uphold (a judgment based upon) an oath and a supporting witness abide by their principle that an oath is a form of evidence permitted to the litigant with a *prima facie* stronger case, and in this case the proof of the plaintiff is strengthened further through a witness as it is strengthened in the case of *qasāma*.

These jurists disagreed about the rendering of judgment on the basis of an oath and two witnesses who are women. Mālik said that it is permitted as two women have been made to stand in the place of one man. Al-Shāfiʿī said that it is not permitted as a woman can be a substitute with one male witness, not alone nor with another woman. Is judgment to be rendered on the basis of an oath in *ḥudūd* that are related to the rights of human beings, like *qadhf* and bodily injuries? There are two opinions about it in the school (of Mālik).

57.3.3. *Section 3: Defendant's Refusal to take the Oath* (Nukūl)

The jurists also disagreed about establishing a right against the defendant by his refusal to take the oath. Mālik, al-Shāfiʿī, the jurists of Ḥijāz and a group of the Iraqi jurists said that if the defendant refuses to take the oath no right is established for the plaintiff by the refusal itself, except when the plaintiff takes an oath or he has one witness. Abū Ḥanīfa, his disciples and the majority of the Kūfīs said that he is to render judgment for the plaintiff against the defendant on the basis of the refusal itself, in cases of financial claims, after asking him thrice to take the oath.

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[246] Qurʾān 2 : 282

The rebuttal of an oath with an oath (reversal), according to Mālik, may take place in cases in which the testimony of a male and two female witnesses is admissible, or in which testimony of a male witness accompanied by plaintiff's oath is admissible. According to al-Shāfiʿī, such rebuttal is permissible in all cases where an oath is acceptable. Ibn Abī Laylā said that the oath is to be offered to the plaintiff in cases of accusation, but not otherwise. There are two opinions from Mālik in the case of reversal due to accusation.

The reliance of those who upheld the reversal of an oath is what is related by Mālik "that the Messenger of Allāh (God's peace and blessings be upon him) offered the oath of rebuttal to the Jews in *qasāma* after commencing with the Anṣār". Among Mālik's proofs is the argument that rights are established in two ways, either through an oath with an accompanying witness, or through *nukūl* and a witness or plaintiff's oath. The principle, according to him, is to accept evidence in pairs. According to al-Shāfiʿī, the judge is not to render judgment on the basis of a witness and refusal.

The reliance of those who maintained the rendering of judgment on the basis of *nukūl* is on the argument that as testimony is for the establishment of the claim and oath is for its dismissal, it is necessary that the claim be established against him because of his refusal to take the oath. They said that its transference from the defendant to the plaintiff is against the texts, as the texts explicitly state that an oath is one of the means (available) for the defendant. These are the fundamentals of the different kinds of evidence on the basis of which the judge renders his judgment.

One of the things about which they agreed under this topic is the judgment of a *qāḍī* on the basis of an epistle received from of another *qāḍī*. According to the majority, this is possible with supporting testimony, I mean, when the *qāḍī*, before whom the case has been proved through two *ʿadl* witnesses, testifies that the case stands proved, that is, this should be recorded in the epistle that he sends to the other *qāḍī*, with two witnesses testifying to the fact that it is the epistle of the *qāḍī*, and that he records their testimony for its proof. It is also said that it is sufficient if it is recorded in the *qāḍī*'s own writing, and this was the earlier practice. Mālik, al-Shāfiʿī and Abū Ḥanīfa disagreed when he records their testimony about the epistle, but does not read it out to them. Mālik said that it is permitted, while al-Shāfiʿī and Abū Ḥanīfa said that it is not permitted, and the testimony is not valid.

They disagreed about the string and the bag in the case of found wealth, whether he renders judgment based on them without testimony, or whether testimony is necessary. Mālik said that he may render judgment based on them, while al-Shāfiʿī said that there must be two witnesses, which was also the opinion of Abū Ḥanīfa. Mālik's opinion in this depicts greater conformity with the traditions, while the opinion of the other jurists agrees more with the derived principles.

An issue about which they differed is the judgment of the judge based upon his own knowledge. The jurists agreed that the *qāḍī* may decide matters of *ʿadāla* and the discrediting of witnesses on the basis of his own knowledge, but if witnesses render testimony contrary to his own knowledge, he is to abstain from rendering judgment on the basis of his own knowledge. They also agreed that he may decide on the basis of his own knowledge about the confession or denial of the litigant, except for Mālik, who said that he must have two witnesses for the confessions and denials of litigants.

They agreed that he decides on the basis of his own knowledge to prefer one of the proofs on a point of law adduced by the parties when these are not conflicting. They disagreed when the proofs on the issue were in conflict. One group of jurists said that his judgment is not to be overturned if it does not violate a point of consensus (*ijmāʿ*). Another group of jurists said that if it is a deviant opinion (it is to be overturned). A third group of jurists said that his decision is overturned when it is based upon analogy and there is a text from the Book or *sunna* opposing analogy, which is more equitable, except when the analogy is supported by principles, while texts from the Book that are liable to interpretation and the (opposing) *sunna* is not *mutawātir*. This is the interpretation that must be assigned to the opinions of those jurists who prefer analogy in some cases over traditions, like what is attributed to Abū Ḥanīfa by agreement and to Mālik with dispute.

They disagreed whether he issues a decision based upon his own knowledge for someone without there being any testimony or confession, or that he is not to render judgment without evidence or a confession. Mālik and most of his disciples said that he does not decide except on the basis of testimony or confession, which was also the opinion of Aḥmad and Shurayh. Al-Shāfiʿī the Kūfī, Abū Thawr and a group of jurists said that the *qāḍī* has the right to decide on the basis of his own knowledge. For each group there are precedents among the verdicts of the Companions and the *Tābiʿūn*, and each relied on the texts and on rational arguments.

The reliance of the group of jurists who disallowed this includes the tradition of Maʿmar from al-Zuhrī from ʿUrwa from ʿĀʾisha "that the Prophet (God's peace and blessings be upon him) sent Abū Jahm for the collection of *ṣadaqa*, and there was a scuffle about the obligation with a man that led to injuries. They came to the Prophet (God's peace and blessings be upon him) and informed him about it, so he awarded them *arsh* (estimated compensation). The Prophet (God's peace and blessings be upon him) then said to them, 'I wish to address the people and inform them about this that you have agreed. Have you agreed?' They said, 'Yes'. The Messenger of Allāh (God's peace and blessings be upon him) mounted the pulpit and addressed the people mentioning the incident. He then said to them, 'Are you satisfied?' They said, 'No!' The *Muhājirūn* were distressed because of them and the Messenger of Allāh (God's peace and blessings be upon him) came down and granted them the compensation, mounted the pulpit and started addressing again. He said, 'Are you satisfied?' They said, 'Yes' ". This makes it evident that the Prophet did not decide on the basis of his own knowledge. As a rational argument they said that it gives rise to an accusation against the *qāḍī*, and they agreed that an accusation has a legal force in law. The example is that the murderer does not inherit from the person whom he killed, according to the majority. Another example is that the testimony of a father for his son is rejected. There are other examples too that are upheld by the majority.

The reliance of those who permitted it with respect to transmission is the tradition of ʿĀʾisha in the incident of Hind, daughter of ʿUtba ibn Rabīʿa, the wife of Abū Sufyān ibn Ḥarb, when the Prophet (God's peace and blessings be upon him) said to her, upon her complaint against Abū Sufyān, "Take what is customarily sufficient for you and your children", without even listening to the argument of the other party. They advance a rational argument saying that when he can render judgment on the basis of the testimony of a witness about whom there can be a doubt in his mind, it is appropriate that he render judgment on the basis of his conviction.

Abū Ḥanīfa and his disciples restricted what the *qāḍī* decides on the basis of his own knowledge, saying that he is not to render judgment on the basis of his own knowledge in the *ḥudūd*, but he can do so in matters other than these. Abū Ḥanīfa further restricted the knowledge on the basis of which he decides, saying that he is to decide on the basis of knowledge that is acquired during the judicial proceedings, but not on the basis of knowledge that was acquired prior to that. It is related from ʿUmar that he ruled on the basis of his own knowledge against Abū Sufyān for a man from Banū Makhzūm. Some of the disciples of Mālik said that he decides on the basis of knowledge acquired during a judicial session, that is, on the basis of what he heard during the judicial session even if it did not amount to testimony. This is the opinion of the majority as we have said. The opinion of al-Mughīra is in conformity with the principles, as the principle in this *sharīʿa* is that he is not to render judgment, except on the basis of evidence, even if the conviction attained through it (his own knowledge) is stronger than the conviction about the veracity of the witness.

57.3.4. *Section 4: Confession/Acknowledgement* (Iqrār)

When a confession is explicit, there is no disagreement about the obligation of judgment based upon it. The examination of this topic relates, however, to the person whose confession is valid. When the confession is ambivalent, there is no disagreement about it(s rejection). The discussion of the person whose confession is valid has preceded.

The discussion about the effective number of confessions has preceded in the section on *ḥudūd*. There is no disagreement among them that a single acknowledgement is operative in financial claims. In the issues related to it, about which they disagreed, the controversy centres around the interpretation of words, and if you like to focus on it then have recourse to the Book of Cases (*furūᶜ*).

57.4. Chapter 4: The Persons for Whom He Can Render Judgment

Against whom does he render judgment, and for whom? The jurists agreed that he renders judgment for a person in whose case no suspicion can arise. They disagreed about the person whose case will give rise to suspicion. Mālik said that his judgment is not valid for a person in whose case his testimony would not be admissible. A group of jurists said that it is permitted as judgment is based on means that are evident, but testimony is not.

Against whom can he render render judgment? They agreed that he can render judgment against a Muslim who is present, but they differed about one who is absent and also about the People of the Book. About the person who is absent, Mālik and al-Shāfiᶜī said that he can render judgment against a person who has been absent for a long time. Abū Ḥanīfa said that he does not render judgment against an absent person at all. This was also the opinion of Ibn al-Mājishūn. It is sometimes related from Mālik that he does not render judgment about property that involves third-party rights.

The reliance of those who uphold his judgment (in the case of absent parties) is upon the tradition about Hind that has preceded, but there is no persuasive force in it as he was not deciding a case of an absent party. The reliance of those who do not uphold his judgment in such a case is upon the words of the Prophet (God's peace and blessings be upon him), "I decide for him in accordance with what I hear", and also what has been related by Abū Dāwūd and others from ᶜAlī that the Prophet (God's peace and blessings be upon him) said to him when he sent him to Yemen, "Do not decide in favour of one of the parties till you hear out the other".

There are three opinions about the judgment against *dhimmī*s. First, that he may judge between them if they bring up the matter to him seeking the same *ḥukm* as that for the Muslims. This is Abū Ḥanīfa's opinion. Second, that he has a choice, which is Mālik's opinion, with al-Shāfiʿī holding both opinions. Third that it is obligatory upon the judge to adjudicate their affair even if they do not take up the matter with him. The reliance of those who stipulate their recourse to the judge is upon the words of the Exalted, "If then they have recourse unto thee (Muḥammad) judge between them or disclaim jurisdiction".[247] Those who upheld an option, also sought support from this. Those who made it obligatory relied upon the words of the Exalted, "So judge between them by that which Allāh hath revealed",[248] and maintained that this verse has abrogated the verse ordaining an option. Those who upheld the obligation of the judgment even if they do not take up the matter with him relied upon their consensus that if a *dhimmī* commits theft his hand is to be amputated.

57.5. Chapter 5: The Method of Rendering Judgment

They agreed unanimously about how the *qāḍī* renders judgment, saying that it is obligatory upon him to maintain exact equality between the two parties during the judicial session, and that he should not hear one of them in the absence of the other. He should commence with the plaintiff and ask him to produce testimony if the defendant denies the claim. If he does not have any evidence (testimony) and the matter relates to a financial claim, an oath becomes obligatory upon the defendant by agreement. If the case relates to divorce, or marriage, or homicide, the oath becomes obligatory upon the defendant, according to al-Shāfiʿī, by the mere filing of the claim. Mālik said that it does not become obligatory unless it is accompanied by a male witness. If the matter relates to a financial claim, does the defendant take an oath about it by virtue of the claim itself or he delays the oath till the plaintiff proves the mingling of rights? They disagreed about this, with the majority of the jurists of the regions saying that an oath becomes binding on the defendant by the filing of the claim itself due to the general meaning in the words of the Prophet (God's peace and blessings be upon him) in the tradition of Ibn ʿAbbās, "The burden of evidence is upon the plaintiff and the taking of oath is upon the defendant". Mālik said that the oath does not become obligatory, except through the proof of rights (by the plaintiff). This was also the opinion of the seven jurists of Medina.

The reliance of those who upheld it is the consideration of *maṣlaḥa* so that people are not led, through the filing of suits, to torment others and waste their energies. It was because of this that Mālik did not allow a wife to require her husband to take an oath when she claimed that he had divorced her, unless there was a witness to support her claim; similarly, when a slave requires his master to take the oath in a case of alleged manumission.

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[247] Qurʾān 5 : 42

[248] Qurʾān 5 : 49

A claim can either be for corporeal property or for the performance of an obligation. If the claim is for an obligation and the defendant denies a liability for such an obligation, having supporting testimony, he must, by agreement, hear the testimony. Similarly, when the claim relates to a contract about property, like sale or something similar. If, however, the claim is about (restitution of) property, which is called *istiḍhqāq*, they disagreed whether he should hear the testimony adduced by the defendant. Abū Ḥanīfa said that he is not to hear the testimony of the defendant, except in the case of marriage and those things that cannot recur. Other jurists said that he should not hear it for any issue. Mālik and al-Shāfiʿī said that he hears it, that is, if the testimony of the defendant demonstrates to the plaintiff that it is his wealth in his ownership (the defendant's).

The reliance of those who said that he should not hear it is that the law has assigned testimony to be in the domain of the plaintiff and the oath to be in the domain of the defendant; it is, therefore, necessary that the matter should not be reversed, and it was to them like a ritual. The reason for the disagreement is whether the testimony of the defendant exhibits a meaning beyond the fact that the disputed thing exists in the possession of the defendant. Those who said that it does not convey an additional meaning said that such testimony is futile, but those who said that it does convey additional information, took it into account.

If we uphold the admissibility of the defendant's testimony, and then a conflict occurs between the two testimonies when none of them is establishing an additional fact that is not likely to recur in the ownership of the owner, the *ḥukm*, according to Mālik, is that he is to render judgment on the basis of testimony that is more sound in terms of *ʿadāla*, but is not to take into account the larger number (of witnesses). Abū Ḥanīfa said the testimony of the plaintiff is considered preferable as a matter of principle, and is not to be preferred on the basis of *ʿadāla*—just as it is not preferred according to Mālik on the basis of number. Al-Awzāʿī said that it is to be preferred on the basis of number.

When the testimonies are equal in terms of *ʿadāla*, it is deemed to be a case of no evidence, and, according to Mālik, the defendant is asked to take the oath. If he refuses, the plaintiff swears the oath and the right is determined, as the possession of the defendant supports him. It was because of this strong position that he is required to produce the weakest type of evidence, that is, the oath.

When the defendant acknowledges the claim, and the thing disputed is property, it has to be delivered to the claimant, by agreement. If, on the other hand, it is an amount to be paid as dues, the person acknowledging is to be considered a debtor (and has to settle the debt). If he claims the non-existence of funds, the *qāḍī* is to imprison him, according to Mālik, till such non-existence is proven, either by the length of imprisonment or through evidence, if he is suspected. When his being destitute becomes manifest, he is to be released due to the words of the Exalted, "And if the debtor is in straitened circumstances, then (let there be) postponement to (the time of) ease".[249] One group of jurists said that he is to be employed for compensatory services, which was the opinion of Aḥmad and has been related from ʿUmar ibn ʿAbd al-ʿAzīz. It is related from Abū Ḥanīfa that his creditors have a right to follow him around wherever he goes.

There is no disagreement that if the defendant is able to discredit the testimony, the claim is dismissed, if this is done before the judgment is rendered. If it is done after the issuance of the verdict, the judgment is not to be set aside, according to Mālik, but al-Shāfiʿī said that it is. When the witnesses retract from their testimony, it depends on whether it happens before the judgment or after it. If it happens before the judgment, the majority maintain that the case is not established, while some jurists said that it is. If it takes place after the judgment, Mālik said that the *ḥukm* stands established, but others held that it is not.

According to Mālik, the witnesses indemnify what is destroyed through their testimony. If this is wealth, they compensate it in all circumstances. ʿAbd al-Malik said that they do not in the case of an error. Al-Shāfiʿī said that they do not compensate wealth. If it is life, and they claim to have made an error, they are liable for *diya*. If they confess (about premeditated intention) they are to be subjected to *qiṣāṣ*, according to the opinion of Ashhab, while they are not according to the opinion of Ibn al-Qāsim.

57.6. Chapter 6: The Time of Rendering Judgment

When does he issue the judgment? This invokes conditions, some of which refer to the (mental) state of the *qāḍī*, some refer to the time of execution of the judicial order and the time of decision, and some refer to the restraining of the disputed property and its recovery, in case it is corporeal property.

The time when the *qāḍī* renders his judgment is that when he is not emotionally disturbed, because of the words of the Prophet (God's peace and blessings be upon him), "The *qāḍī* is not to render judgment, if at such time he is in anger". On similar grounds, Mālik held the opinion that the *qāḍī* is not to render judgment when he is thirsty, hungry, in fear, or in some such state that interferes with his understanding. If, however, he renders a correct judgment in any of these states, they agreed, as far as I know, that his judgment is to be executed. It is possible to say that no judgment is to be executed in the particular case that has been mentioned by the text, which is that of anger, as the prohibition depicts the invalidity of the thing prohibited.

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[249] Qurʾān 2 : 280

The time of execution of his judgment is after the determination of a period and the granting of an opportunity for raising of objections. The meaning of execution here is that he confirms or rejects the proofs adduced by the plaintiff. Does he have the right to hear further arguments after the judgment? There is a disagreement within the opinions of Mālik. The best known is that he may hear arguments in things pertaining to the right of Allāh, like *waqf* (trust) and manumission, but not in other cases. It is said that he may not hear arguments after the execution of judgment, and this is called *taʿjīz* (inability). It is said that he does not hear arguments from any of them, while it is also said that a distinction has to be made between the plaintiff and the defendant, which is after he has expressed his inability to do so.

The time for restraining the property arises when the case is established, but before objections are raised. This takes place when the person, who is in possession of the claimed property, does not wish to litigate, and has recourse to the seller for the price he paid. If he should need to claim it from the seller, it is up to the seller to agree with him in this so that its purchase from him is established, in case the other person is denying it, or confirm it for him if he is acknowledging it. The person in possession, from whom the property is being claimed, may take the property from the person claiming it by paying him its value. Al-Shāfiʿī said that he should buy it from him (paying the price not the value). If the property perishes in the hands of the possessor, he is to compensate it, but if it perishes during the litigation, they disagreed as to who is to compensate it. It is said that if it perishes after the claim is established, the compensation is upon the claimant, and it is said that the claimant compensates after the judgment, but after proof of the claim and prior to the judgment, it is the person from whom it is claimed who compensates it.

The Qāḍī (Ibn Rushd), may Allāh be pleased with him, said: It is necessary to know that the *aḥkām* of the *sharīʿa* are divisible into two kinds. One of these kinds is adjudicated by the judges, and the majority of the *aḥkām* we have mentioned fall under this category. The second kind are those not adjudicated by the judges, and most of these are in the recommended (*mandūb*) category. This category of the *aḥkām* are like responding to the Muslim greeting (*salām*), blessing one who sneezes, and the like, which are mentioned by the jurists at the end of their books that are called *Jawāmiʿ*. We have also thought of mentioning the best known of this category, God willing.

It is necessary, before this, to know that the legal *sunan* (practices) pertaining to conduct have as their purpose the virtues of the believer. Some of them refer to respect, to whom it is due, and to the expression of gratitude, to whom that is due. The *ʿibādāt* are included in this category. These are the *sunan* relating to ethical values. Some of the *sunan* relate to the virtue called *ʿiffa* (chastity, abstinence from undignified habits), and are of two kinds: *sunan* laid down about food and beverages, and *sunan* laid down about marital affairs. Some *sunan* refer to the requirement of justice and abstention from tyranny. These are the categories of *sunan* that require the maintenance of a balance in financial dealings, and the maintenance of a balance in personal relations (physical contact). Related to this category are (the *aḥkām* of) *qiṣāṣ*, wars, and punishments, as the maintenance of justice is the aim of all of these. Among them are *sunan* laid down for individual integrity, and *sunan* laid down for all kinds of wealth and its valuation, through which is intended the attainment of the merit called generosity, and the avoidance of the meanness called *bukhl* (covetousness). *Zakāt* is included in this category from one aspect, and is included in the communal sharing of wealth from another; same is the case with charity (*ḍṣadaqāt*). There are *sunan* laid down for social life, which is the essential condition for human life, and the preservation of its benefits relating to conduct and knowledge, which are called statehood. It is for this reason that these *sunan* should be upheld by the leaders and the upholders of the *Dīn*. Among the important *sunan* for social life are those related to love and hate, and to co-operation for the maintenance of all these *sunan*, which is called *al-nahy ʿan al-munkar, waʾl-amr biʾl-maʿrūf* (prohibiting the blameworthy and requiring what is good), and which is love and hate, that is religious, which occurs either due to the evasion of these *sunan* or due to the evil intent of the believer in the *sharīʾa*. Most of what the jurists mention in the *Jawāmiʿ*, among their books, is that which deviates from the four categories that are the merit of chastity, the merit of justice, the merit of courage, and the merit of generosity, and all kinds of worship (*ʿibāda*) are like conditions for the fulfilment of these merits.

The Book of Judgments is now complete, and with its completion is completed the entire manual. Praise be to Allāh, as is His due, many times over.